INDEMNITY OF ESTATE TRUSTEES AS APPLIED IN RECENT CASES[1]

Albert H. Oosterhoff[2]

1. Introduction

I had assumed that the law of indemnity for estate trustees was well settled and well understood. However, a number of recent cases suggest that the courts do not understand the principle of indemnity or have a mistaken understanding of it, for some of the cases have significantly limited the right of estate trustees to be indemnified. There are many cases that are concerned with the right to indemnity and a significant number deny or restrict indemnity in their particular circumstances. That is because the cases are fact-driven and often the right to indemnity is lost in whole or in part because the claim is excessive. In other words, the facts of cases lead to different outcomes when the principle is applied. However, most of those (older) cases do not question the long-established law of indemnity, while the recent cases do. It seemed good to me therefore to review this area of the law and to examine where the cases have gone astray in the last number of years.

To that end, I shall describe the historic view of indemnity as discussed in leading cases, both in England and Canada, and in provincial statutes. In doing so, I shall quote extensively from the primary sources. I shall then provide a critique of the recent cases.

My paper is thus limited in scope. It does not address the law of indemnity generally. Nor does it examine a number of aspects of the law of indemnity as it affects estate trustees and trustees[3] specifically. Thus, I shall not consider the following topics, even though some of them arise incidentally in the recent cases: (a) the nature and extent of the estate trustee's lien against the estate assets and whether the estate trustee's creditors have a right to be subrogated to the estate trustee's lien; and (b) the circumstances in which trustees and estate trustees are entitled to claim indemnity from trust or estate beneficiaries.

While I shall mention some of the older cases, I shall by no means survey all of the case law on this topic, for the cases are but examples of circumstances in which indemnity is either granted or denied after application of the basis principle. There are in any event a number of other sources that provide a broad overview of this law.[4]

---

1 This article is a revised version of a paper I delivered at the STEP Toronto Branch Conference on 9 January 2013. My co-panelists were The Hon. Maurice Cullity and Archie Rabinowitz. I am indebted to them for their comments on earlier drafts of this article.

2 Professor Emeritus, The University of Western Ontario, Faculty of Law.

3 Although our topic only concerns estate trustees, I shall speak promiscuously of trustees and estate trustees, since the rules for both are largely identical in the context of indemnity.

4 See, *e.g.*, M.C. Cullity, "Personal Liability of Trustees and Rights of Indemnification" (1996), 16 E.T.J. 115; *Widdifield on Executors and Trustees*, 6th ed. by Carmen S. Theriault, ed. (Toronto: Thomson Carswell, 2002), c. 4; Suzanna Popovic-Montag, "Revisiting a

2. Why We Need Indemnity

In our legal system an estate is not a juridical person. Neither is a trust. Thus, neither incurs expenses. Rather, its representative, the estate trustee, or trustee in the cases of a trust, does. It follows that an estate or trust is not directly liable for such expenses. The estate trustee or the trustee is. It also follows that third parties cannot sue an estate or a trust. The only person they may have had dealings with is the estate trustee or the trustee It is that person whom they must sue. The defendant will undoubtedly incur expenses and costs in the course of the litigation and it is appropriate that she be able to recover them from the estate or trust, assuming they were incurred properly. Similarly, a trust or an estate cannot commence an action.[5] The trustee or estate trustee must do so. Again, if the action is appropriate he should be able to recover the expenses and costs. In other words, third parties deal with a trustee or an estate trustee as principal. She is not an agent for the trust or estate, nor for the beneficiaries. Thus, third parties cannot normally recover their costs from the beneficiaries.

It is astounding that some lawyers do not realize that an estate and a trust are not juridical persons and cannot sue or be sued. This matter arose in a couple of the recent cases to be considered. The courts quite rightly corrected the lawyers' mistaken notion of the nature of estates and trusts. On that issue at least they were correct.

Further, an estate trustee will likely incur various expenses in the course of administering an estate, including typical administration expenses. He may also incur liability in contract, tort, or under statute. It is not fair that he should bear those himself, but should be able to recover them from the assets of the estate in priority to the beneficiaries.

3. The Right to Indemnity

Consequently, the courts have always held that trustees and estate trustees are entitled to be indemnified for their reasonable expenses. In the early case, *Worrall v. Harford*, Lord Eldon put it thus:

> It is in the nature of the office of trustee, whether expressed in the instrument or not, that the trust property shall reimburse him for all the charges and expenses incurred in the execution of the trust. It is implied in every such deed.[6]

Trustee's Right to Indemnification" (2003). 50 E.T.R. (2d) 161; *Waters' Law of Trusts in Canada*, 3rd ed. by Donovan W.M. Waters, Mark R. Gillen, and Lionel D. Smith (Toronto: Thomson Carswell, 2005), c. 22. See also Jennifer J. Jenkins, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* (Toronto: Canada Law Book, 2011), c. 22.

5 But see Rule 9.3 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended, which states that such an action is not a nullity and that the court may order that the proceeding be continued against the proper executor or administrator and may impose terms.

6 (1802), 8 Ves. Jun. 4 at 8, 32 E.R. 250 (Eng. Ex. Ch.).

To the same effect is the following statement of Rand J, speaking for the majority in *Thompson v. Lamport*,[7] a case I shall also refer to later in another context:

> The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly.

See also *Goodman Estate v. Geffen*,[8] in which Wilson J. stated and applied the following principle:

> The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. *Reasonable expenses include the costs of an action reasonably defended*.[9] In *Re Dallaway*[10] Sir Robert Megarry stated the rule thus:[11]
>
> > *In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders*; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than the benefit of the fund.

There are many other cases decided by lower Canadian courts to the same effect. The principle of indemnification is thus firmly embedded in Canadian law.

This principle was codified in Canadian statutes in the 19th century.[12] Thus, for example, the Ontario *Trustee Act*[13] now provides:

---

7 [1945] S.C.R. 343 at 356, [1945] 2 D.L.R. 545.

8 [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97, at para. 75, emphasis added.

9 See *Re Dingman* (1915), 35 O.L.R. 51.

10 [1982] 1 W.L.R. 756, [1082] 3 All E.R. 118.

11 *Ibid*., at All E.R. 121, emphasis added.

