STEP Canada 15th National Conference
June 10-11, 2013

Estate Litigation:
Important Updates and Overview of Recent Case Law on Costs in Passing of Account Applications

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A. INTRODUCTION *

In estate litigation, estate trustees, beneficiaries and lawyers are often concerned about a key aspect of any potential passing of account application: costs. At the end of the day, where will the money come from to pay for a dispute about the estate accounts? This paper will review recent cases which have set out guidelines in the awarding of costs in the specific context of passing of account applications as well as the indemnification of estate trustees for those costs.

B. COSTS IN PASSING OF ACCOUNTS APPLICATIONS

Predicting costs in any type of estate litigation can cause confusion for both litigants and counsel. Judges who hear contested matters always have discretion, with a high level of deference,[1] to make costs orders. In the estates context, courts are generally moving away from the "traditional" approach where costs are paid out of the estate, to a more modern approach which closely resembles the "loser pays" rule found in civil litigation. The court also must take into account elements of: public policy, conduct of the parties, success in the litigation, as well as proportionality and access to justice. Costs decisions that allow for impecunious parties to have their properly incurred costs paid are a means for those parties to have access to justice that they may not have otherwise had.

This paper will examine recent cost decisions in passing of accounts applications. Passing of accounts applications are a way for estate trustees to have their accounts formally approved by a court. Often these applications can become contentious when beneficiaries file objections to the accounts submitted for approval. This paper will look at how courts have recently decided on the appropriate quantum for costs in a passing context and when costs will be paid by the estate, the unsuccessful objecting beneficiary, or even the estate trustee personally. In each of these cases the courts looked at the actions taken by the estate trustee, the objectors and the level of success of both when awarding costs. A reminder, a passing of accounts is not mandatory, rather

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[1] *Davies v. Clarington (Municipality)*(2009), 100 O.R. (3d)(C.A.).

the duty to account is. This is an important distinction when considering the costs associated with an application to pass accounts.

This paper will also briefly examine recent cases that deal with beneficiaries' objections to estate trustees taking legal fees they have incurred in the course of their administration out of the estate without a court order or approval of the beneficiaries. These cases appear to stand for the proposition that trustees are not authorized to pay from trust property at first instance properly incurred legal costs associated with the administration of the trust. This paper will comment on how these cases appear to be at odds with established case law (*Goodman v. Geffen*) and section 23.1 of the *Trustee Act*[2] which gives trustees the express authority to use estate assets respecting an administration subject to review by a court on a passing of accounts. Note should be made of an article published by Professor Albert Oosterhoff in The Advocates Quarterly, which effectively and critically analyses some of the noted decisions, concluding some were wrongly decided.[3]

Recent Cases Regarding Costs in Passing of Account Applications

1) Quantum

The following cases provide an insight into how courts are currently quantifying the "*reasonable*" costs in passing of accounts applications.

Vano Estate, Re[4]

In *Vano Estate*, the Estate Trustee During Litigation sought costs on a passing of accounts application in a voluntarily reduced amount of approximately $374,000.00. Low, J., described the proceedings as having a long and tortured history, replete with attendances before several Justices including Cullity, Klowak, Siegel, Brown and Archibald, and in some cases multiple attendances.[5] Low, J., summarized the history of the passing of accounts proceedings as it had a significant bearing on the resultant costs decision.

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[2] R.S.O. 1990, c. T.23 (the "*Trustee Act*").
[3] Professor Albert Oosterhoff, "*Indemnity of Estate Trustees as Applied in Recent Cases*", The Advocates Quarterly, (2013), 41 Adv.Q. ("Oosterhoff").
[4] 2012 ONSC 262 ("*Vano Estate*").
[5] *Ibid.* at para. 3.

A previous 2011 decision in this litigation found that, but for a handful of small errors, the estate trustee was largely successful in satisfying the Court that the estate had been reasonably administered and that the objector, Mr. Vano, was not able to substantiate the vast majority of his objections and allegations. Mr. Vano argued that the costs claimed by the Estate Trustee During Litigation were grossly excessive, given the assets, and moreover, that a large portion of the estate had already been taken in fees and expenses, while only a small portion was distributed to the beneficiaries. In other words, the concern was 'proportionality'.

Having regard to Rule 57[6] of the Ontario *Rules of Civil Procedure,* as well as the principles for full indemnity payment in respect of estate trustees as set out in *Josephs Estate Re*[7], and having regard to the relative degree of success of the parties on the issues raised in the application, Low, J., concluded that the proceeding ought to have been very straightforward.[8] Low, J. criticized Mr. Vano for not abiding by the rules and directions of the Court which could have disposed of the proceedings within one day or two.[9] Importantly, the fact that the hearing stretched to six days in total, was attributable entirely to the unwillingness or inability of Mr. Vano as per the decision of Low, J.[10] The Court also spoke to the delay attributable to Mr. Vano's failure to particularize objections and to call evidence that was largely irrelevant.[11] Notably, also Low, J. referred to various offers to settle that had been made by the Estate Trustee During Litigation and which were referenced in the costs submissions. Though the Court opined that the Rule 49.10 offer had no practical effect as far as the consequences of the Rule were concerned, it did however shed light on the conduct of the parties and their willingness to act reasonably.

