EVALUATING COSTS AWARDS IN ESTATE LITIGATION

By

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INTRODUCTION

Every year in Canada, practitioners, courts, and other stakeholders report a significant increase in the number of estate claims heard. In 2018, the Lawyers Professional Indemnity Company ("LawPRO"), reported 'real growth' in the proportion of wills and estates claims. In that year, approximately 11.5 percent of all claims were wills and estates.[1] In 2020, only two years later, LawPRO reported that the wills and estate claims had risen to 14 per cent of all claims.[2] These numbers may only continue to rise as more Canadians reach the age of retirement. This paper will explore the nature of these often-contentious estate claims through the lens of costs awards in proceedings. To facilitate a thorough understanding, the following will evaluate costs awards in estate litigation, focusing on their purpose, the modern approach to these awards, and classifications of indemnification before reviewing recent cases where significant costs awards have been ordered.

Background

Based on projections and recent national census data, older adults over the age of 85 are one of the country's fastest growing demographic. Accordingly, it has been reported that this demographic has more than doubled since the 2001 census.[3] What's more, the recent

[1] Anita Balakrishnan, "LawPRO sees spike in claims from family law, wills" May 31, 2019, *Law Times News*, online: https://www.lawtimesnews.com/practice-areas/real-estate/lawpro-sees-spike-in-claims-from-family-law-wills/.

[2] Lawyers Professional Indemnity Company, "Annual Report" 2020, online: https://www.lawpro.ca/wp-content/uploads/2021/04/FINAL-AODA-2020-Annual-Report-WEB.pdf.

[3] Michael Ranger and The Canadian Press, "Canada faces rapidly aging population, record retirements: 2021 census" April 27, 2022, *CityNews*, online: https://toronto.citynews.ca/2022/04/27/statistics-canada-2021-census-data/

census data also indicates that "more than 20 per cent of the working age population is now between the ages of 55 and 64."[4] As a result of increased longevity leading to vulnerability and risk of later life illnesses, estate plans are more frequently compromised leading to challenges based on testamentary incapacity or undue influence. While estate claims are clearly on the rise, it is also vital to try and understand what is motivating some of the conflict that frequently drives parties to litigation.

One of the major driving factors in the increase of estates litigation is financial conflict. In 2014, a study created by BMO Investorline highlighted the emergence of the largest inter-generational transfer of wealth in Canadian history, from those born in the 1930s and 40's to the baby boomers. According to the study, "about one trillion dollars will change hands in this country over the next two decades."[5]

Laura Tamblyn Watts, CEO of CanAge, explained to the CBC in 2014 how the baby boomers are "the most indebted generation that Canada has ever had,"[6] leading to an entitlement to 'spoils,' and thus, relying on generous inheritance to help pay debts and meet financial goals. According to Watts, "We're seeing a tension between their parents … the saving generation, and their children, who are coming into retirement in debt."[7] Watts argues that adults are living longer, requiring expensive care, leading to financial conflicts between children and other family members.

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[4] *Ibid*.

[5] Talin Vartanian, "Inheritance 'tension': Why more families may be headed for court" November 23, 2014, *CBC News*, online: https://www.cbc.ca/news/canada/inheritance-tension-why-more-families-may-be-headed-for-court-1.2840370.

[6] *Ibid*.

[7] *Ibid*.

1. The Purpose of Costs Awards

Costs are more than just legal fees to lawyers and other professionals. Costs can also include taxes and other miscellaneous charges incurred by a party to prosecute or defend a proceeding or particular step in a proceeding. In a proceeding, legal costs include what are known as disbursements: expenses incurred for things like expert fees, requests for financial or medical disclosure, travel costs, and even office expenses.

There are considerations to fixing costs awards, including access to justice, procedural fairness, reasonableness, efficiency, and resource management.[8] According to Drake and Malen, "[t]he general rule is that costs will be fixed by the court at every step in the proceeding that requires court intervention."[9] Typically, costs will not be granted in uncontested matters such as *ex parte* motions, case conferences, scheduling attendances, and pre-trial conferences. Similarly, the authors also point out that "steps in the litigation which are done without court adjudication do not have immediate cost consequences."[10] This can include steps such as the preparation of pleadings, discovery of documents, and examinations for discovery. These steps are dealt with only at the conclusion of the proceeding.

The Honourable Mr. Justice Quinn of the Ontario Superior Court once opined that, "litigation is war with rules. It is a nasty and expensive business."[11] As the occurrence of

[8] See Robert J Drake and Robert D Malen, Rules of Civil Procedure Chapters, Costs, Rule 57 – Costs of Proceedings in *Civil Procedure and Practice in Ontario*, Noel Semple (ed.), Canadian Legal Information Institute, 2021 CanLII 2050 [Drake and Malen].

[9] *Ibid*.

[10] *Ibid*.

[11] *Ibid*.

estate litigation increases, so too, does the number of significant costs awards for questionable and even reprehensible conduct.