12 The current statutory provisions are: *Trustee Act*, R.S.A. 2000, c. T-8, s. 25; R.S.B.C. 1996, c. 464, s. 95; C.C.S.M. 1987, c. T160, s. 78; R.S.N.L. 1990, c. T-10, s. 29; R.S.N.S. 1989, c. 479, s. 29; R.S.N.W.T. 1988, c. T-8, s. 5; R.S.N.W.T. (Nu.), c. T-8, s. 5; R.S.O. 1990, c. T.23, s. 23.1, added by S.O. 2001, c. 9, Sched. B, s. 13(1); S.S. 2009, c. T-23-01, s. 43; R.S.Y. 2002, c. 223, s. 8; *Trustees Act*, R.S.N.B. 1973, c. T-15, s. 13(2). Note, however, that most of these provisions are not as extensive as Ontario's s. 23.1. P.E.I. does not have comparable legislation.

13 R.S.O. 1990, c. T.23, s. 23.1, added by S.O. 2001, c. 9, Sched. B. s. 13(1). This provision also applies to estate trustees. See *Trustee Act*, *ibid.*, s. 1, which defines "trust" to extend to and include "the duties incident to the office of personal representative [*i.e.*, estate trustee] of a deceased person." I have always thought it odd that while the *Rules of Civil Procedure*, supra, footnote 5, were changed by O/Reg. 484/94 to create the title of "estate trustee," corresponding statutory provisions, such as s. 1 of the *Trustee Act* still speak of "personal representative," or in other contexts of "executor" and "administrator," the terms used in the rest of the common law world.

> **23.1** (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
>
> (a) pay the expense directly from the trust property; or
>
> (b) pay the expense personally and recover a corresponding amount from the trust property.
>
> (2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

Saskatchewan recently enacted a new *Trustee Act*.[14] Section 43, which addresses indemnity, *inter alia*, is in some respects clearer than the Ontario provision and the statutes in some of the other provinces, in that it provides specifically for expenses to settle an action or satisfy a judgment, and for legal fees and costs. Section 43 provides:

> **43.**
>
> . . .
>
> (3) A trustee may reimburse himself or herself for, or pay or discharge out of the trust money, all expenses reasonably incurred in or about the execution of the trustee's trust or powers.
>
> (4) A trustee may:
>
> (a) be indemnified out of trust money with respect to:
>
> (i) liabilities and expenses, including an amount paid to settle an action or satisfy a judgment, arising out of any matter or thing done honestly and in good faith relating to the exercise or attempted exercise of the powers and duties of the trustee; and
>
> (ii) legal fees and costs relating to a claim for which this subsection provides an entitlement to an indemnity; and
>
> (b) receive out of the trust money an advance of money for the purpose of meeting an expense for which the trustee may be reimbursed or indemnified pursuant to this section.
>
> (5) A trustee shall repay the money advanced to the trustee pursuant to clause (4)(b) if the trustee is found not to be entitled to be reimbursed or indemnified with respect to the expense for which the advance was made.

Most of the other statutes are of an older vintage and incorporate the right of trustees and estate trustees to pay themselves expenses incurred in the administration of the estate or trust in a section dealing with the liability of trustees for assets received. The Alberta provision is typical. It provides:[15]

> **25.** A trustee
>
> . . .
>
> may reimburse the trustee or pay or discharge out of the trust property all expenses incurred in or about the execution of the trustee's trust or powers.

4. The Nature of Indemnity

---

[14] *Trustee Act, 2009*, S.S. 2009, c. T-23.01, s. 43.

[15] *Trustee Act*, R.S.A. 2000, c. T-28, s. 25.

As the word itself suggests, the right to be indemnified implies that estate trustees should bear the costs and expenses themselves first and then seek reimbursement from the estate assets. But this presents a problem. Many trustees and estate trustees do not have the wherewithal to pay the costs out of their own pocket. Nor should they have to. Their office is a socially desirable one which at one time, at least in the case of trustees, was carried out without remuneration.

Of course, a person who has been named to the office does not have to accept it. He may renounce. Most people would probably want to renounce once apprised of the fact that they must pay for all costs and expenses personally and can recover them only afterwards. On that basis few people would agree to take on the office. That is certainly not desirable, for the administration of estates is a socially necessary and desirable function that the law should promote and foster. And so it has long been the practice and the courts have long since recognized that trustees and estate trustees may pay the costs and expenses out of estate or trust assets.[16] Thus the statutes set out and referred to above also rightly codify this aspect of the principle of indemnity.

5. Limits on the Right of Indemnity

It is obvious that the right to indemnity may be abused by trustees and estate trustees, especially if they take costs and expenses out of the trust fund or estate assets before they are permitted by the beneficiaries or authorized by the court to do so.[17] But even if they pay these initially themselves, they may be refused indemnity subsequently by the courts or be required to repay the trust or estate. The principle set out above and codified in the statutes also recognizes this possibility. The expenses and costs must have been reasonably or properly incurred. If they were not, the trustee or estate trustee is not entitled to be indemnified for them.

This issue normally arises when the trustees or estate trustees apply to pass their accounts or when they are forced to do so by the beneficiaries. However, it may also arise on an application for advice and directions. The onus is on the estate trustee to prove that the expenses were proper.[18]

---

16 See, *e.g.*, *Re Dallaway*, *supra*, footnote 10 and the excerpt from that case quoted in the text at that location.

17 I have eschewed the use of the unfortunate terms "pre-take" and "pre-taking," which are found in many modern cases. They are undoubtedly convenient shorthand and everyone knows what they mean, but they are bad English, just like the term "pre-planning," which is in common use in the funeral industry. The prefix "pre" means "before," so the expressions "pre-taking" and "pre-planning" are silly. Literally, they mean that you are not doing anything. Having said this I confess to being shocked that the OED does recognize "preplan" as meaning "plan in advance," but I am pleased that it does not mention "pre-take." It is well to recognize that the OED is descriptive in its entries, *i.e.*, it describes what people say, not what they ought to say. I suggest that we refer such taking as "interim payment of expenses."

18 *Carter v. Blaney* (1989), 34 E.T.R. 229 (B.C.C.A.).

So the question is what kinds of expenses are reasonable or proper. A singularly unhelpful explanation is that of Lindley L.J. in *Re Beddoe*[19] who said, "the words 'properly incurred' in the ordinary form of order are equivalent to 'not improperly incurred.'" That does not gain us a clearer understanding of the words. For that we need to go the cases.

A number of general principles emerge from the older cases:[20]

> (1) The expenses must have been incurred on behalf of or in the course of the administration of the trust or estate. If they were not, they are not recoverable, even though they were incurred in a related matter and, if not incurred, would have had a deleterious effect on the trust.[21] If they were incurred on behalf of the trust, however, they are recoverable.[22]
> (2) Expenses voluntarily assumed by a trustee are not recoverable.[23]
> (3) Trustees and estate trustees are not entitled to be indemnified for expenses that arose out of their own misconduct.[24]

These principles clearly make sense and continue to be accepted in modern case law. However, their application in particular cases is not always clear. And, as argued by Waters,[25] if the expenses, though incurred outside the scope of the trust, in fact benefit the trust, perhaps the estate should be required to indemnify the trustees on the ground that the beneficiaries are unjustly enriched.