Finding that the Estate Trustee During Litigation did act reasonably, the Court nevertheless was of the view that the total amount claimed for costs, even while reduced, was excessive. A strong message can be gleaned from Justice Low's following comments: *"The principle of the indemnity is not a carte blanche for costs to be drawn*

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[6] *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, at Rule 57.01(c), (e), (f) and (g).
[7] *Josephs Estate, Re* (1993), 14 O.R. (3d) 628, 50 E.T.R. 216 (Ont. Gen. Div.).
[8] *Vano Estate*, *supra* note 4 at para. 29.
[9] *Vano Estate, supra* note 4 at para. 30.
[10] *Ibid*.
[11] *Ibid* at paras. 31 and 32.

from the estate corpus on a passing of accounts anymore than it would in a typical adversarial proceeding where there is a loser and a winner. The court must, in every case, address the question of the amount in costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed". [12]

Low, J. concluded that the reasonable amount in costs for the proceedings, even taking into account its "tortured history", warranted costs being awarded in the reduced amount of $220,000.00 plus HST, as opposed to the $374,000.00 (voluntarily reduced amount) claimed, noting that all disbursements were allowed.

***Chan Estate v. Gold*[13]**

In the June 6, 2011 *Chan Estate v. Gold*[14] passing of accounts decision, Mulligan, J., invited the parties to reach an agreement in respect of costs. Mulligan, J. notes in the 2012 costs decision that no agreement was reached. Accordingly, costs submissions were made by the applicant (a former estate trustee), yet, notably none were submitted by the respondent beneficiaries who were self-represented, despite further invitation from the court to make responding submissions. The applicant sought costs on a partial indemnity basis in the amount of in or about $83,000.00.

Mulligan, J., made note of the ongoing litigation and the significant unfounded allegations of criminal and quasi criminal conduct against the applicant. The Court also referenced the lengthy, disorganized, repetitive and unclear affidavits of the objectors which resulted in unnecessarily complex, lengthy proceedings that were considered unmeritorious.

In that regard, and having regard to the factors set out in Rule 57.01 of the Ontario *Rules of Civil Procedure* and the relevant case law including *Boucher v Public Accountants Council*[15] and *Clarington (Municipality) v. Blue Circle Canada Inc.*[16] the Court awarded

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[12] *Vano, supra* note 4 at para. 36.
[13] 2012 ONSC 55 ("*Chan*").
[14] 2011 CarswellOnt 5810 (S.C.J.), 2011 ONSC 3423.
[15] *Boucher v. Public Accountant's Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.) ("*Boucher*").
[16] *Clarington (Municipality) v. Blue Circle Canada Inc.*, [2009] O.J. No.4236 (C.A.).

the applicant's claim for partial indemnity costs of $83,000.00 (which was the amount sought), out of the Estate.

Though the applicant, estate trustee, enjoyed a substantial measure of success on the passing, there was somewhat of a harsh result in that the compensation was reduced by the amount pre-taken. That said, in the end the applicant was successful in obtaining the full amount of the partial indemnity costs sought. The respondents were not awarded any costs.

Baldwin (Re)[17]

In this contested passing of accounts case a settlement was reached after several days of hearing the application whereby the estate trustee admitted to the misappropriation of funds while acting as a fiduciary. The objectors sought costs on a substantial indemnity basis of approximately $87,000.00.

In analyzing the costs award, the Honourable Justice Hourigan relied on Rule 57 of the *Rules of Civil Procedure*, the case of *Boucher,*[18] and the principle that the court is bound by what is fair and reasonable given the expectations of the parties. Hourigan, J., also reviewed cases where an award of costs on a higher scale was warranted.[19]

Hourigan, J., had "*no hesitation in concluding that this case fell within those rare exceptions where costs on a higher scale are warranted*"[20] and ordered the estate trustee personally to pay the substantial indemnity costs of the objectors. Hourigan, J., based this costs ruling on the fact that the estate trustee engaged in a massive misappropriation, and while at first admitted to the misappropriation, thereafter denied any malfeasance under oath, failed to voluntarily produce an account, forced the other side to prove every aspect of the case and she failed, despite court order, to make proper production.

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[17] 2012 ONSC 7235 ("*Baldwin*").
[18] *Boucher*, *supra* note 15.
[19] See *Hunt v. TD Securities*, 2003 CanLII 3649 (ON.C.A.) and *McBride Metal Fabricating Corp. v. H&W Sales Co*., 2002 CanLII 41899 (ON.C.A.).
[20] *Baldwin, supra* note 17 at para. 21.

2) Objector Personally Liable for Costs?

The following cases reveal when a court will order an objecting beneficiary personally liable for costs on a passing of accounts application.

Scott Estate[21]

In this decision, the estate trustee, a trust company, sought approval of its accounts on a passing of accounts application. One of the children of the deceased filed an objection for reasons which included a dispute about compensation, delay in distribution of cash legacies, the imprudent sale of land as well as other issues.

In the decision by the Honourable Justice J. James, the Court opined that the objector, though not agreeing with the discretion exercised by the estate trustee, had to yield to the fact that it was the testator's decision to grant power to the estate trustee which included broad discretionary powers. The Court ordered that the accounts be passed including the estate trustee's compensation claim which was charged in accordance with the fee agreement signed by the testator. The estate trustee sought an Order requiring the objector to pay legal costs due to the costs having been substantially increased by the numerous objections advanced by the objector. In the result, the Court agreed in part and ordered the objector to pay personally $2,000.00 plus HST in costs with the balance being ordered to be paid from the Estate, which represented about half of the objector's estimated costs. The Court opined that it is a valid consideration to hold that there are financial consequences to unnecessary and unsuccessful litigation.