Courts dealing with estate litigation are live to this reality. In fact, in the 2009 decision in the case of *Salter v Salter Estate,*[12] Justice Brown scolded the parties to the litigation for treating the assets of the estate "as a kind of ATM bank machine for which withdrawals automatically flow to fund litigation."[13] Justice Brown in *Salter* described the need to bring discipline to parties in contentious estates claims, arguing 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 of 'loser pays' in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes."[14]

The purpose of a costs award is indemnification, whether fully or partially, to cover the successful party for the expenses incurred in hiring counsel to defend or enforce their legal rights. In the seminal decision in the case of *British Columbia (Minister of Forests) v Okanagan Indian Band*,[15] the Supreme Court of Canada ("SCC") reaffirmed that the traditional purpose of costs awards remains indemnification and that a regular costs award has four standard characteristics:

1. They are an award to be made in favour of a successful or deserving litigant, by the loser.

[12] (2009), 50 ETR (3d) 227 (Ont SC) [*Salter*].

[13] *Salter, supra* note 12 at para 6.

[14] *Ibid*.

[15] [2003] 3 S.C.R. 371 [*Okanagan*].

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.[16]

Indemnity, however, is not the exclusive governing principle in determining a costs award. In fact, pursuant to the decision in *Fellows, McNeil v Kansa General International Insurance Co.*[17] the three other main justifications are the encouragement of settlement, the prevention of frivolous or vexatious litigation, and the discouragement of unnecessary steps in proceedings.

2. The Modern Approach

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 approach to costs awards in estates litigation has evolved, especially with courts recognizing that 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.

[16] *Okanagan*, *supra* note 15 at paras 20-21.

[17] (1997), 37 O.R. (3d) 464 at 475 (Gen. Div.)

Therefore, to deter improper behavior, courts have taken a 'modern approach' to costs in estate litigation by implementing the usual 'loser pays' approach in civil litigation.

This 'modern approach' was first implemented in 2005 in the case of *McDougald Estate v Gooderham*,[18] where Gillese J.A. held that the modern approach 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. The modern approach allows courts to ensure that only valid Wills executed by competent testators are propounded and to protect estates from being depleted by unwanted litigation.

The governing principles on modern cost orders in estate litigation were set out in the decision in the case of *Neuberger v York*[19] which held that "in deciding the quantum of costs, the award must be fair and reasonable in all the circumstances, with due consideration for the parties' reasonable expectations."[20] The *Neuberger* decision also held that a comparison of the respective costs of appeal can be useful when considering what the parties' reasonable expectations are. Also, *Neuberger* held that the historical approach to costs, in Ontario at least, has been displaced in favour of one in which the costs rules apply at first instance and on appeal, unless the court finds that one or more of the relevant public policy considerations dictate that costs (or some of the costs) should be paid out of the assets of the estate.[21]

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[18] (2005) 255 DLR (4th) 435; 199 OAC 203; 17 ETR (3d) 36; 2005 CanLII 21091 (ON CA) [*McDougald Estate*].

[19] 2016 ONCA 303 [*Neuberger*].

[20] *Ibid*, at para 17 citing *Boucher v. Public Accountants Council for the Province of Ontario (2004)*, 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291, [2004] O.J. No. 2634 (C.A.), at para 38.

[21] *Ibid*, at para 24 citing *McDougald Estate* at para 80; also, *Sawdon Estate v. Sawdon* (2014), 119 O.R. (3d) 81, [2014] O.J. No. 573, 2014 ONCA 101, 370 D.L.R. (4th) 686, at para 101.

In *McDougald Estate*, the Court held that, "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." There are inherent public policy considerations at play in estate litigation. These are primarily of two sorts:

1. Where the difficulties and ambiguities that give rise to the litigation are caused, in whole or in part, by the testator; and,
2. The need to ensure that estates are properly administered.

To this extent, the decision in *Neuberger* also endorsed the use of a blended costs award "in which a portion of costs is payable by the losing party and the balance is payable out of the estate."[22] Interestingly, in the recent decision of *McGrath v Joy*,[23] the Ontario Court of Appeal held that:

> this approach is not a balancing of the public policy considerations against the rationale for cost rules that ordinarily apply to civil litigation. Rather, it is a sequential analysis, the first step of which is to determine whether one or more of the public policy considerations apply. If so, generally the parties' reasonable costs should be payable from the estate. A departure from this principle requires justification on the part of the court.[24]

3. Statutory Considerations

In Ontario, in addition to common law, costs awards are a product of legislation. Section 131 of Ontario's *Courts of Justice Act*,[25] bestows discretion to the court to determine by whom and to what extent the costs of a proceeding shall be paid. A court in Ontario, making a determination of costs, may also have regard to the factors found in Rule 57 of

[22] *Neuberger*, *supra* note 19 at para 25 citing *Sawdon*, at paras 93-100 and 107.

[23] 2022 ONCA 119 [*McGrath*].

[24] *Ibid*, at para 95.

[25] R.S.O. 1990, c. C.43.

the *Rules of Civil Procedure* where "the court may make a costs award for a fixed amount, a percentage, or rather, that no costs be awarded to any party to a litigation. A percentage of costs is determined by a set costs grid enacted under the *Rules*."[26] These percentages pertain to 'partial indemnity' and 'substantial indemnity' costs.

In Ontario, substantial indemnification is appropriate in two situations:

1. Where there has been an offer to settle under Rule 49.10 (where an award of substantial indemnity costs is explicitly authorized); and
2. Where the unsuccessful party engaged in behaviour worthy of sanction.

In *Hamilton v Open Window Bakery Ltd,*[27] the SCC held that unfounded allegations of fraud or improper conduct may warrant a costs award on a substantial indemnity basis.