The principles apply to all costs and expenses incurred by the trustees or estate trustees. It should not matter whether they arose directly in the administration of the estate; whether they are contractual, tortious, or statutory obligations of the trustees; or whether they consist of legal costs incurred in litigation conducted by the trustee or estate trustee on behalf of the estate or trust either as plaintiff or defendant in an action, or as applicant or respondent in applications or motions.

Legal costs can, of course, arise in different ways. Some will clearly be incurred in the context of the administration of the estate. These include legal advice on the duties of estate trustees and on the interpretation of the testator's will. Normally, the estate trustee is entitled to be indemnified for them. However, the cases also make it clear that legal advice on the amount of compensation to which the estate trustee is entitled, legal costs

---

19 [1893] 1 Ch. 547 at 558 (Eng. C.A.), on appeal from an order of Kekewich J.

20 See generally Waters, *supra* footnote 4, at 1152ff; and Popovic-Montag, *supra*, footnote 4, both for a discussion of the general principles and a wealth of examples in which indemnity was either granted or refused.

21 *Fultz v. McNeil* (1906), 38 S.C.R. 198.

22 *Ceepeear (School District No. 3069) v. Security Trust Co*., [1919] 1 W.W.R. 615 (Alta. C.A.).

23 See *Vermont Loan & Trust Co. v. Ennis* [1933] 2 W.W.R. 397 (Sask. C.A.).

24 See, *e.g.*, *Tebbs v. Carpenter* (1816), 1 Madd. 290, 56 E.R. 107; and *Morton v. Miller* (1906), 1 E.L.R. 91 (N.S.S.C.).

25 Waters, *supra*, footnote 4, at 1153-54.

on an application for advice and directions, and legal services provided on the contested passing of accounts are also true administration expenses and the estate trustee is entitled to be indemnified for them, unless the expenses are excessive.[26]

The matter is more complex when it involves litigation brought either by the estate trustee, by a beneficiary, or by a third person. The modern rule is that costs in estate litigation are treated the same as costs in other civil litigation. Thus, the general rule is that costs follow the event, unless (a) there are reasonable grounds upon which to question the execution of the will or the testator's capacity, or (b) when the difficulties or ambiguities in the will that gave rise to the litigation were caused in whole or in part by the testator, in which case the costs are still normally awarded out of the estate.[27] In other cases, such as challenges to the propriety of the estate trustee's actions and contested claims against the estate, costs usually follow the event. In such cases the estate trustees may be awarded full indemnity or partial indemnity for their legal costs or indeed be denied costs. The question then arises whether they may claim the difference between what they have awarded and their actual costs out of the estate. Usually they can.

It is certainly clear that courts tend to scrutinize legal costs more closely than other expenses, perhaps to prevent unnecessary litigation at the cost of the beneficiaries.[28] One principle that arises out of this closer scrutiny is that trustees are not normally indemnified for the costs of an appeal, since it may not be for the benefit of the beneficiaries. They should normally be satisfied with the judgment at first instance. However, this principle is also subject to exceptions.[29]

Goodman Estate v. Geffen, already mentioned,[30] is a clear example of such an exception. A person with mental illness had inherited property from her mother. With input from her brothers, she settled the property upon trust for herself for life, with remainder to her children, nieces and nephews. Two of her brothers and a nephew were named as the trustees. After her death, her son sued the trustees in his personal capacity and as executor of his mother's estate, alleging that the brothers had exercised undue influence over their sister. The trial judge found that there was no undue influence. The Alberta

---

26 See, *e.g.*, Jenkins, *supra*, footnote 4, para. 22:20.20; *Re Kanee Estate* (1991), 41 E.T.R. 263 (B.C.S.C.); *Re Watterworth Estate*, 1995 CarswellOnt 2528 (Ont. Ct., Gen. Div.); *Chabros v. Anderson*, 2011 ABQB 806, 75 E.T.R. (3d) 281. Clark J. in that case disagreed, rightly, I submit, with *Re Preboy Estate* (1989), 72 Sask. R. 33 at 43 (Surr. Ct.), affirmed (1989) 74 Sask. R. 223 (C.A.); and with *Widdifield*, *supra*, footnote 4, at 4-21, which came to the opposite conclusion.

27 See *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.). See also Rule 57 of the *Rules of Civil Procedure*, *supra*, footnote 5, which contains detailed provisions to guide the court in exercising its discretion to award costs.

28 See, *e.g.*, *Re Foote Estate*, 2010 ABQB 197 at para 16, *per* Graesser J.

29 *Smith v. Beal* (1894), 25 O.R. 368 (C.A.). And see *The Canada Trust Company (Trustee of the Poloniato Grandchildren's Trust v. Brown*, 2011 ONSC 731 (application for advice and directions); 2011 ONSC 4400 (costs endorsement of L.A. Pattillo J.); 2012 ONCA 862 (the Ontario Court of Appeal affirmed the decision on the application with full indemnity costs to all parties appearing on the appeal payable out of the estate).

30 *Supra*, footnote 9.

Court of Appeal reversed on the ground of the presumption of undue influence. On further appeal, the Supreme Court of Canada restored the trial judgment, holding that the presumption was rebutted. The trustees obviously had to defend the action and the appeal to the Court of Appeal. But should they have brought the appeal to the Supreme Court? The Supreme Court did not address the issue directly, but appears to have had no difficulty with the appeal. On the issue of costs, the son argued that the trustees should not be allowed their costs out of the estate, since they were acting for their own benefit. However, the court held that there could be no question that the trustees had acted reasonably and were thus entitled to be indemnified. Justice Wilson went on to say:[31]

> Nor can there be any serious question that the appellants in defending the action were acting, not for their own benefit, but for the good of the trust. For [the nephew trustee], of course, defending the action promoted both his personal interest as well as that of his fellow beneficiaries. While we have not been referred to a case in which trustees seeking indemnification from a trust were also beneficiaries of the trust, I do not consider the co-existing interest of trustee and beneficiary a valid basis for denying costs. Similarly, the fact that the Geffen brothers were acting in the interests of their children, nephews and nieces, does not, in my view cast any doubt upon the propriety of their actions.