Patterson v. Patterson [22]

The objecting beneficiary in this passing of accounts case failed to prove his case. The evidence before the court showed that the Estate Trustee had answered all inquiries to the best of his ability, all documentation requested was provided, and an invitation by the Estate Trustee to the beneficiary to participate in a document review was rejected.

After finding the objections to be without merit, DiTomaso, J. ordered that the objecting beneficiary was responsible for his own costs. The Court also, however, rejected the Estate Trustee's argument that the Estate's legal expenses should be paid by the

[21] 2012 ONSC 2516 ("*Scott Estate*").
[22] 2012 ONSC 4625 ("*Patterson*").

beneficiary personally. DiTomaso, J., was "*not satisfied that [the beneficiary was] entirely at fault as a result of his conduct with the result that he should pay $22,329 to the Estate*."[23]

3) Estate Trustee's Right to Indemnification for Costs

The following cases of *Delorenzo v. Beresh*, *Craven v. Osidacz* and *McDougall Estate, Re*., discuss when a trustee may or may not be authorized to pay from trust property at first instance, properly incurred legal costs associated with the administration. As noted below, some comments and findings made by the Court in these cases could be at odds with established case law and s. 23.1 of the *Trustee Act*, which gives trustees express authority to use estate assets respecting the administration, subject to review by a court on a passing of accounts.

***DeLorenzo v. Beresh*[24]**

In *DeLorenzo v. Beresh*, an application was brought to remove an estate trustee for paying legal fees in connection with estate litigation out of estate funds without prior court approval or the consent of the beneficiaries. While Justice Thomas Lofchik chose not to remove the estate trustee, he did order the respondent to personally repay all of the legal fees.

DeLorenzo v. Beresh involved the will of the late Vincent Anthony DeLorenzo, the terms of which set up a trust for each of his grandchildren. At the time the within motion was decided, there were three proceedings before the court relating to the estate. Throughout the course of the proceedings the estate trustee used estate funds to pay all the legal fees he incurred with respect to the various proceedings. The question that arose was whether: "[i]n absence of prior court approval, or the consent of all beneficiaries, [it is] appropriate for an estate trustee to use estate funds to pay legal fees incurred in connection with litigation between himself and the beneficiaries of the estate[...]"[25]

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[23] *Patterson, supra* note 22 at para.46.
[24] [2010] O.J. No. 4367 (S.C.J.) ("*DeLorenzo*"). Note that leave to appeal was granted in this case in an unreported decision, however there is no known appeal decision, and it is not known if the appeal actually proceeded.
[25] *Ibid*., at para. 12

The Court noted that counsel retained by an estate trustee is counsel to the estate trustee. The corollary of this then is that an estate trustee is personally liable to the solicitor for the fees they incur. The Court referred to the case of *Coppel v. Coppel Estate*[26] for support for the principle that, without a court order, or the consent of the beneficiaries, it was impermissible for the estate trustee to pay the litigation accounts from the estate funds.[27] The Court further relied on *Coppel* for the proposition that the appropriate time to deal with legal fees paid out of the estate is on a passing of accounts. The court cited Quinn J. in *Coppel* at paragraph 10 as follows:

> Until such time as these legal accounts are approved by the court or subject to the consent of the beneficiaries, they are the responsibility of the defendant personally. At the end of the action and after a passing of accounts, it will be determined to what extent the defendant shall be entitled to recoup the amount I have ordered to be repaid to the estate.[28]

In its reasons, the Court then drew a distinction between the different proceedings giving rise to legal costs incurred on behalf of the estate trustee, and how such costs ought to be treated. The court noted generally speaking, the executor and any beneficiary properly attending and represented by a lawyer on a passing of accounts is awarded full reimbursement for his or her legal expense from the estate.[29] The basis for same being "the well settled principle that full indemnity of the trustee's proper costs, charges and expenses in administering an estate is the price to be paid by the *cestui que* trust for the services of the trustee and that the trustee must not be required to pay them personally."[30] According to the court, these charges and expenses are normally awarded at the time of the audit or passing of accounts.[31]

Accordingly, this is to be contrasted with contentious or adversarial legal proceedings, where, according to the Court, the general rule on costs applies in that it is the successful party that is awarded its costs, on the lower partial indemnity scale to be paid by the unsuccessful party.[32]

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[26] *Coppel v. Coppel Estate*, [2001] O.J. No. 5246 (S.C.J.) ("*Coppel*").
[27] *Ibid* at paras. 8 & 9.
[28] *Coppel, supra* note 26 at para. 10
[29] *DeLorenzo, supra* note 24 at para. 20.
[30] *Ibid*. at para. 20.
[31] *Ibid*. at para. 21.
[32] *Ibid*. at para. 22.

The rationale underlying the distinction is that as there is no losing party to pay costs on an audit, each party is entitled to be paid from the estate as such constitutes the only source of money to pay the costs. However, as noted by the court, when there is litigation between the estate trustee and the beneficiaries related to the question of whether or not the trustee has properly discharged his duties, different considerations apply. In the circumstances, whether a trustee is entitled to charge the estate with his legal fees may turn on the outcome and it should be determined on a passing of accounts or court application, if not agreed to by the beneficiaries.