Rule 57.01 (4)(d) of the *Rules of Civil Procedure* provide the court the tools to award costs in an amount representing a full indemnity. Full indemnity is not a defined term but is generally considered to be a complete reimbursement of all amounts a client has had to pay their lawyer in relation to the litigation. In making such an assessment, 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 are one of the factors in determining what is fair and reasonable.

[26] R.R.O. 1990, Reg. 194: RULES OF CIVIL PROCEDURE [*Rules*].

[27] 2004 SCC 9 at para 26 [*Hamilton*].

In the case of *Davies v Clarington (Municipality),*[28] the Ontario Court of Appeal held that full indemnity should only be employed when there is a clear finding of reprehensible conduct on the part of the party against which the costs award is being made. Pursuant to *Davies*, misguided litigation does not equal censure, however, malicious counter-productive conduct or harassment of the opponent by futile claims may merit an elevated order of costs. The case of *Zimmerman v McMichael Estate,*[29] held that full indemnity costs are reserved for those exceptional circumstances where justice can only be done through complete indemnity. The Court in this case held that this is an exceptionally high bar.

4. The Line Between Partial, Substantial and Full Indemnification

Partial indemnity costs are not specifically defined and there is little textual help in the Rules. In most cases this amounts to somewhere between half and two-thirds of the reasonable costs of a successful party. Drake and Malen share that "[p]ractically, the custom that has developed is for parties to seek partial indemnity at a rate between 40% and 60% of their legal expenses."[30] Because a substantial costs award is "1.5 times what would otherwise be awarded in accordance with Part 1 of Tariff A,"[31] we can mathematically conclude that an award of partial indemnity cannot be greater than 66.6 percent of total legal costs and disbursements incurred in that step, otherwise an award

[28] 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) [*Davies*].

[29] 2010 ONSC 2947.

[30] Drake and Malen, *supra* note 8.

[31] The tariff of costs is found in Ont. Reg. 284/01 and includes fees assessed and allowed under the grid. Drake and Malen argue that "practice has moved past the Tariff, so that litigants can generally avoid referring to it."

of substantial costs would exceed 100 percent (making it greater than 1.5 times any partial award).

Substantial indemnity costs are usually ordered where a party unnecessarily makes the process less efficient, longer, or complicated by way of unreasonable conduct or the outright refusal of a reasonable settlement offer. Before a substantial indemnity award is ordered, there are criteria to be satisfied including that:

- The successful party made an offer to settle at least seven days prior to the commencement of trial;
- The offer was not withdrawn and did not expire prior to commencement;
- The offer was not accepted; and,
- The successful party received a judgment as favourable or more favourable than the offer.

5. Asking for Costs

Costs are dealt with in two ways at the end of every step: in person or in writing at the direction of the court. Sometimes, the court will give its decision immediately following the argument and will call for costs submissions immediately thereafter while sometimes, parties have agreed in advance what costs will be (if this is the case, it should be made known to the court). Otherwise, the successful party in a litigation can prepare a Bill of Costs or a Costs Outline where the party can give submissions regarding “how fair and

reasonable costs are, how inevitable victory was, and how unreasonable the other side was for not simply capitulating to their now successful position."[32]

Despite what we've learned about the modern approach, costs can still be awarded against a successful party. In fact, Rule 57.01(2) holds that "[t]he fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case."[33] The discretion of the court to order costs against a successful party hinges on the conduct of that party before and during litigation.

6. Other Relevant Costs Considerations

Estate litigation has its own unique considerations that may also factor into a costs award. Often in estates litigation, parties under a disability come the court. These parties may require representation that ensures their interests and rights are looked after. Rule 57.06 (1) deals with the costs of a litigation guardian and holds that "[t]he court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent, but may further order that the successful party pay those costs only to the extent that the successful party is able to recover them from the party liable for the success party's costs."[34] Alternatively, sub rule 2 holds that "[a] litigation guardian who has been ordered to pay costs is entitled to recover them from the person under disability for whom he or she has acted, unless the court orders otherwise."[35]

[32] Drake and Malen, *supra* note 8.

[33] R.R.O. 1990, Reg. 194, r.57.01 (2).

[34] R.R.O. 1990, Reg. 194, r. 57.06 (1).

[35] R.R.O. 1990, Reg. 194, r. 57.06 (2).

Where it concerns the conduct of a lawyer before or during the litigation, costs can also be ordered against a lawyer personally. Under the *Rules*, costs are usually attributable to parties. Lawyers as agents, are usually not responsible for paying or receiving costs, however, courts have long held the power to award costs against a lawyer personally as part of the court's inherent jurisdiction. The sub rule "supplements the court's inherent jurisdiction to give it the authority to award costs against a lawyer who has caused costs to be incurred without a reasonable cause or to be wasted by undue delay, negligence, or other default."

Rule 57.07(1) is "designed to protect and compensate a party who has been subjected to costs being incurred without reasonable cause, not to punish a lawyer." There is a two-part legal test designed to determine whether a lawyer's conduct caused unreasonable costs to be incurred. Step one is an inquiry into whether the lawyer's conduct falls within rule 57.07 (1) in the sense that it caused costs to be incurred unnecessarily.[36] Step two requires the court to consider, as a matter of discretion, whether the imposition of costs against a lawyer personally is warranted. This decision is made sparingly and carefully and only in the clearest of cases. If this does occur, the court is empowered to schedule a new hearing to determine whether a lawyer should pay costs personally and provide the lawyer with an opportunity to make representations to the court.