The court awarded the trustees full reimbursement from the trust property for their actual and reasonable costs, including legal fees, while requiring the son to bear his own costs.

Thus, statements to the effect that when executors are seeking compensation they are to be regarded as ordinary litigants in respect of costs, appear to be incorrect.[32] I submit that since executors are entitled to compensation for the work they have done, their costs incurred on their application for compensation are an administration expense.[33]

I want to look a bit more closely at another case already mentioned, *Thompson v. Lamport*.[34] It is significant for the broad principles applied by Rand J. The case concerned an action by the executors of a will which directed them to set up a trust for the testator's daughter with a capital sum of $100,000. She was to receive income from the trust for life. She would also receive the corpus if she should survive her husband, but the corpus would fall into residue if she predeceased her husband. The residue of the estate was left to her two brothers. The brothers and a trust company were appointed the executors and trustees. The daughter brought an action against the trustees, alleging various improprieties. The trial judge dismissed the action with costs. The party and party costs, as taxed, were being paid out of the income paid to the daughter. The solicitor and client costs were also taxed and the trustees sought to recover the difference between the

---

31 *Ibid*., at para. 77.

32 See, *e.g.*, *Widdifield*, *supra*, footnote 4, at 4-21. *Re Preboy Estate*, *supra*, footnote 26.

33 See, *e.g.*, Jenkins, *Compensation*, *supra*, footnote 4, at para. 22:20.20; and *Re Kanee Estate* (1991), 41 E.T.R. 263 (B.C.S.C.), followed in *Re Watterworth Estate*, *supra* footnote 26, in which the Ontario Court (General Division) said at para. 38 that the time spent by an estate solicitor responding to the executor's questions concerning compensation to which they are entitled is a legitimate expense and that it is in the estate's best interests that legitimate compensation be paid.

34 *Supra*, footnote 7.

two assessments from the trust fund. The daughter objected. The application judge directed that the difference should be recovered out of the capital of the trust. The Ontario Court of Appeal was of opinion that trustees can only recover costs from a trust if they have benefited it. Here the only benefit was to the residue and so the court directed that the trustees could only recover the difference between the two sets of costs from the residue. The trustees then appealed to the Supreme Court of Canada.

In the course of his judgment for the majority, Rand J. referred to and applied *Walters v. Woodbridge*.[35] The trustee of an estate had obtained court approval for the sale of the partnership interest of the deceased. Pursuant to a compromise, the proceeds were to be held on the trusts of the will. Some beneficiaries then brought a bill in equity to have the court's decree set aside for misrepresentation. The bill was dismissed with costs, but the trustee was unable to recover his taxed costs from the beneficiaries. He brought an application to have his solicitor and client costs taxed and charged against the estate. Lord Romilly dismissed the application for lack of jurisdiction, since the action was defended by the trustee to clear his own character. The Court of Appeal reversed and James, L.J. said the following:[36]

> It is agreeable to me personally that we are not obliged to put a trustee in a position which would be disgraceful to the administration of justice. The Court is very strict in dealing with trustees, and it is the duty of the Court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust. Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts; and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs.

Justice Rand had this to say about the "benefit":[37]

> Now, what are the characteristics of this benefit? There [in *Walters*] the proposed sale required the prior approval of the court, and the effect of the judgment dismissing the bill was to confirm that approval. But what of the case where the trustee carries through a transaction which does not require such an approval? What is to be the measure or test of benefit? Can it be anything more than that the act was properly done within the duty of the trustee? Must the court examine the details of the transaction challenged and find not only propriety but a "benefit" as against what is alleged ought to have been done?
>
> Where the trustee is resisting the assertion of a right by a third person against the trust estate, obviously his action is for its benefit. But a new element is introduced when the complaint is by the beneficiary for a breach of duty, such as fraud or negligence. In that case the trustee is in fact defending both his administrative act and his own interest. In the

---

35 (1878), 7 Ch. D. 504 (C.A.).

36 *Ibid*. at 510.

37 *Thompson*, *supra*, footnote 7, at 357-58.

> latter aspect, he has no special privilege in costs over an ordinary litigant: he is in the same position as any other person improperly accused of a wrong, and any outlay over the costs allowed by law must be borne by himself as the price of his own vindication. The question in such cases is whether the personal defence is incidental to that in his representative capacity: if it is, the costs will not be split.
>
> From this the Court of Appeal has drawn the conclusion that in suits by beneficiaries it must appear that the defence is for the benefit of the trust in virtually the same sense as in cases brought by third persons: that the trustee is warding off an attack upon his funds: and the court in fact looked upon the litigation as essentially, if not exclusively, a claim against the residue. But, with the utmost respect, that is not, in my opinion, the principle of *Walters v. Woodbridge*[38] where, as here, the court is called upon to determine whether an act or transaction carried through by the trustee can be said to have been done within his authority and duty: and where the undoing of the act is the direct object of the litigation.

Taking all this into account, Rand J. directed that the solicitor and client costs of the trustees, as well as the costs of the other parties, should be borne by both the trust fund and the residue of the estate in proportion to their respective values.

These cases therefore make it abundantly clear that the basic rule entitles trustees and estate trustees to recover full indemnity, including legal costs, out of the funds under their management. However, there is also a caveat and it is an important one, namely, they are only entitled such costs as were reasonably incurred in the administration of the trust or estate.

As regards prior approval by the court or the consent of the beneficiaries, the latter will often not be available because there is already animosity between the estate trustee and the beneficiaries, or because some or all of the beneficiaries are incapable. In circumstances in which the estate trustees are in doubt about the propriety of a proposed expense they may be well-advised to seek advice and directions from the court. That way they will avoid a nasty surprise later if the court should disallow the expense. Perhaps testators and settlors might be advised to authorize the taking of expenses from the estate or trust fund by the estate trustee or trustee if they deem them to be reasonable and proper.

The cases also make clear that costs are normally recoverable out of the capital of the fund, although in fact the whole fund, including the income, is liable for them. And they make clear that the courts should not attempt to make fine distinctions between the extent to which trustees, who are also beneficiaries, have benefited the estate and the extent to which they have benefited themselves in conducting litigation. In other words, there is no distinction between the case of a trustee defending an action by a beneficiary against himself, and the case of a third person who brings an action against the trustee. In all cases the question is whether the trustee's actions were carried out within scope of her authority and whether the expenses were properly incurred. However, if the action is

---

38 *Supra*, footnote 35.

solely for the trustee's benefit, she may have to bear any costs awarded against her personally.

