

# EVALUATING COSTS AWARDS IN ESTATE LITIGATION

October 6, 2022

Bryan Gilmartin

# Agenda

Today we will:

- Discuss the purpose of costs awards
- Understand the 'Modern Approach' in Estate Litigation
- Indemnification classifications
- Asking for costs and other relevant considerations
- Review recent cases

Increase in frequency of Estate litigation

## Inter-generational Transfer of wealth

AVERAGE LIFE EXPECTANCY

89



86

3/4   
million  
**LIVING WITH  
COGNITIVE  
IMPAIRMENT**

1 in 11  >65  
**CURRENTLY HAS ALZHEIMER'S  
OR RELATED DEMENTIA**

12 million  
**SENIORS**  
BY 2061



## Trends in estate litigation costs awards

- In the case of *Salter v Salter Estate* Justice Brown scolded parties for treating the assets of the estate “**as a kind of ATM bank machine for which withdrawals automatically flow to fund litigation.**”
- “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.”

# The Purpose of Costs Awards

- the true purpose of a costs award is indemnification – whether fully or partially, to compensate the successful party for expenses incurred in hiring counsel to defend or enforce legal rights
- Indemnification principles:
  - *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 S.C.R. 371.

## Standard Characteristics

1. They are an award to be made in favour of a successful or deserving litigant, by the loser.
2. Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
3. They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
4. They are not payable for the purpose of assuming participation in the proceeding

# History of Costs Awards in Estate Litigation

- Dating back to the 1800's, it was practice in English courts to award costs of all parties to an estate litigation matter payable out of the assets of the estate. English courts would award costs of all parties to be paid out of the estate where litigation arose because 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.

## The Modern Approach

***McDougald Estate v Gooderham***, (2005) 255 DLR (4<sup>th</sup>) 435; 199 OAC 203; 17 ETR (3d) 36; 2005 CanLII 21091 (ON CA)

- permits courts at first glance 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

**Blended costs approach:**

- ***McGrath v Joy***, 2022 ONCA 119



## Statutory Considerations

- Section 131 of Ontario's *Courts of Justice Act* bestows **discretion** to the court to determine by whom and to what extent the costs of a proceeding shall be paid.
- Rule 57 – *Rules of Civil Procedure*

# Indemnification

## Partial, Substantial, Full

- Partial award = at most, can only equal **66.6%** of legal costs
- Substantial award = **1.5 times** the partial costs award
- Full award = **rare** as there are significant constraints on full indemnification

## Unfounded allegations

***Hamilton v Open Window Bakery Ltd***, 2004 SCC 9 at para 26.

- Unfounded allegations of fraud or improper conduct may warrant a costs award on a substantial indemnity basis

## Substantial versus Full Indemnification



In the case of ***Bayford v Boese***, the Ontario Court of Appeal released a decision which signals an important constraint on recovering costs on a full indemnity basis on an appeal.

The case involved an Appellant seeking full indemnity costs in a dispute where the Will in question was signed after the testator passed away

## Asking the court for costs

- In person / In writing at the direction of the court
- Costs can also be awarded against a successful party
- Successful party will submit:
  - A Bill of Costs or a Costs Outline

## Other relevant costs considerations

- Litigation Guardian costs
- Costs against a lawyer personally
- Security for costs

# Negative behaviour

## ***Estate of Felice Pipito (Re)***

- Substantial indemnity costs awarded to Respondent
- S.F. Dunphy J. re: conduct of the Applicant:
  - I have rarely seen a litigant as clearly driven by spite, venom and antipathy to the opposing party as I observed in the case ... The vicious but entirely unproved personal attacks made by her on her opponents deserve sanction

# Unreasonable objections

## ***Toller James Montague Cranston (Estate of)***

- Over 300 objections
- Unfounded allegations of fraud and conversion
- Complex and important job of trustee of the estate recognized by the court
  - \$6 million in assets, 400 valuable paintings



## In the context of a *SDA* proceeding

***Rudin-Brown et al. v Brown AND Brown v Rudin-Brown et al.***, 2021 ONSC 6313

- Costs on a substantial indemnity basis
- Recorded conversations
- Failure to respond to any settlement offers
- Failure/refusal to follow case management orders

## Bad conduct of estate trustees

***Dewaele v Roobroeck***, 2021 ONSC 1604

- No meaningful steps to facilitate the realization of the estate assets
- Failure to comply with court orders
- Full indemnification
- “the respondent’s conduct is worthy of sanction and can be characterized as reprehensible and outrageous”

## Reckless disregard for the truth

### ***Malacek v Young***, 2021 BCSC 2219

- Scandalous allegations attacking a 37 year marriage
- Two incidents constitute bullying and disclose conduct that is reprehensible, outrageous, scandalous and deserving of rebuke
- Special costs award

## Conclusion

- Conduct worthy of sanction can lead to an expensive costs award
- Failure to respond to settlement offers will lead to a costs award of substantial indemnity
- Full indemnity is rare but available where conduct is reprehensible, outrageous, scandalous, and deserving of rebuke

# THANK YOU & Questions