In the decision in the case of *Carleton v. Beaverton Hotel*, the court held that the focus of rule 57.07 is not on regulating the profession and civility in the courtroom and the administration of justice but on conduct that incurs unreasonable costs in the proceeding.

[36] Rule 57.07 (1) refers to conduct that "caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default."

In *Krieser v. Garber*,[37] the court held that substantial indemnity costs because of a losing party's behaviour, should be rare and exceptional absent applicable settlement offers and subsequent rejections. Pursuant to *Krieser*, substantial indemnity costs because of a party's behaviour should only be ordered "where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties" in the circumstances which gave rise to the cause of action or in the proceedings.[38]

Under Rule 56, the court may make an order of security for costs. Security will be ordered where:

- The plaintiff or applicant is ordinarily resident outside of Ontario;
- The plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- The defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remains unpaid in whole or in part;
- The plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe they have insufficient assets in Ontario to pay the costs of the defendant or respondent; and,
- There is good reason to believe the action or application is frivolous and vexatious and the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent.

[37] 2020 ONCA 699 [*Krieser*].

[38] *Ibid*, at para. 137.

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.

7. Recent Caselaw

Recent decisions in Ontario demonstrate how courts are applying the modern approach to estates litigation. Consequently, there has been a notable uptick in the amount of substantial costs awards ordered, especially where it concerns the bad conduct of one or both of the parties.

2021 – Bayford v Boese - ON

In *Bayford v Boese,*[39] the Ontario Court of Appeal released a decision which signals to litigants, constraints on recovering costs on a full indemnity basis on an appeal. The case involved a Will in question which was signed after the testator passed away. The Appellant was seeking costs on the appeal on a full indemnity basis in the amount of $113,500. The Appellant argues, in essence, "that the respondent attempted to perpetrate a fraud upon the court."[40] The Court, pursuant to the decisions in the cases of *Young v Young,*[41] and *Mars Canada Inc. v Bemco Cash & Carry Inc.,*[42] held that costs on a substantial indemnity basis may be awarded "where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties."[43]

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[39] 2021 ONCA 533, 69 ETR 4th 216 [*Bayford*].

[40] *Bayford*, *supra* note 39 at para 3.

[41] 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3 at 134 [*Young*].

[42] 2018 ONCA 239, 140 O.R. (3d) 81, at para 43.

[43] *Young*, *supra* note 41 at para 1.

The Court carefully looked at the note of caution that was expressed in *Net Connect Installation Inc. v Mobile Zone Inc.,*[44] which held that "substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs."[45] A series of recent cases demonstrates the type of conduct that is worthy of sanction.

2022 – Estate of Felice Pipito (Re) - ON

In *Estate of Felice Pipito (Re)*,[46] The Honourable Justice Dunphy decided on the legitimacy of a joint tenancy. Justice Dunphy dismissed the Applicant's claim with costs, citing the negative behaviour of the Applicant over the course of the litigation. Felice Pipito passed away on January 4, 2016, leaving behind one material asset; his interest in his home of 29 years in Etobicoke that he shared with his granddaughter and great-grandson (the Respondent). When Felice died, the home was mortgage-free and registered in the name of all three as joint tenants. The application, involving a determination of the rightful owner of the house, was "dismissed in its entirety with costs payable to the respondents."[47]

Justice Dunphy issued judgment on December 23, 2021. After the close of the trial, parties were directed to file costs outlines, however, neither side were able to follow those

[44] 2017 ONCA 766, 140 O.R. (3d) 77 at para 8.

[45] *Bayford*, *supra* note 40 at para 5.

[46] 2022 ONSC 1802 [*Pipito*].

[47] *Ibid*, at para 3.

directions precisely. In awarding substantial indemnity costs to the Respondent, S.F. Dunphy J., made three observations about the conduct of the Applicant. First, the Court noted that:

> I have rarely seen a litigant as clearly driven by spite, venom and antipathy to the opposing party as I observed in the case of Ms. Harrison. Her animus against her niece – the principal respondent in this case – was palpable and clearly influenced almost every phase of the litigation including the decision to launch it. The vicious but entirely unproved personal attacks made by her on her opponents deserve sanction.[48]

Second, the Court recognized that in the case of self-represented litigants such as Ms. Harrison, the Applicant, while "it is fair to observe that costs … are generally going to be somewhat higher due to the inherent difficulties of efficiently prosecuting litigation with a party who has no familiarity with the process, Ms. Harrison's conduct of this litigation tended to place it on the outer edge of that continuum."[49] Finally, the Court noted that the Respondent made two offers to settle, "both of which would have resolved this case on better terms for Ms. Harrison and at substantial savings to both in terms of time and aggravation."[50]

In the end, the Respondent was awarded $60,000, despite claiming $66,081.2. However, because the Respondent provided the Court with what was "more in the nature of a document dump than an actual outline of costs," the Court had to estimate and rounded down the costs claim significantly.

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[48] *Pipito*, *supra* note 46 at para 6.

[49] *Ibid*, at para 7.

[50] *Ibid*, at para 8.

This is not the first time in Ontario a self-represented litigant was faced with a significant costs award because of conduct in litigation. In *De Cruz Lee v Lee,*[51] the Court concluded that it would use "the hammer of a cost's award" to address self-represented litigants whose aim it is to advance outrageous claims without the evidence to support them.[52] In *Lee*, Justice Myers awarded two solicitors their full indemnity costs.