6. The Recent Case Law

This brings us to an examination of the recent cases. Have they applied the principles stated above correctly and have they found against the estate trustee solely on the facts? Or have they diverged from the established principles? I shall examine them *seriatim*, give a brief statement of the facts, and then consider the foregoing questions.

6.1 *Coppel v Coppel Estate*[39]

This was an uncontested motion for further directions by a beneficiary. The issue was whether an estate trustee may, without court approval or the consent of all the beneficiaries, use estate funds to pay legal fees incurred in defending an action brought by a beneficiary. Counsel was unable to find any authority on point.

Quinn J. noted in passing that the solicitors for the defendant were not the solicitors of the estate, as they claimed, but solicitors for the estate trustee.[40]

> *This is correct, as discussed above.*

However, he then held that therefore it is impermissible for an estate trustee to pay litigation accounts from estate funds without approval or consent.[41]

> *This is incorrect since there was direct authority to the contrary at the highest level in* Goodman Estate v. Geffen.[42] *Further, s. 23.1 of the* Trustee Act[43] *was enacted in the year* Coppel *was decided and is clear authority for such taking. In any event, its predecessor, s. 33,*[44] *also allowed it. Neither section was referred to by the court. Accordingly, the decision was made* per incuriam.

In *dictum*, Quinn J. went on to say, "…it is also impermissible for non-litigation, but estate-related accounts to be paid without prior court approval or the consent of the beneficiaries."[45]

---

39 [2001] O.J. No. 8457 (S.C.J.).

40 *Ibid.,* para. 8

41 *Ibid*.

42 *Supra*, footnote 8 and excerpt there quoted in the text.

43 *Supra*, footnote 13, quoted in the text at that point.

44 *Trustee Act*, *supra*, footnote 13, repealed by S.O. 1998, c. 18, Sch. B, s. 16(1). I suspect that the gap between the repeal of s. 33 and the enactment of s. 23.1 is because: (a) the repeal of section 33 was part of the repeal of all sections of the Act dealing with trust investments and their replacement with the new regime of the prudent trustee in 1998; (b) it was realized later that the repeal of s. 33 also repealed the codification of the right of indemnity; and (c) that required the enactment of s. 23.1 to reinstate, clarify, and expand the right of indemnity.

45 *Coppel*, *supra*, footnote 38, para. 9.

This is also incorrect for the same reason.

Quinn J. directed that the estate trustee reimburse the estate for all legal accounts incurred in defending the action, presumably because he believed that the taking was improper. Also, because the estate trustee failed to respond to the plaintiff's motion, the court awarded the plaintiff substantial indemnity for his costs, payable by the estate trustee personally. It did not award costs to the estate trustee.

The costs award may have been appropriate because of the estate trustee's failure to respond to the motion.

6.2 *DeLorenzo v. Beresh*[46]

Residuary beneficiaries under a will brought a motion in which one of them, having reached the specified age under a testamentary trust, sought to have the estate trustee, who was also a solicitor, transfer the capital of her interest under the trust to her. At the time there were three other proceedings before the court, two being the estate trustee's applications to pass his accounts from the testator's death to the end of 2004, and an application by the residuary beneficiaries for an order removing the estate trustee. The estate trustee had not yet applied to pass his accounts from 2005 to date and it appeared that he may have been dilatory in obtaining a tax clearance certificate. In addition, he had not yet fulfilled certain undertakings. He resisted the claim to transfer the capital to the one beneficiary, since he claimed a lien for compensation and expenses on the estate funds. Meanwhile, he had paid his legal costs in the various proceedings from estate funds.

Lofchik J. acknowledged that on a passing of accounts the estate trustee is normally fully indemnified for the costs of administration, including legal costs, but distinguished such indemnity from legal costs incurred in contentious or adversarial legal proceedings between the estate trustee and beneficiaries, or between the estate trustee and third parties. In such cases each party should pay their own costs until the litigation is finished, after which the court, on the passing of the accounts can determine whether, or to what extent the estate trustee should be indemnified for them. Consequently, Lofchik J. applied *Coppel*,[47] since the estate trustee had not obtained court approval or consent of the beneficiaries and ordered reimbursement of the amounts taken with post-judgment interest.

For the reasons given in the discussion of Coppel*, I submit that this is wrong. In this case the court also failed to refer to s. 23.1 of the* Trustee Act,[48] *which permits such taking.*

---

46 [2010] ONSC 5655.
47 *Supra*, footnote 39.
48 *Supra*, footnote 13.

Lofchik J. also held that while the estate trustee was entitled to a lien, this did not entitle him to withhold payment of the whole of the capital of the beneficiary's interest. Lofchik J. directed that he pay her 80 percent. The court also held that if he should later be found liable for payment of income tax or other expenses, he could make a claim for reimbursement from the beneficiaries.

> *The court may well have been influenced by the estate trustee's delays, but the holding on the lien is troubling. In the circumstances, the order to pay 80 percent to the beneficiary was probably satisfactory, but in other cases a court might, on this basis, defeat an estate trustee's lien entirely.*

6.3 *Craven v. Osidacz Estate*[49]

The deceased stabbed his son to death during an access visit and was about to kill his estranged spouse when he was shot to death by the police. He had appointed his brother his estate trustee and the brother and their mother were the sole beneficiaries under the deceased's will. The spouse sued the estate for the wrongful death of her son and for the assault against her and engaged in litigation with the estate about the sale of the matrimonial home and for dependants' support. The estate trustee used estate funds to pay legal fees in excess of $100,000 to defend these claims. He and his mother alleged that they had approved this payment. The spouse brought a motion to restrain the estate trustee from takint further expenditures from the estate without court approval and directing the estate trustee to repay the moneys already taken to the estate.

Lofchik J., citing *Goodman*[50] and *Coppel*,[51] noted that an estate trustee has a duty to defend claims against an estate, so long as the estate assets are expended reasonably. The estate trustee may be indemnified for his expenses, but only if the costs were reasonable and properly incurred. When both the estate trustee and others are beneficiaries or otherwise have a personal claim against the estate and their interests conflict, it is improper to use the estate "as a kind of ATM machine from which withdrawals automatically flow to fund the litigation whether reasonable or not."[52] For the estate trustee must use his best judgment about whether to litigate after considering the interests of the beneficiaries and others. If in doubt, the estate trustee should seek the court's approval or the consent of the beneficiaries. The applicant had a financial interest in the estate and, thus, had standing to object to the payment of the expenses from the estate.

Lofchik J. refused to order repayment of the moneys already taken, stating that the reasonableness of the taking would be best measured on the passing of the accounts. However, the court did restrain the estate trustee from taking further estate funds to pay further legal accounts without the consent of the beneficiaries, including the applicant, or the court's approval.