For these reasons, and given the fact that the outcome of the litigation involved in this case may very well have a bearing as to what costs each of the parties should be required to bear, the Court concluded that it was preferable that each of the parties bear their own costs until the litigation is completed.[33] As the Court was of the view that it would be inequitable to permit the estate trustee to pay his legal costs out of the estate funds, and require the applicants, whose funds are tied up in the estate to bear their own legal costs while the litigation proceeds, the court ordered the estate trustee to repay the estate all legal fees deducted therefrom, inclusive of interest thereon, from the date such payments were made out of the estate.

The court restrained the estate trustee from using estate funds to pay any further legal accounts with respect to the ongoing litigation with the beneficiaries without the consent of the beneficiaries or further order of the court.

What *DeLorenzo* (and *Coppel*) failed to address was the authority from the Supreme Court of Canada in *Goodman Estate v. Geffen*[34] and section 23.1 of the *Trustee Act*. In *Goodman v. Geffen*, 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*. In *Re Dalloway* Sir Robert Megarry stated the rule thus: 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 was acting unreasonably, or

[33] *DeLorenzo*, *supra* note 24 at para. 24.
[34] [1991] 2 S.C.R. 353 ("*Goodman*").

> in substance for his own benefit, rather than the benefit of the fund.[emphasis added][35]

Section 23.1 of the *Trustee Act* also stipulates that a trustee may have his or her reasonable expenses paid directly from the trust:

> *Expenses of trustees*
> 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. 2001, c. 9, Sched. B, s. 13 (1).
>
> *Later disallowance by court*
> (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. 2001, c. 9, Sched. B, s. 13 (1).

A scholarly article entitled *"Indemnity of Estate Trustees as Applied in Recent Cases"* by Professor Albert Oosterhoff,[36] is noted in considering the analysis of these decisions.

In response to the *Coppel* case, Professor Oosterhoff stated that Quinn J.'s holding that it was impermissible for an estate trustee to pay litigation accounts from estate funds without approval or consent was:

> incorrect since there was direct authority to the contrary at the highest level in *Goodman Estate v. Geffen*. Further s.23.1 of the *Trustee Act* was enacted in the year *Coppel* was decided and is clear authority for such taking. In any event, its predecessor, s.33 also allowed it. Neither section was referred to by the court. Accordingly, the decision was made *per incuriam*.[37]

Professor Oosterhoff went on to opine that:

> [f]or the reasons given in the discussion of *Coppel*, I submit that [the decision in *DeLorenzo*] is wrong. In this case the court also failed to refer to s.23.1 of the *Trustee Act*, which permits such taking.[38]

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[35] Goodman, *supra* note 34.
[36] Oosterhoff, *supra* note 3.
[37] *Ibid.* at p.11.
[38] *Ibid*. at p.13.

***Craven v. Osidacz*[39]**

In another case by the same judge, *Craven v. Osidacz*, the court opined: "In cases where the executor and close family members have a personal interest in the outcome of the litigation against a beneficiary…it would be inequitable to use the assets of the estate as a kind of ATM machine from which withdrawals automatically follow to fund the litigation whether reasonable or not."

The issue in *Craven v. Osidacz,* similar to *DeLorenzo v. Beresh*, was whether an estate trustee, who was also a beneficiary of the estate, ought to be prohibited from unilaterally paying litigation costs out of estate funds, without court or beneficiary approval, and prior to any resolution of the estate litigation or upon the passing of accounts.

The estranged wife of the deceased, also the applicant in the within proceedings, contended that while an estate trustee may move for reimbursement of legal expenses from the estate at the resolution of the litigation and upon the passing of accounts, with court approval, he ought not be entitled to unilaterally pay litigation costs out of the estate funds, without requisite approval.[40] Hence, the applicant moved to compel the estate trustee to personally reimburse the estate for monies he had taken to pay his legal fees. The impugned legal expenses resulted from the defence of a wrongful death claim brought by the applicant, and the within court file which involved various estate litigation matters. By way of background, the deceased had been shot down by police after he killed his eight year old son during an access visit and then attempted to kill the applicant.

In its analysis of the relevant legal principles the Court opined that when counsel is retained by an estate trustee, counsel is solicitor to the trustee and not, as is sometimes mistakenly believed counsel to the estate. The Court also noted that an estate trustee is "entitled, indeed, obliged to defend claims against the estate so long as the estate assets are expended reasonably"[41] and not for their own benefit. And, whether an estate trustee has acted reasonably is to be determined by reference to the applicable case law such as the Supreme Court of Canada case in *Goodman Estate v. Geffen*[42] and *Coppel*

[39] [2010] O.J. No. 5154 (S.C.J.) ("*Craven*").
[40] *Craven*, supra note 39 at para. 3.
[41] *Ibid.* at para. 21.
[42] *Goodman*, supra note 34.

v. Coppel Estate[43]. Although the Court was of the view that, an estate trustee has a duty to defend claims and a right to be indemnified if he or she acts reasonably to do so, the Court noted that where an estate trustee and family are beneficiaries of the estate, the estate trustee's duty may be seen in a different light. The court stated:

> *In cases where the executor and close family members have a personal interest in the outcome of the litigation against a beneficiary or person with an interest in the estate akin to a beneficiary (this may include a creditor with a crystallized claim), it would be inequitable to use the assets of an estate as a kind of ATM machine form which withdrawals automatically flow to fund the litigation whether reasonable or not. Requiring the parties including the executor to fund the litigation from their own resources on a "loser pays" basis brings needed discipline to civil litigation by requiring the parties to assess their personal exposure to costs before launching down the road for the lawsuit or a motion. Whether a right to indemnity or reimbursement exists is a matter between the estate trustee and the beneficiaries of the estate and is to be determined either by agreement with them or on a passing of accounts. In itself the existence or nonexistence of such a right, does not affect the liability of the estate trustee to the estate solicitor.*[44]

The Court opined that in cases where monies are already expended by an estate trustee, a determination as to whether such expenditures were reasonably made is best determined at the outcome of the litigation and ought to be determined on a passing of accounts.[45]

With respect to future expenditures on the litigation, however, the Court found that it would be inequitable in the circumstances of this particular case for the estate trustee to pay for the litigation out of the assets of the estate, given his personal interest as a beneficiary in the outcome, yet require the applicant, who it was determined has an interest in the estate, to fund her litigation out of her own relatively meagre asset base.