2021 – Toller James Montague Cranston (Estate of) - ON

In *Toller James Montague Cranston (Estate of)*,[53] Philippa Baran, trustee of the estate of Toller Cranston, was compelled to bring an application to pass her accounts for the period from January 23, 2015 to April 31, 2018 by two other beneficiaries to Toller's Estate, Guy and Goldie Cranston. The beneficiaries, Guy and Goldie, "raised over 300 objections to various expenses paid by Philippa personally to administer Toller's estate in Mexico."[54] Despite the objections, they were only successful on a total of five.

Guy and Goldie also alleged and maintained their allegations that Philippa had committed fraud and stolen several hundred thousand dollars of estate funds, without evidence to support their claims.[55]

The Court in *Cranston* looked at the complex and important job that Philippa had as trustee of the estate.

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[51] 2015 ONSC 2012 [*Lee*].

[52] *Ibid*, at para 29.

[53] 2021 ONSC 3704 [*Cranston*].

[54] *Ibid*, at para 1.

[55] *Cranston*, *supra* note 53 at para 4.

Toller Cranston died in Mexico without a will. He owned approximately $6 million in assets located in Mexico, including 400 very valuable paintings, over 18,000 non-Toller art and decorative items and two houses on the same lot in San Miguel de Allende, Mexico.[56] As trustee, Philippa was required to personally pay the ongoing expenses to value and conduct a sale of the 18,000 non-Toller items, take careful steps to maintain, sever and sell two real estate properties in Mexico and identify, value and divide 400 original Toller paintings (which included packing and shipping them to Canada).[57]

In looking at the reasonable expectations in a costs award, the Court in *Cranston* held that "the respondents … acted unreasonably by bringing an application to have the Trustee pass her accounts only 3 ½ months after she was appointed as the Estate Trustee in Ontario."[58] The Court also admonished the respondents' "insistence on exchanging affidavits of documents, conducting examinations for discovery and spending 3 days cross-examining the Trustee on her affidavits, conducting additional written discoveries, and ultimately, turned what should be a summary proceeding into a complicated hearing."[59]

In determining the reasonable expectations, the Court looked at the decision in *Boucher v Public Accountants Council for the Province of Ontario (2004)*,[60] where the Ontario Court of Appeal in deciding what was a fair and reasonable costs award, held that "the

[56] *Ibid*, at para 11.

[57] *Ibid*, at para 12.

[58] *Ibid*, at para 16.

[59] *Ibid*, at para 17.

[60] 2004 CanLII 14579 (ON CA), 71 O.R. (3d) 291 (C.A.) at para 26 [*Boucher*].

expectation of the parties concerning a costs award is a relevant factor."[61] In *Cranston*, the respondents were well aware that their lawyer spent over 352.9 hours and that the Trustee would be expected to have spent more time to respond to over 300 expense objections. The Court awarded Phillipa costs of $325,000 on a substantial indemnity basis.

2021 – Rudin-Brown et al. v Brown AND Brown v Rudin-Brown et al. - ON

Another case which saw a significant costs endorsement which factored in the conduct of one of the parties was *Rudin-Brown et al. v Brown AND Brown v Rudin-Brown et al.*,[62] a case which dealt with the significant estate of Carolyn Emily Brown, valued at approximately $1.2 million. Carolyn was the mother of the opposing parties, Missy and Gordon and Jeanne's sister-in-law. Missy and Jeanne say that Gordon acted in an abusive manner and advanced a position that had no merit and ran up the cost of the litigation unnecessarily. The decision of Justice Williams looks at the determination of costs in *Substitute Decisions Act* cases.

Missy and Jeanne referred the Court to the decision of the Honourable Justice Price in *Arvanitis v Levers,*[63] which considered principles applicable to costs in cases involving incapable individuals and the *Substitute Decisions Act.*[64] In *Arvanitis*, Price J. held that

[61] *Cranston*, *supra* note 53 at para 27.

[62] 2021 ONSC 6313 [*Rudin-Brown*].

[63] 2017 ONSC 3758 [*Arvanitis*].

[64] 1992, S.O. 1992, c.30 [*SDA*].

the principles the court articulated for determining liability for costs in estate litigation apply equally to proceedings under the *SDA*:

> In proceedings under the *Substitute Decisions Act*, the public policy objectives that must be considered and balanced are to give effect to the intentions of persons, when competent, to name those who, in the event of future incapacity, are to be entrusted with their personal care and property, and to ensure that those they choose as their attorneys for property administer their estates properly.[65]

Justice Price went on to say that in an *SDA* proceeding, "the central issue to be addressed when dealing with costs … is, 'when a parent is declared incapable and a guardian appointed over her property, to what extent must the incapable parent's assets bear the costs of controlling litigation amongst her disputatious children?"[66] In *Rudin-Brown*, Justice Williams looked at the trial decision in which Gordon's conduct justifies an order for costs on a substantial indemnity basis.[67]

Justice Williams was clear in concluding that Gordon's conduct "added to the length and expense of the litigation."[68] In the trial decision, Justice Williams found that the relationship of Carolyn and Gordon at the time the powers of attorney were signed in September 2016 triggers the presumption of undue influence, Justice Williams also held that "there was evidence from Carolyn Mossman that Gordon was verbally abusive toward Carolyn."[69]

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[65] *Arvanitis, supra* note 63 at paras 70 and 81.

[66] *Ibid,* at para 82 citing *Fincco v. Lombardi*, 2009 ONSC 46170 at para 1.