---

49 2010 ONSC 6637.
50 *Supra*, footnote 8.
51 *Supra*, footnote 39.
52 *Craven*, *supra*, footnote 49, para. 23.

> *Despite the uncritical reference to* Coppel*, I submit that this was a reasonable order in the circumstances. It confirmed and protected both the right of estate trustees to use estate funds to defend claims against the estate and the right of beneficiaries to prevent unreasonable use of such funds. The case does not make it clear when the passing of accounts would take place. The facts suggest that it might be some time, so it is somewhat surprising that the respondent was not required to repay the moneys taken by him from the estate. Section 23.1 was not referred to.*

6.4 *Bott v. MacCaulay*[53]

This case is different from the others in that it concerns the claim of a solicitor who was engaged by the estate trustee to perform legal services for the estate, as well as some "executor's work," that is, work normally performed by an estate trustee. The estate trustee had signed a retainer that made a distinction between the two types of services, but it did not, as the court found, entitle the solicitor to claim five percent of the value of the estate as the equivalent of an estate trustee's compensation. The solicitor submitted two accounts, one for the legal services and one for the "executor's work," and paid himself from estate assets. The estate trustee applied to have the second account assessed under the *Solicitor's Act*[54] and submitted an affidavit detailing the "executor's work" he had done. The solicitor claimed that such an assessment could only take place on a passing of accounts.

Cullity J. held that he had jurisdiction to order the assessment, since the solicitor was not solicitor to the estate, but to the estate trustee. Thus, the latter was entitled to have the solicitor's accounts assessed. An estate trustee may agree to pay a particular amount for services rendered by a solicitor but, as the court found, there was no such agreement in this case.

Cullity J. also held that if there is no special agreement between the parties, the solicitor may charge only on the normal *quantum meruit* basis, *i.e.*, one based on the time spent, labour, degree of difficulty and other factors. These principles apply to accounts for legal work and for solicitor's work. Even if the retainer amounted to an agreement to pay the solicitor a specific amount, the court would still have power to declare the agreement void on the ground that its terms were unfair and unreasonable.

Cullity J. directed the solicitor to deposit the amount taken pursuant to the second account into an interest-bearing trust account pending completion of the assessment.

> *This decision is clearly right. It applies correct principles and comes to an eminently reasonable conclusion.*

---

53 (2005), 76 O.R. (3d) 422 (S.C.J.).

54 R.S.O. 1990, c. S.15.

6.5 *Re Vincent Estate*[55]

A beneficiary began proceedings to challenge the validity of his mother's two wills and an estate freeze. This led to litigation between him and his sister, the other beneficiary. The court appointed a trust company as estate trustee during litigation. Prior to March 1, 2010, the estate trustee during litigation, represented by counsel, made three court appearances and the court awarded the estate trustee its costs on a full indemnity basis to be paid from the estate. The parties then reached a settlement which the court approved. The order provided that reasonable legal fees and disbursements relating to the transfer of a condominium to the sister should be paid out of the estate. It also provided that the estate trustee was entitled to be reimbursed for legal costs and disbursements and other properly incurred charges and reasonable out-of-pocket expenses. The son took part in negotiating the terms of the order.

The lawyers' accounts during the litigation had been regularly provided to the beneficiaries after they had been paid and the son had not objected to them. However, when the estate trustee applied to pass its accounts, the son objected to the legal accounts paid during the litigation and for the condominium transfer.

Prior to the return of application on 4 May 2011, both the estate trustee and the son served draft orders, but the draft order of the estate trustee raised as one issue whether the son was prevented from raising objections on the ground that those objections had already been adjudicated and were subject to existing court orders. Corrick J. held in an endorsement, dated 4 May 2011, that the order approving the settlement estopped the son from objecting to the legal accounts paid before the date of the order, but that he was entitled to have legal accounts paid after the date of the order assessed. His sister did not object to the passing of the accounts.

The endorsement was followed by the judgment of Corrick J., also dated 4 May 2011, passing the accounts as presented. The judgment in turn was followed by the order of Corrick J., dated 17 June 2011, which ordered that the son was estopped from objecting to the legal accounts prior to 1 March, 2010, but permitted him to contest the accounts rendered after that date. He subsequently declined to have those assessed. The judgment was followed by the reasons for decision of Corrick J, dated 26 September 2011. In those reasons, Corrick J. dealt with the daughter's costs and a request for increased costs by the estate trustee. Justice Corrick granted the latter request, passed the estate trustee's accounts to April 30, 2010, assessed the costs of passing the accounts of the solicitor for the estate trustee, and directed that the larger portion of the latter costs, as well as the costs awarded to the sister be paid out of the son's share of the estate.

The son appealed. He argued that: (a) he did not present evidence in support of his objections at the 4 May, 2011 hearing because it was only a motion for directions; (b)

---

[55] 2011 ONSC 3806 (endorsement, Corrick J, 4 May 2011), reversed 2012 ONSC 940 (Div. Ct., endorsement, 6 February 2012). See also Court File No. 02-105/10 (Judgment on Passing of Accounts, Corrick J., 4 May 2011, and Order of Corrick J., 17 June 2011); and 2011 ONSC 5625 (Reasons for judgment of Corrick J., 26 September 2011).

Corrick J. failed to follow the appropriate procedure as contemplated by the Practice Direction Concerning the Estates List in Toronto dated 18 February 2009, but decided the substantive issue of estoppel; and (c) therefore the order deprived him of the opportunity to make his case. By an endorsement of 6 February 2012, the Divisional Court accepted the son's argument and set aside all but one of the provisions of the order of Corrick J, of 17 June 2011.

But this is the strange part: While the court set aside the order of 17 June, it did not refer to the Reasons for Decision of 26 September. I understand that the court was not informed of them. The result, I submit, is that those Reasons are still in effect and that leaves the parties in a quandary about where they stand.

> *With respect, I find the decision of the Divisional Court strange. It speaks of an application for directions, but the order made by Corrick J was actually made on an application to pass accounts. Thus, Corrick J. clearly had jurisdiction to deal with the substantive issues under s. 49 of the* Estates Act,[56] *as well as under the* Trustee Act,[57] *and the* Rules of Civil Procedure.[58] *I submit that a Practice Direction cannot override those legal provisions. In addition, it would seem that the son had sufficient opportunity to provide timely details of his objections. Finally, in light of the modern approach to decide matters summarily if there are no reasonable issues for adjudication, I submit that it made sense for Corrick J. to make the findings and decide the matter as she did.*

6.6 *Zucker v. Moore*[59]

This is a bizarre case that involved numerous applications and orders. We are concerned with three of them. The case concerns the administration of a $42 million estate. The testator left his estate to his three children and named a family friend who was a retired partner of an accounting firm and another partner of that firm as estate trustees. The friend was not active for long as an estate trustee because of age and was eventually removed. He was paid $500,000 as compensation and the costs of some of the litigation that ensued. The continuing estate trustee was paid $1.2 million in compensation personally, as well as costs of the litigation, and the firm was paid $1.1 million in fees. Two of the beneficiaries raised objections, while the third concurred in their actions. The will was silent on the matter of taking compensation before approval.