The Court dismissed the applicant's motion that the executor immediately repay to the estate all of the legal fees he paid out of the estate, holding that the issue of repayment of legal fees already paid by the executor is adjourned to be determined on the passing of accounts, subject to further order of the court. However, the Court restrained the estate trustee from using estate funds to pay any further legal accounts, unless he obtained the consent of the beneficiaries, including the applicant, or approval of the

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[43] *Coppel*, supra note 26.
[44] *Craven*, *supra* note 39 at para. 23, citing *Salter v. Salter Estate*, 2009 CarswellOnt 3175 (S.C.J.).
[45] *Craven*, *ibid*, at para. 24.

court, which, the Court noted, he may seek either before or after such expenditure is incurred.[46]

Commenting on *Craven*, Professor Oosterhoff stated:

> *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 [of the Trustee Act] was not referred to.*

It should be noted that in the Ontario Court of Appeal case of ***Kerry (Canada) Inc., v. DCA Employees Pension Committee***,[47] the court held that a fiduciary trustee is permitted to pay, from the trust property, expenses properly incurred in carrying out the trust or to seek indemnification for any such expenses. The court relied on s. 23.1 of the *Trustee Act*. Accordingly, whether the trust fund is used at first instance, or if there is a reimbursement is irrelevant. The principal stands and is supported by the case of ***Re Grimthorpe*** [1958] 1 Ch. 615; [1958] 1 All E.R. 76.

As long as a trustee forms the requisite *bona fide* opinion that the litigation costs are "properly incurred," the trustee should be entitled to use the estate funds to pay, subject to being ordered to pay it back if ordered on a passing of accounts.

Delorenzo, if correct, does not reconcile with prevailing case law (*Goodman*) and s. 23.1 of the *Trustee Act*. It has long been the case that an estate trustee is entitled to its properly incurred legal fees reasonably expended from the estate/trust. We will have to wait and see how the courts will respond to these cases and whether they represent the beginning of a shift in this area of law. At the time that this paper was written, no case had referenced or interpreted the *Craven* case and only one case, ***MacDougall Estate (Re)*** (discussed below) has cited the *DeLorenzo* case.

[46] *Craven, supra* note 39 at para. 27.
[47] 2007 ONCA 605, aff'd [2009] SCR 678.

However, what is less clear from these cases is how the court will rectify the situation if costs are withdrawn without approval and before a court passing, and whether a trustee should be ordered to repay the estate or not.

McDougall Estate, Re[48]

In this contested passing of accounts case the objector took issue with a certain charitable donation the estate trustee made to an eye clinic in Jamaica, the amount of trustee compensation sought and certain legal fees paid by the estate.

According to the estate trustee, it was her understanding that the Will required her to make a donation to a charity involved in eye care research in glaucoma and cataracts in Jamaica. Ultimately, she travelled to Jamaica at a cost of $859.00 to deliver a cheque for $9,000.00 to a clinic. The estate trustee testified that Ms. McDougall, the objector and sister of the deceased, knew about and consented to the donation to the Jamaica eye clinic.

The objector however asserted that the Will did not authorize a gift to the charity and she vehemently denied consenting to such a donation. Her position at the contested passing of accounts hearing was that if the Will, properly construed, contained a charitable bequest, the gift should fail because the testator did not specify a portion or dollar amount. Justice van Rensburg agreed and stated that while the testator clearly intended that a bequest to a charity would be paid before the residue would fall to the sister, the "*authorities are clear that gift of a specific legacy with no certain amount will fail*."[49]

The objector then argued that the estate trustee should be required to repay the estate or have her compensation reduced as the Will did not authorize the charitable donation. The Court disagreed and found that the estate trustee had met the onus of establishing that she acted honestly and reasonably in carrying out what she thought were the testator's intentions. Her interpretation of the Will was not unreasonable.

Next the objector argued that the estate trustee's compensation should be reduced because of her negligent handling of the estate and because she improperly pre-took

[48] 2011 ONSC 4189 ("*McDougall*").
[49] *McDougall, supra* note 48 at para. 28.

compensation. Justice van Rensburg concluded that other than the improper donation, the estate trustee properly administered the estate, which was time consuming and extensive, included arranging the funeral, flowers, headstone, contacting family and friends, collecting rent from tenants, renewing home insurance, paying utilities, dealing with a real estate agent and selling the deceased's property. The Court concluded that the estate trustee's compensation should not be reduced based on how she administered the estate.

However, the Court did conclude that the estate trustee was wrong to pre-take compensation. The estate trustee followed the advice of a bank teller and did not question what she was told, nor did she seek legal advice on the matter. The Court held that the remedy for improperly pre-taking compensation is to require the payment of interest on the amount pre-taken (see *Goldlust Estate, Re*, [1991] O.J. No. 1840 (Gen.Div.)). The estate trustee was ordered to pay back $360.00 in interest.