[67] See *Rudin-Brown et al. v. Brown AND Brown v. Rudin-Brown et al.*, 2021 ONSC 3366 [*Brown*].

[68] *Rudin-Brown*, *supra* note 62 at para 32.

[69] *Brown*, *supra* note 67 at para 156.

There was ample evidence that the 2016 power of attorney documents were not a product of Carolyn's full, free and informed thought. The Court also took notice of Gordon's recorded conversations between himself and Carolyn, submitted as evidence, remarking how, "One of the recorded conversations between Gordon and Carolyn as they reviewed Missy and Jeanne's application record was as revealing as it was uncomfortable to listen to." The decision then went on to say that on one recording "Carolyn says she wants to telephone Missy and asks Gordon if she is putting herself in danger if she calls her. Somewhat ironically, Gordon replies by telling Carolyn that she is in danger of being manipulated by Missy."[70]

One factor that raised the potential for a substantial costs award is the fact that Gordon failed to respond to any settlement offers. In addition to that, "Gordon also failed or refused to follow some of Kershman J.'s case management orders, including an order to stop recording Carolyn's conversations."[71] Justice Williams even noted that even in his costs submissions, "Gordon continued his attack on Missy and Jeanne (whom he had described at trial as having 'something reptilian about her'), accusing them of an 'ongoing attempt to defraud the Court and extort the Respondents' and of waging a defamation campaign."[72] Missy and Jeanne sought all-inclusive (fees, disbursements and HST) substantial indemnity costs of $238,004.08. Having received $50,000 under Justice

[70] *Ibid*, at para 162.

[71] *Rudin-Brown, supra* note 62 at para 36.

[72] *Ibid*, at para 35.

Kershman's January 15, 2020 order, Justice Williams awarded a costs order against Gordon in the amount of $150,000.00 ($200,000 minus the previous $50,000 awarded).[73]

2021 – Dewaele v Roobroeck - ON

The bad conduct of estate trustees can also be sanctioned through a substantial costs award. In *Dewaele v Roobroeck*,[74] the Applicant commenced an application for directions and other relief respecting the administration of her parents' estates. The parties to the application are the beneficiaries and co-estate trustees of the estate of their late parents, Rose-Marie Margaret Roobroeck and Eric Cyriel Roobroeck. Eric died on August 23, 2016 and Rose-Marie died on January 25, 2018.[75] As a background to the December 4, 2020 decision which removed the respondents as co-executors and trustees of Rose and Eric's estates, the decision in *Dewaele v Roobroeck*, 2020 ONSC 7534, concluded that:

> the brothers had refused to take any meaningful steps to facilitate the realization of the estate assets. They had not fulfilled their obligation as co-estate trustees, to the detriment of the beneficiaries of the estate. They had not complied with court orders … their behaviour had brought the administration of the estate to a standstill and was likely to continue.

In *Dewaele*, the Court established that in Ontario, the starting point for fixing costs is s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 as amended, which provides that "subject to the provision of an Act or rules of court, costs are in the discretion of the court, which may determine by whom and to what extent costs shall be paid."[76] The Applicant asked for substantial indemnity costs from the respondents. The Court held that "such an award is authorized under Rule 57.01 (4) (c) of the *Rules of Civil Procedure* and, pursuant

[73] *Ibid*, para 39.

[74] 2021 ONSC 1604 [*Dewaele*].

[75] *Ibid*, at paras 1-2.

[76] *Dewaele*, *supra* note 74 at para 13.

to *Davies v Clarington (Municipality)*,[77] may be awarded "where the losing party has engaged in behavior worthy of sanction."[78]

As previously discussed in the *Bayford* decision, the Court in *Dewaele* noted that elevated costs should only be awarded "where there has been reprehensible, scandalous or outrageous conduct on the part of one the parties."[79] After clarifying the law, the Court concluded that "the respondent's conduct is worthy of sanction and can be characterized as reprehensible and outrageous," awarding costs on an elevated scale. The Court held that the applicant was entitled to be fully indemnified to the amount of $73,802.63, $60,821.50 of which to be paid by the respondents with the balance of the applicant's costs ($17,981.13) paid from the estate of Eric and/or Rose as determined by the applicant.[80]

2021 – McGrath v Joy – ON

The decision in *McGrath v Joy*[81] provides not only a thorough analysis of the modern approach to costs awards in estate litigation but also provides guidance on a blended costs order. In *McGrath*, the court was deciding on whether the Mr. Joy (the "Deceased") had the capacity to make a will when he wrote his Suicide Note. The application judge found that not only did Mr. Joy lack the requisite capacity but also that costs should be awarded against him personally.

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[77] 2009 ONCA 722, 100, O.R. (3d) 66, at para 28.

[78] *Ibid*, at para 16.

[79] See *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at p. 134.

[80] *Dewaele*, *supra* note 74 at para 22.

[81] 2022 ONCA 119 [*McGrath*].