The first proceeding was a motion by the beneficiaries for an order requiring the estate trustees to pass their accounts, directing them to repay all moneys taken by them for compensation and prohibiting them from being paid further compensation or reimbursement for legal and accounting fees. Grace J. took note of cases that permitted

---

56 R.S.O. 1990, c. E.21.

57 *Supra*, footnote 11.

58 *Supra*, footnote 5.

59 *Zucker v. Moore*, ONSC File No, 01-2521/04, 2011 02 02 (Endorsement of Grace J.); *Zucker v. Moore*, 2011 ONSC 7165 (Endorsement of Greer J.); *Re Zucker Estate*, 2012 ONSC 2262 (Reasons for judgment of Lofchik J.).

the taking of compensation before approval, as well as cases and other authorities that objected to the practice. He concluded that such taking appears normally to be unlawful unless the will or the court authorizes it, or all the beneficiaries consent, and possibly also if the estate involves ongoing administration and the interim compensation is reasonable. He held: (a) that the estate trustees were entitled to take interim compensation if the amount is reasonable and the accounts are passed expeditiously; (b) if consent was required, the evidence showed that the beneficiaries consented through 2005; and (3) whether there was consent post-2005 could not be determined on the evidence. He expressed concern about the amount of the compensation taken, but concluded that the estate trustees should not be ordered to repay the amounts taken since the issue was not really the taking without authority, but the quantum. Accordingly, he ordered the passing of the accounts and prohibited the further taking of compensation without court approval or beneficiaries' consent. He also directed the estate trustees to post an irrevocable letter of credit. It was never posted. Meanwhile, the continuing estate trustee was terminated by his accounting firm and he brought an action against it for wrongful dismissal.

The second proceeding was a motion on various issues, including the removal of the continuing estate trustee and an increase in the letter of credit. Justice Greer ordered that alternative security be posted in the form of an irrevocable direction by the continuing estate trustee to the trustees of an *inter vivos* trust of which he was a beneficiary, to assign his interest in the trust to the beneficiaries' law firm in trust. She also directed the estate trustee to assign all his right, title and interest in his lawsuit against his former accounting firm to that law firm and she directed the estate trustee who had been removed earlier to assign his interest under a trust of a condominium to the law firm if the beneficiaries should be successful in their fraudulent conveyance motion against him. In addition, Justice Greer ordered the removal of the remaining estate trustee, replaced him with another person, and directed that the removed trustee take no further compensation from the estate.

The third proceeding was a further motion for directions. Justice Lofchik gave various directions for the trial of issues concerning the compensation and legal costs taken by the original estate trustees.

> *The case is bizarre in that so much court time was taken up to attempt to resolve it, caused, it seems, in large part by the recalcitrance of the surviving estate trustee and by his apparent (though yet to be determined) egregious taking of excessive compensation and reimbursement of legal expenses. In view of the facts, it is surprising that Justice Grace did not require repayment, but concluded that the issue should be dealt with on the passing of accounts. I submit that this is the correct approach, but that in circumstances such as this an order prohibiting further taking of compensation or reimbursement of expenses was appropriate. The case is also important on the issue of an estate trustee or trustee taking compensation before court approval on a passing of accounts. The cases disagree on their right to do so. It is to be hoped that an appellate decision will soon provide clarity on this issue.*

> *It seems to me that many of the problems that arose in this case could be avoided if the judge originally assigned to the case remains seized of it until it is concluded. The judge can then move the case along as quickly as possible. As it is, with different judges deciding various motions and applications, it often seems as though the right hand does not know what the left hand is doing.*

6.7 *The Canada Trust Company (Trustee of the Poloniato Grandchildren's Trust) v. Browne*[60]

This case involved an application by the trustee of an *inter vivos* trust for advice and directions concerning the interpretation of the twice-varied trust. The parties sought payment of their costs from the trust. In the case of the trustee the issue concerned the quantum. In the case of the Children's Lawyer and some of the beneficiaries it concerned their entitlement.

Pattillo J. rightly noted the modern rule that costs in estate litigation follow the cost rules that apply in civil litigation cases generally, except when the litigation arose because of the actions of the testator or the residuary beneficiaries, or when the litigation is reasonably necessary for the proper administration of the estate or trust. In the exceptional cases, if the litigation was reasonable, the estate will bear the costs of the litigation. An application for advice and directions is normally regarded as reasonably necessary for the proper administration of the estate, although the estate will not have to bear the costs if the court finds that the application was unwarranted or unnecessary.[61]

Pattillo J. found that the application was reasonable and properly brought by the trustee and that, in the circumstances, the quantum was reasonable. The court awarded full indemnity costs allocated one-third against income and two-thirds against capital. The court also found that the Children's Lawyer's costs were reasonable and awarded full indemnity costs to be paid from the capital of the trust. Several of the income beneficiaries were represented by different counsel. Pattillo J. noted that while the parties were entitled to retain their own counsel, that did not mean they were entitled to have their counsel's costs paid by the trust on a full indemnity basis. Pattillo J. stated, "[t]he days of trusts or estates being bank machines for litigation costs are over,"[62] found that the interests of the income beneficiaries were aligned, and held that they were thus entitled to the costs of one counsel on a full indemnity basis, to be paid from the capital of the trust. The court also allowed the costs of another law firm, allocated one-third against income and two-thirds against capital. It awarded no costs to certain capital beneficiaries, because their position in support of the income beneficiaries could have been presented to the court by letter.

> *I submit that this costs decision is unexceptional. It does not concern a taking without approval or consent, but does affirm: (a) a trustee's entitlement to indemnity, including legal costs; (b) the modern rule regarding costs in estate*

---

60 *Supra*, footnote 29.

61 See, *e.g.*, *Re Preymac* (1964), 45 D.L.R. (2d) 554 (B.C.S.C.).

62 *Supra*, footnote 29, para. 47 (Pattillo J.).