Finally, the objector took issue with some of the legal fees paid by the estate. According to the objector the estate should not be responsible for legal fees incurred responding to the objector's concerns about the administration of the estate. The Court relied on *DeLorenzo* for the finding that "*amounts incurred to address a beneficiary's concerns about the administration of the estate; that is, challenges to the conduct of the estate trustee, would ordinarily be payable personally be the estate trustee, subject to an order for reimbursement made after the conduct has been examined*."[50]

Justice van Rensburg held that, based on *DeLorenzo*, where the conduct of the estate trustee is challenged, the cost of responding was for her own account, until payment of such fees from the estate was approved by the beneficiaries or the court. Justice van Rensburg went on to find that the legal fees were however properly incurred by the estate trustee and she would not have to pay them back. The Court also held that "*as payment of legal fees from the estate that ought to have been paid by the estate trustee is a form of pre-taking of compensation the estate trustee is liable for interest which [is fixed] at $70.00. In addition, [the estate trustee] is not entitled to compensation on the legal fees paid on her behalf of from the estate*."[51]

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[50] *McDougall*, *supra* note 48 at para.52.
[51] *Ibid* at para. 74.

4) Objections to Quantum of Legal Fees for Litigation

The following cases provide insight into the court's determination of reasonable legal fees incurred by an estate in defending or bringing a legal action.

Denofrio Estate (Re)[52]

This was a contested passing of accounts case where one of the objections of the beneficiaries was that the legal fees incurred by the Estate in defending a family law action were unreasonable and excessive.

The Honourable Justice Kershman reviewed the legal fees and opined that the estate trustees were under an obligation to defend against the family law action, preserve the Estate and administer the Estate in accordance with the terms of the Will and as prudent Estate Trustees. Kershman, J., found that the Estate Trustees satisfied these obligations and that the legal fees of approximately $50,000.00 were not excessive.

The beneficiaries also objected to the compensation sought by the Estate Trustees. Kershman J. concluded that the 2.5% sought by the applicants was "*a little high, but not by a large amount*"[53] and reduced the compensation to 2.25%. Kershman, J., also awarded the Estate Trustees their substantial but not full indemnity costs for the application to be paid out of the estate in the amount of $104,580.33 and awarded no costs to the objecting beneficiaries as "*their success was very minimal*".[54]

In April of 2013 the Divisional Court dismissed an appeal and cross-appeal in this matter.[55] The beneficiaries appealed the amount of compensation awarded to the estate trustees and the estate trustees appealed the costs award. The Divisional Court dismissed the appeal of the compensation as the "award of compensation was in the discretion of the application judge. He made no error in principle, and the award cannot be said to be grossly excessive, given the factual context of this case."[56]

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[52] 2012 ONSC 3408 ("*Denofrio*").
[53] *Denofrio*, supra note 52 at para.130.
[54] *Ibid* at para. 146.
[55] 2013 ONSC 2106 (Div.Ct.).
[56] *Ibid* at para.9.

For the cross-appeal, the estate trustees argued that the application judge denied them natural justice because he gave them no opportunity to make submissions on costs, in particular on outstanding offers to settle and who should pay the costs. The Divisional Court dismissed the cross-appeal stating that the offers to settle would not have affected the costs outcome and that there was no error that the costs came out of the estate: "*While the Ontario Court of Appeal stated in McDougald Estate v. Gooderham (2005), 255 D.L.R. (4th) 435 at para.85 that parties to estate litigation should not expect that costs will be routinely ordered from the estate, the Court did not say that the unsuccessful party must always pay costs personally*."[57]

The estate trustees were awarded $45,000.00 in substantial indemnity costs for successfully defending the appeal and the beneficiaries were awarded $5,000.00 in partial indemnity costs for successfully defending the cross-appeal. After setting-off the beneficiaries award against the costs awarded to the estate trustees, the three beneficiaries were ordered to pay the $40,000.00 jointly and severally.[58]

Aragona v. Aragona (Guardian of)[59]

In 1999, Beniamino Aragona was appointed guardian of property for his mother Maria Emilia Aragona who suffered from Alzheimer's disease and lived in a nursing home. In 2001 the son was ordered to pass his accounts, which he did. In 2004, he was ordered to pass his accounts again, and to do so every three years thereafter. The son chose to ignore this order. In March 2010, Mrs. Aragona passed away. The son was again ordered to bring an application to pass his accounts. His appeal of the order to the Court of Appeal was dismissed.

When the son eventually filed his application to pass accounts, it revealed that from 2001 to 2010 he had withdrawn over $120,000.00 in cash from his mother's account without a valid explanation for the monies' usage. Despite this discrepancy in the accounting, which showed significant monies unaccounted for, the son sought increased compensation.

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[57] *Supra,* note 55 at para. 16.
[58] *Ibid.* at paras.20-21.
[59] *Aragona,* 2012 ONSC 1495.

The Court disagreed with the son's position and instead denied his request for compensation in its entirety. In his decision, Justice Gray criticized the son's conduct as being "*shocking*".[60] The Court also denied the son his legal costs, and ordered him to repay the Estate $132,628.00 which included the monies that he had taken as well as additional legal fees that had been paid out of the estate. The additional legal fees were fees paid on behalf of the estate for certain proceedings commenced against Beniamino's brothers relating to the estate of their late father. Justice Gray was not persuaded that the legal fees were "*appropriate*" to be paid out of Mrs. Aragona's estate.