The application judge referred to the cost principles relevant to estates per the decisions in *Zimmerman v. Fenwick*[82] and *Neuberger Estate v. York*[83] and concluded that in the case at bar, the Appellant had "acted unreasonably" in attempting to have the Suicide Note admitted as Mr. Joy's will because he was "pursuing his self-interest in an attempt to oust the legacies to [Ms. Joy] and [Mr. Ramsundarsingh] in [the 2016 Will], and to further the legacies to himself and his son."[84]

The application judge further explained that the Estate bore "some burden" for Mr. Joy having prepared the Suicide Note but also that the Appellant "acting solely as beneficiary must face costs consequences as the unsuccessful party."[85]

On Appeal, the Ontario Court of Appeal found that while the application judge did refer to the governing principles on costs orders in estate litigation set out in *Neuberger*, he ultimately failed to follow these principles, providing a Costs Order that is "plainly wrong" and must be set aside pursuant to *Hamilton v. Open Window Bakery Ltd.*[86]

The *McGrath* decision succinctly summarized not only the traditional approach to costs in estate litigation but also the modern approach. The court noted that traditionally, the parties' costs were paid from the testator's estate. Pursuant to the decision in *McDougald Estate v. Gooderham*[87], the Court clarified the public policy considerations underlying the traditional approach:

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[82] 2010 ONSC 3855, 57 E.T.R. (3d) 241, at para. 4 [*Zimmerman*].

[83] 2016 ONCA 303, 131 O.R. (3d) 143 at paras. 24-25 [*Neuberger Estate*].

[84] *McGrath*, *supra* note 81 at para. 40.

[85] *Ibid*, at para. 41.

[86] *Hamilton*, *supra* note 27 at para. 27.

[87] *McDougald Estate*, *supra* note 18 at paras. 78-79.

> the need to give effect to valid wills that reflect the intention of competent testators and the need to ensure that estates are properly administered. Accordingly, if there are reasonable grounds on which to question the execution of a will or the testator's capacity to make the will, it is in the public interest that such questions be resolved without cost to those questioning the will's validity. And, where the difficulties or ambiguities that gave rise to the litigation are caused by the testator, it is again appropriate for the testator's estate to bear the costs of their resolution.[88]

The Court then looked at para. 80 of *McDougald Estate* which summarized the modern approach that courts of first instance are to take in fixing costs in estate litigation:

> [C]arefully 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. [Emphasis added.]

The Court clarified that if one or more of the public policy considerations apply, as a general principle, the parties' reasonable costs are to be paid from the testator's estate. The Court went on to say that this approach is not a balancing of the policy considerations against the rationale for cost rules that ordinarily apply to civil litigation. Rather, it is a sequential analysis in which the first step is the determination of whether public policy considerations apply. A departure from this general principle requires justification on the part of the court.

In the case at bar, the Court found that the application judge failed to take this first step and instead, began from the premise that the civil litigation costs regime operated. As a result, he ordered the Appellant, as the losing party, to pay the bulk of the other parties' costs.

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[88] *McGrath*, *supra* note 81 at para. 91.

The Court was clear; if the application judge had taken the first step, he would have found that public policy considerations applied and the application was necessary to ensure that Mr. Joy's estate was properly administered: the Deceased wrote the Suicide Note under suspicious circumstances which created reasonable ground to question his testamentary capacity at the time. What's more, it was his conduct which led to the litigation (because of the suspicious circumstances in which he wrote the Suicide Note, it was unclear whether his Estate should be administered according to the Suicide Note or his 2016 Will).

The Court held that the Appellant did not act unreasonably and that it was an error to hold this as a possible explanation for departing from the general principle. While generally the executor should take the necessary steps to ensure the estate is properly administered, in this case, Steve Ramsundarsingh renounced his right to administer Mr. Joy's estate. The Appellant therefore, brought the Application to ensure that the estate was distributed in accordance with the true testamentary wishes of the Deceased, whether that was found to be as expressed in the Suicide Note or the 2016 Will.

The Court also held that the application judge erred in concluding that in bringing the Application, the Appellant was pursuing his self-interest as the Appellant's position on the application was also of benefit to his minor son, Michael Jr., a position that was fully supported by the OCL.

Where it concerns costs on appeal, the Court reviewed *McDougald Estate* and concluded that costs are normally ordered against an unsuccessful appellant. Moreover, the same

rules that govern costs awards in estate litigation at the appellate level apply to unsuccessful appellants in estate litigation:

> Absent exceptional circumstances, the unsuccessful appellant is not entitled to costs of the appeal and will be ordered to pay the respondent(s) costs on a partial indemnity basis. However, where an appellant in estate litigation is successful, the appellant's costs are generally payable from the estate on a full indemnity basis.[89]

The Court held that because the Appellant is the wholly successful party, he is entitled to full indemnity costs from the Estate, provide those costs are reasonable and warranted. Pursuant to the decision in *Sawdon Estate*[90], the Court found that a blended costs award is available where an appellant succeeds in an estate matter. Although the Respondents in this case were unsuccessful on appeal, the Court did not view this as a situation in which the Respondents should be required to pay the Appellant's costs on a partial indemnity basis. As it was explained, the Respondent's participation at first instance was necessary to ensure that the questions surrounding Mr. Joy's testamentary capacity were fully explored. Their views prevailed at first instance. The public policy considerations that applied below continue to operate at the appellate level.

Because of the conduct of the Deceased in creating the need for this litigation, the Court held the view that it would be unfair to penalize the Respondents in costs below or on appeal. The Court set aside the Costs order and ordered all-inclusive costs to the Appellant, the OCL, Ms. Joy, and Mr. Ramsundarsingh:

> [109] Further, I would set aside the Costs Order and make the following costs orders of the Application. The sums are all-inclusive and to be paid from the Estate:

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[89] See *McDougald Estate*, *supra* note 18 at paras. 77, 87-88, and 91.