> *litigation; and (c) the principle that although costs are usually payable from capital, they are the costs of the entire estate or trust, unless otherwise allocated.*

The Court of Appeal affirmed and granted full indemnity costs to all parties, payable out of the estate.

6.8 *Chabros v. Anderson*[63]

A beneficiary had contested the compensation claimed by the executors. Clark J. held the claim to be grossly disproportionate and reduced it by about 60 percent. The parties then sought a decision on the matter of costs.

In the course of the reasons, Clark J. referred to the modern rule regarding costs in estate litigation, but noted that the litigation model did not apply to the circumstances of the case. There is no adversity in interest between the estate and executors in the determining the amount of the compensation, because the estate owes the executors a reasonable remuneration. As regards the legal costs incurred by the executor in respect of the determination of what they are entitled to by way of compensation, they are also entitled to be indemnified for them, but only to the extent that the costs are reasonably and properly incurred.

Clark J. then noted that the solicitor is the solicitor for the executor and not the estate and that the executor can only recover the legal fees from the estate if they are reasonable and proper. The judgment cited *Widdifield*[64] and *Coppel*[65] to support the statement that without prior court approval or consent of all the beneficiaries, executors may not pay themselves litigation costs in defending proceedings brought by a beneficiary.

Clark J. went on to say:[66]

> It is clear then, that executors are not entitled to assume that their legal fees will be reimbursed by the estate, regardless of circumstances or quantum. If an executor wishes to seek out "gold-plated" legal representation and/or retain counsel to do work not necessarily required by the estate, he may do so, but he may expect to be indemnified only for the portion of that cost reasonably required for the administration of the estate.

Similar sentiments are found in other cases, typically when the conduct of the estate trustees is egregious. Indeed, Clark J. expressed concern that executors and estate lawyers regard a large estate as a "dripping roast" that allows them to claim excessive compensation and legal costs and decried that attitude.[67] Consequently, Clark J. fixed the

---

63 *Supra*, footnote 26.
64 *Supra*, footnote 4 at 4-8.3.
65 *Supra*, footnote 39.
66 S*upra*, footnote 26 para. 15.
67 *Supra*, footnote 63, para. 50.

legal costs of the estate trustees at less than 10 percent of the amount claimed and awarded full indemnity to the beneficiary, both to be paid from the estate.

> *Clearly the conclusions of the court on: (a) the modern rule about litigation costs and its adaptation on applications for compensation; (b) the principle that the legal costs must be reasonable and proper; and (c) the position that a solicitor is the solicitor for the executors, not the estate, are correct. However, I submit that its conclusion that executors may not pay themselves litigation costs without prior court approval or beneficiaries' consent, is incorrect for the reasons discussed above under* Coppel.[68] *The court did not cite or consider s. 25 of the* Trustee Act,[69] *reproduced above, which provides otherwise. In that respect the case was, therefore, decided* per incuriam.

7. Conclusions

It is difficult to draw definitive conclusions about the recent case law, since the cases are very much fact-driven. However, I suggest that we can derive the following principles from the jurisprudence:

1. A trust and an estate are not legal entities. Hence they can neither sue nor be sued, nor incur expenses. The trustee or estate trustee, acting as principal, is the person who incurs the expenses. Moreover, a third person must sue the trustees or estate trustees and the trustees or estate trustees are the proper parties to bring actions against third persons or beneficiaries.

2. It follows from the first principle that trustees and estate trustees are personally liable for the costs of litigation and, indeed, for any expenses of administration.

3. The basic principle that an estate trustee and a trustee are entitled to be indemnified out of estate or trust assets for expenses they have incurred in the course of their administration is undoubted in the case law and is codified in statute. Not only are they entitled to be indemnified, but the cases and statutes permit them to take the expenses from the estate or trust unless the will or trust instrument provides otherwise. The proviso is that the expenses are reasonable and properly incurred.

4. The principle of indemnification also applies to the costs of litigation, whether the litigation is brought by the estate trustee, a beneficiary or a third party, subject to the same proviso.

5. The fact that an estate trustee or a trustee benefits incidentally from the expenses incurred, even in proceedings by a beneficiary against the trustee or estate trustee, does not disentitle her to indemnity. However, if the proceedings are exclusively for the estate trustee or trustee's benefit, she must bear the expenses personally.

---

[68] *Supra*, footnote 39.

[69] Reproduced in the text at footnote 15, *supra*.

6. It is, however, true that courts will look more closely at the costs of litigation than at other costs because they seek to prevent the depletion of an estate by unnecessary litigation at the cost of the beneficiaries.

7. It is astounding that the recent cases fail to cite long-established cases of the highest authority and statutes that endorse the right of indemnification and permit estate trustees and trustees to take expenses from the estate or trust. It is even more remarkable that many rely on the *Coppel* case, which was a decision on an uncontested motion and, thus, a weak authority, and which, as we saw, was decided *per incuriam*. This bespeaks sloppy or non-existent research on the part of counsel.

8. The proviso that the expenses must be reasonable or proper is normally measured by the court on the passing of accounts. To the extent the expenses were not reasonable or proper, the estate trustees or trustees will have to reimburse the trust or estate and they may be charged with interest on the amount disallowed.

9. If a trustee or estate trustee is unsure about a proposed expense, such as the cost of litigation, he should obtain the consent of the beneficiaries or the approval of the court.

10. It would be desirable for an appellate court to clarify the circumstances in which trustees and estate trustees may take interim compensation from the funds they administer before they obtain a judgment on a passing of accounts.[70]

---

[70] The remarks of Misener J. in *Re William George King Trust* (1994), 2 E.T.R. (2d) 123, para 12 (Ont. S.C.J.), a case involving an application to pass accounts, have much to recommend them, I submit. He acknowledged the general rule that estate trustees and trustees are prohibited from taking interim compensation without approval, but thought the general rule ought not to apply to a continuing trust such as the one before the court. He said:

> Passing accounts is an expensive procedure. It is expensive to the beneficiaries and, in theory at least, to the public as well. It seems to me that, unless the beneficiaries insist that it should be otherwise, accounts in a continuing trust such as this ought not to be passed any more than every three years. Even that seems too frequent to me. It is unfair to ask trustees to defer their compensation for that period of time. Applications for interim allowances are expensive as well, and so should be discouraged. The alternative is the so-called prepayment or pre-taking. So long as the trustees pay themselves for services already rendered (i.e. in arrears), and so long as the amount taken does not exceed what is fair compensation for those services, I see nothing at all wrong with it when, as I have said, the administration of the trust or of the estate is a continuing one. Indeed, I think it is the right thing to do.