The son appealed the decision to the Ontario Court of Appeal[61] asserting various grounds of appeal including that the application judge erred in depriving him of compensation as guardian of his mother's property and in not adequately explaining his decision requiring the appellant to repay the $132,628.00. The Court of Appeal rejected these grounds of appeal.

However, the Court of Appeal did allow one ground of appeal. The application judge had ordered that legal fees not be paid by the estate relating to lawsuits the appellant initiated against his brothers on behalf of the estate. The appellant argued that the application judge failed to take into account the possibility that the estate could *actually benefit* from the proceedings, as there was a cost award in the amount of $25,000.00 in favour of the estate arising from a motion in those proceedings. The appellant argued that it would be unfair for the estate to receive a benefit from the motion without having to incur any of the associated costs. The Court of Appeal was swayed by this argument and ordered that if the estate collects the total amount of $25,000.00 pursuant to the costs award, that it reimburse the appellant $7,500.00 for legal fees he can demonstrate he paid and that led to this award.

As the majority of the appeal was dismissed, the Court of Appeal awarded costs of the appeal to be paid by the appellant personally.

[60] *Supra,* note 59 at para.34.
[61] *Aragona v. Aragona (Guardian of)*, 2012 ONCA 639.

5)Costs and Consequences Against Rogue Executors

The following cases reveal the stiff penalties our courts are willing to order when an estate trustee fails to live up to his or her duties.

Langston v. Landen[62]

In the December 2010 decision of *Langsten v. Landen*, [63] Justice Greer sentenced Barry Landen, a former estate trustee of the Estate of Paul Penna, to 14 months in prison for civil contempt of four orders of the Court, including a *mareva* injunction order, a passing of accounts order, an order to attend an examination and an order to provide the court with an updated Affidavit.

Millions of dollars had gone missing from the estate for which Landen had provided no explanation. A significant portion of the Estate was supposed to have been given to various charities pursuant to Penna's will. At the completion of his 14 months in prison Landen was ordered to re-attend before Greer, J. of the Superior Court of Justice "*to tell the Court what you did with the balance of the estate assets. This includes an explanation as to how you and your wife used the $500,000 line of credit registered against the house when it was sold*."[64]

On October 10, 2012, Landen appeared before Greer, J. after his 14 month sentence was completed, and a decision was released on December 20, 2012.[65] A relative of Landen's had hired an accountant to go over the records to assist with the Court's request for answers as to where the millions of dollars went. However much of the missing money and shares could not be traced or located. Greer, J. was not impressed with this: "*Another accounting was not what I had in mind. I expected that Landen would prepare an Affidavit setting out how he had used the funds and what he had done with various missing shares. . .*"[66]

In deciding whether or not to sentence Landen to a further 6 months in jail for further contempt, Justice Greer had this to say:

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[62] 2012 ONSC 7290 ("*Langsten*")
[63] 2010 ONSC 6993.
[64] *Ibid.* at para. 57.
[65] *Langsten, supra* note 62.
[66] *Ibid.* at para. 3

> "*I agree that there is little likelihood of locating any further eligible assets. . . Landen really did not purge his contempt. He left it to [the accountant] to try to do it for him. He filed no Affidavit and no letter of apology. He showed absolutely no remorse in the witness box and had a selected memory of events he did not wish to discuss, such as the missing shares. . .The question then is, "Would it serve the public's interest to sentence him to a further 6 months in prison?" I have reluctantly concluded that it would not. He is living along in a friend's house and is said to be in receipt of social assistance. His life has become a narrow existence in comparison to the salad days of living in Forest Hill, attending the Leaf's games, and driving luxury cars, all on other people's money.*
>
> *I withdraw my Order that Landen Pass his Accounts in the Estate as it is an impossible task for him. The [accountant's] reports are the best evidence there is*."[67]

The Court concluded that the matter had come to an end and that Landen not be returned to prison. While the Court really had no other option and the decision seems appropriate, this is rather an unsatisfactory conclusion to the beneficiaries and to this long and infamous case. Ultimately, the many charities that were to benefit under the Will, will never see any of the money misappropriated by Landen.

***Zimmerman v. McMichael Estate*[68]**

The case of *Zimmerman v. McMichael Estate* is now an infamous one. Mr. Zimmerman, a former crown attorney, had acted as the attorney for property of Signe McMichael (the wife of Robert McMichael, the founder of the McMichaels' Art Collection), for the period from November 18, 2003 to September 30, 2008 and as the trustee of the Signe McMichael Trust, for the period from May 16, 2004 to September 30, 2008.

In an earlier case before the courts, it was determined that Mr. Zimmerman's conduct fell well below the standards expected of a trustee and that he had breached some of the most basic obligations of a trustee, such as: failing to properly account; making improper and unauthorized payments and loans to himself, benefitting himself out of the Trusts; mingling Trust property with his own property and using the two interchangeably for his own purposes; paying himself compensation of almost $450,000.00, without keeping proper records of his alleged pre-takings or the calculation thereof, and without the

[67] *Langsten, supra* note 62 at paras. 33-35.
[68] *Zimmerman v. Fenwick*, 2010 CarswellOnt 8372 ("*Zimmerman*").

consent of the beneficiaries; and using other Trust assets such as the BMW and the McMichaels' art collection for his own personal benefit.