[90] *Sawdon Estate, supra* note 21 at paras. 93-107.

a. to the Appellant, fixed at $83,960.63;
b. to the OCL, fixed at $26,478.56;
c. to Ms. Joy, fixed at $31,655.67; and
d. to Mr. Ramsundarsingh, fixed at $25,694.50.

[110] I would order costs of the appeal as follows. Again, the sums are all-inclusive and to be paid from the Estate:

a. to the Appellant, fixed at $15,000;
b. to Ms. Joy, fixed at $10,000; and,
c. to Mr. Ramsundarsingh, fixed at $10,000.[91]

2021 – Malacek v Young - BC

Finally, while not a case from Ontario, this recent case from the province of British Columbia highlights the dangers of making unsubstantiated allegations in high stakes and emotional estate litigation. In *Malacek v Young*[92] the British Columbia Supreme Court held that a weak argument could constitute misconduct. On June 4, 2021, in reasons for judgment the Court looked at two petitions, the first brought by David Young, the Executor of the Estate of Olaf Hall Leiran and the second, from the four daughters of the deceased from a prior marriage. The common issue was whether Mr. Hall and Carol Leiran, his wife of 37 years, had separated prior to his death. The issue was raised by the daughters who sought leave pursuant to s.151 of the *Wills, Estates and Succession Act*[93] to file a family law claim on behalf of Mr. Hall's estate against Carol for a division of family property under Part 5 of the *Family Law Act.*[94]

The Court in *Malacek* declined to grant leave to the daughters to commence a proceeding citing overwhelming evidence indicating a marital relationship at the time of death and

[91] *McGrath*, *supra* note 81 at paras. 109-110.
[92] 2021 BCSC 2219 [*Malacek*].
[93] S.B.C. 2009, c.13 [*WESA*].
[94] S.B.C. 2011, c. 25.

that "… it was 'scandalous' for the daughters to have made allegations concerning a relationship between Carol and a friend, Alice Fisher."[95] As a result of the allegations, the Executor and Carol requested an order awarding special costs. In the alternative, the executor requested an award of partial special costs and partial uplifted party-and-party costs.[96] Pursuant to the decision in *Smithies Holdings Inc. v RCV Holdings Ltd.*,[97] the British Columbia Court of Appeal noted that the types of conduct that attract special costs, "such conduct includes reprehensible conduct, conduct from which the court seeks to dissociate itself, conduct deserving of reproof or rebuke, and conduct that is scandalous or outrageous."[98] Relying on strong authority, the Court then held that "special costs may also be awarded where the plaintiff's case was so weak it amounts to misconduct."[99] In *McLean*, Madam Justice Mackenzie clarified this line of reasoning at paras. 29-30:

> The grounding of a weakness of claim was summarized in *Webber v. Singh*, 2005 BCSC 224 at para. 28:
>
> a) Special costs may be ordered where a party has displayed 'reckless indifference' by not seeing early on that its claim was manifestly deficient;
> b) Special costs may be ordered to punish careless conduct; and,
> c) Special costs may be ordered where a party pursues a meritless claim and is reckless about the truth.

In *Malacek*, several factors warranted a special costs award. The daughters' allegations that Carol and close friend Alice were romantic or intimately involved particularly troubled the Court, which found, "… the daughter's position today to be wholly disingenuous."[100]

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[95] *Malacek*, *supra* note 92 at para 4.

[96] *Ibid*.

[97] 2017 BCCA 177 [*Smithie*].

[98] *Malacek*, *supra* note 84 para 5, citing *Smithie* at paras 56 to 57.

[99] *Ibid*, at para 10 citing *Solex Developments Co. v. Taylor (District) (1998)*, 1998 CanLII 5104 (BC CA), 60 B.C.L.R. (3d) 53 (C.A.) and *McLean v. Gonzalez-Calvo*, 2007 BCSC 648.

[100] *Malacek*, *supra* note 92 at para 13.

Additionally, one of the daughter's visited Alice Fisher at her place of work while another sent a cryptic Facebook message to Carol. The Court held that the "two incidents constitute bullying and disclose conduct that is reprehensible, outrageous, scandalous, and deserving of rebuke."[101] The Court was especially dismayed with the reckless disregard for the truth in attacking a 37-year marriage, holding that the Executor and Carol are entitled to special costs of the two petitions to be assessed by the registrar and special costs for the applications and appearances.

The issue of awarding special costs was also explored in the 2017 British Columbia case of *Hadley Estate (Re)*[102] which held that:

> In estate litigation, courts commonly award special costs payable out of the estate to all parties. This practice is based on the principle that where an estate issue must be litigated to remove any doubts, all interested parties must be joined and the result, the litigation does not conclude in their favour. The central question as to costs is whether the contested issue arises from the conduct of the deceased or the conduct of another. In the case of the former, an award of special costs from the estate will usually be made: *Milwarde-Yates v. Sipila*, 2009 BCSC 277 at paras. 81-82.[103]

CONCLUSION

With the rise of contentious estate litigation, there is also a coinciding rise in conduct or behaviour that is deserving of sanction from the court. As the cases reviewed have demonstrated, conduct that leads to unnecessary delays or complicates a proceeding will be viewed with careful scrutiny.

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[101] *Ibid*, at para 15.

[102] 2017 BCCA 311 [*Hadley*].

[103] *Ibid*, at para 47.

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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