Courts are Ordering Costs on Unmeritorious Claims in Estate Law

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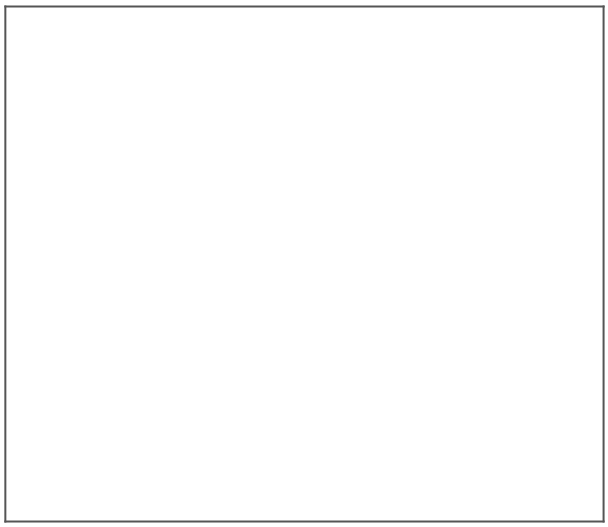
Jurisprudence in recent years has confirmed a movement away from the traditionally perceived manner in which costs are awarded in estate litigation. In contrast to Charles Dickens' account of Jarndyce and Jarndyce in Bleak House, where the entire capital of the estate was 'squeezed dry' in lawyers' fees, the courts are no longer simply allowing a blanket recovery of legal costs from an estate, without regard to the degree of success of a party to the litigation. Increasingly, the courts are taking the position that an estate should not be diminished in size because a party, including an executor, pursues a claim without merit. As in other litigation, a party who brings or defends a claim against an estate with no substantial merit will have to pay the costs. Several recent decisions illustrate this point.



In Oldfield v. Hewson [2005] O.J. No. 3076, the Ontario Superior Court of Justice found that, although the executor attempted to settle the matters in dispute when the litigation commenced between the parties, he delayed the administration of the estate, he engaged in conduct which was 'tantamount to criminal behaviour' by borrowing monies from the estate without proper authorization and he should have resigned when it became clear that the estate's beneficiaries wanted him removed. The court concluded that it was inappropriate for the executor's legal fees to be paid from the estate, as his conduct largely contributed to the protracted litigation. The court also awarded the successful applicant beneficiary costs in the sum of $70,000, with $50,000 to be paid by the executor personally and the remaining $20,000 from the estate.

In Re: Estate of Walter L. Kemp and Strain v. Kemp et al. [2006] B.C.J. No. 68, the plaintiff executor was a friend of the testator who commenced an action to prove the testator's Will. The defendant was, the testator's son, who filed a counterclaim seeking a declaration that the testator died intestate. The defendant was ultimately successful and was appointed administrator of the estate. The court determined that, although there are circumstances where costs can be ordered against the executor personally or for which the executor is deprived of costs, this was not an appropriate case for such an order. The court reviewed a number of cases as examples of those circumstances, including: Szpradowski v. Szpradowski Estate [1992] B.C.J. No. 94 (B.C.S.C.) in which the judge suggested that the denial of costs to an executor might be considered 'where the executor s claim is outrageous or tainted by serious misconduct'; Ram v. Prasad [1998] B.C.J. No. 1769 (B.C.S.C.), which also reviewed a number of cases where executors have been required to pay costs or be deprived of costs; and Lee v. Lee Estate [1993] B.C.J. No. 1894 (B.C.S.C.), in which the judge stated:

'. . . where the validity of a will or the capacity of the testator to make a will or the meaning of a will is in issue, it is some times the case that the costs of all parties are ordered to be paid out of the estate. This is upon the principle that where such an issue must be litigated to remove all doubts, then all interested parties must be joined and are entitled to be heard and should not be out of pocket if in the result the litigation does not conclude in their favour. The estate must bear the cost of settling disputes as a cost of administration . . . The question to be asked in such case is whether the parties were forced

into litigation by the conduct of the testator or the conduct of the main beneficiaries.'

Finally, in Bogoch Estate (Re), [2003] M.J No. 61 (Man. Q.B.); varied [2004] M.J. No. 20 (Man. Q.B.), the Master, during a passing of accounts, had to determine the extent to which the executor's legal costs should be paid by the estate. The executor incurred legal fees in connection with the administration of the estate, unsuccessfully defending the widow's claim for an accounting and equalization and an application by the executor for his own removal as executor. The executor's legal counsel had obtained the consent of the residual beneficiaries to payment of their fees from the estate but the widow, who was a judgment creditor of the estate, objected on the basis that the fees were not fair and reasonable. The Master found that the executor had made the litigation involving the accounting expensive for the widow and Justice Perry Schulman noted, on appeal, that it was difficult to see why the claim was defended based on the facts before him.

The Master decided that, while he would not interfere with the agreement of the residuary beneficiaries to have the legal fees payable by the estate, he would allow only a small portion (approximately $12,800) of the total legal fees (roughly $68,000) to be paid from the estate in priority to the equalization payment owed to the widow. The court ordered that any fees paid to the executor's legal counsel in excess of that ordered was to be paid back to the estate, with interest.

On appeal (by this point the estate had become insolvent), the court upheld the decision of the Master with only a slight

increase in the legal fees to be paid in priority to the widow's claim. In addition, the court confirmed that an executor's right to reimbursement depends on a finding that the expenses are reasonably incurred, and that, in defending the litigation, the executor had acted 'prudently and properly', to do this, the court will examine all of the circumstances, including the initial decision to defend the proceeding, the manner of conduct of the defence, the decision to conduct an appeal and the manner of conduct of the reference as well as the motivation of the parties.

In response to the argument that people would be disinclined to serve as executors unless they were indemnified for the costs in question, Justice Schulman noted that the courts have long ruled that an executor who engages in litigation without a proper basis will be held accountable at the end of the day.