Hence, in reasons released May 20, 2010, and reported as *Zimmerman v. McMichael Estate*, 2010 ONSC 2947 (Ont. S.C.J.), Justice Strathy dealt, in part, with the application of Mr. Zimmerman to pass his accounts in his capacity as attorney for property of Mrs. McMichael and as the trustee of the Signe McMichael Trust, for the periods noted above. Strathy J. had ordered Mr. Zimmerman to repay compensation that he had taken in the amount of $356,462.50, Canadian, and $85,400.00, U.S., together with pre-judgment interest. He also ordered Mr. Zimmerman to repay $34,064.55, which he had paid to Reynolds Accounting Services for the preparation of accounts.

In a subsequent endorsement released on July 6, 2010*, Zimmerman v. Fenwick*, 2010 ONSC 3855 (Ont. S.C.J.), Strathy J. found that Mr. Zimmerman had presented accounts that were "manifestly inaccurate, incomplete and false," and delayed and obstructed the beneficiaries in search for answers. As such, Strathy J. was of the view that Mr. Zimmerman should pay all of the costs involved in getting to the truth, stating that there was no reason why Mr. Zimmerman should not personally pay costs that were incurred in bringing him to account. Consequently, Mr. Zimmerman was ordered to pay the costs of the respondents, John and Penny Fenwick, in the amount of $167,978.52 as well as costs the McMichael Canadian Collection, in the amount of $116,383.67, both inclusive of disbursements and taxes.

In Justice Strathy's most recent Judgment, dated October 4, 2010, he noted that in his earlier reasons, he expressed concerns about the adequacy of Mr. Zimmerman's response to the objections raised with respect to the accounts produced by him.[69] And, as such, Strathy J. afforded him yet another opportunity to respond to the objections by providing evidence, including affidavit evidence, regarding the nature of each disbursements and why such expenses were incurred.[70] It was suggested that Mr. Zimmerman provide receipts and vouchers, if available, or, if not, that he provide an explanation.[71]

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[69] *Zimmerman, supra* note 68 at par. 2.
[70] *Ibid*.
[71] *Ibid*.

Strathy J. was subsequently advised that no further response or affidavit was forthcoming from Mr. Zimmerman.[72] And, at the hearing held on September 15, 2010, Strathy J. was advised that Mr. Zimmerman was content to proceed, without any further response to the hundreds of objections raised by the objectors.[73]

Despite having clearly been given a number of opportunities to vindicate himself and provide satisfactory explanations for his expenditures, Mr. Zimmerman failed and/or refused to do so. As such, the Court was left with no choice but to allow the objections, less a modest deduction in the amount of $5,147.38.10, for which an adequate explanation was provided by Mr. Zimmerman, and order Mr. Zimmerman to pay his successor trustees a total of $71,693.80 in relation to disbursements made out of Mrs. McMichael's property and $390,039.02, in relation to disbursements made out of the Trust.

This recent endorsement of Justice Strathy is valuable in that it demonstrates the harsh financial consequences that result in situation where fiduciaries fail to adequately respond to objections raised with respect to their accounts.

It should be noted that Mr. Zimmerman passed away at the age of 52 shortly after the last decision in this matter was released. His cause of death was not made public. This unfortunate turn of events raises the corollary issue of non-payment to the estate of the various repayment orders issued against Mr. Zimmerman.

C. CONCLUSION

Hopefully, this review of recent passing of account cases will provide some insight into how courts will decide the quantum and payment of costs in the passing of accounts context, including the basis for the costs being paid and by whom. The cases show that the courts will look at the full context of the case including the actions of all involved and the principles set out in *Boucher* and the *Rules of Civil Procedure* in determining the "*reasonable*" quantum of a costs award in a passing of accounts application. Furthermore, in determining where the costs will come from, either out of the estate or a party personally, the courts will look at the actions of all parties, including whether an

[72] *Zimmerman, supra* note 68 at par. 3.
[73] *Zimmerman, supra* note 68 at par. 4.

objector made unsubstantiated objections and whether the number of objections contributed to the length of the litigation. The actions of an estate trustee will also be examined closely, especially if costs are sought against him or her personally where there has been a misappropriation of funds such as in the *Baldwin*, *Zimmerman* or *Penna* cases. A back to basics approach on the rights of indemnification for costs/disbursements associated with an administration, and in particular regard to the codified, statutory provision of S.23.1 of the *Trustee Act*[74] as well as cases like *Goodman v Geffen*[75] must be considered by counsel and our judiciary on a passing, such that the proper court treatment is afforded to trustees in their longstanding rights to full indemnification for reasonably incurred costs.

As also can be seen, in general, recent costs awards aim to curtail the conduct of wasteful and overly aggressive litigants and penalize a party who has acted improperly to ensure the estate does not bear the burden of misconduct. While the policy of penalizing wasteful litigants is understandable, there is a risk that broadly restricting costs could have severe negative consequences on parties who properly rely on cost awards. Or the estate trustees may be dissuaded from even bringing their matter to court if they are worried about being saddled with unexpected legal expenses. This would undermine the public policy purposes of encouraging trustees to seek the assistance of the courts and to ensure that all proper steps are taken. The broad goals of "access to justice" and "proportionality" require an ability to predict an outcome. However, as legal fees in estate litigation can be quite significant and now somewhat unpredictable, recent costs decisions must be reviewed carefully at the outset of a retainer, particularly dealing with emotionally fraught litigation.

[74] *Trustee Act, supra* note 2.
[75] *Goodman v. Geffen*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97.