TAB 3

Costs after the Re *Salter* Decision

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Continuing Legal Education

COSTS AFTER THE RE SALTER DECISION

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The quickest way to get a litigation lawyer's attention is to advise him or her that there have been important changes as to how a court decides how and why he or she gets paid for their services. Bluntly, that is the purpose of this paper and my talk concerning the same issues.

In writing this paper, and in talking about it, I choose to take a practical approach to the topic. In short, how do those changes affect me in my specific practice and in practice in the Estates and Trust Bar in general.

In the case of ***Salter v. Salter Estate***[1] Mr. Justice Brown was asked by way of motion to determine whether the widow of a deceased husband possessed sole beneficial interest in assets owned by the testator, or alternatively that she enjoyed a constructive trust over remaining estate assets.

His Honour decided by way of judgment dated June 4, 2009 to dismiss the motion but on the terms that a trial of the issues be held. Counsel were asked to make submissions as to costs of the motion itself.

In the first four paragraphs of a six paragraph decision the Court ordered a trial of the contentious issues raised by the litigants, with the issue of costs at trial to be determined by the judge deciding the trial of the issues so ordered.

However, in the last two paragraphs of his judgment, His Honour scribed the following:

[1] Salter v. Salter Estate 2009 CarswellOnt 3175

"5 One final point. In his written submissions counsel for Ms. Salter argued that "as a matter of principle and practice the costs of contentious estate matters are generally paid from the estate itself." With respect, that is not a correct statement of the law. As the Court of Appeal made clear in *McDougald Estate v. Gooderham* estate litigation, like any other form of civil litigation, operates subject to the general civil litigation costs regime established by section 131 of the *Courts of Justice Act* and Rule 57 of the *Rules of Civil Procedure*, except in a limited number of circumstances where public policy considerations permit the costs of all parties to be ordered paid out of the estate. Those limited circumstances exist where the litigation arose as a result of the actions of the testator or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate: *McDougald Estate*, paras. 78 to 80."

6 From a year of acting as administrative judge for the Toronto Region Estates List I have concluded that the message and implications of the *McDougald Estate* case are not yet fully appreciated. A view persists that estates litigation stands separate and apart from the general civil litigation regime. It does not; estates litigation is a sub-set of civil litigation. Consequently, the general costs rules for civil litigation apply equally to estates litigation - the loser pays, subject to a court's consideration of all relevant factors under Rule 57, and subject to the limited exceptions described in *McDougald Estate*. Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation. The "loser pays" principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from estate litigation. Quite the contrary. Given the charged emotional dynamics of most pieces of estates litigation, an even greater need exists to impose the discipline of the general costs principle of "loser pays" in order to inject some modicum of reasonableness "

WHAT HAS CHANGED

In my view the position reinforced by Mr. Justice Brown has in fact been the law in Ontario at least since 2005 and in my experience much earlier. The key paragraphs in the *McDougald Estate* [2]case referred to by Mr. Justice Brown read as follows:

"78 The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate. See *Mitchell v. Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280 (Eng. Prob. Ct.) and *Spiers v. English*, [1907] P. 122 (Eng. P.D.A.). Public policy considerations underlie this approach: it is important that courts give effect to valid wills that reflect the intention of competent testators. Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity.

79 Traditionally, Canadian courts of first instance have followed the approach of the English courts. While the principle was that costs of all parties were ordered payable out of the estate if the dispute arose from an ambiguity or omission in the testator's will or other conduct of the testator, or there were reasonable grounds upon which to question the will's validity, such cost awards became virtually automatic.

80 However, the traditional approach has been — in my view, correctly — displaced.

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[2] *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.)

The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation. Four cases usefully illustrate this modern approach.

81 In *Montreal Trust Co. of Canada v. James* (1985), 19 E.T.R. 135 (B.C. S.C.), a trust company was executor of an estate. It brought an application for power to lease a parcel of land; the power was not given to it by the terms of the will. Justice Spence acknowledged that an executor has an obligation to seek the advice and direction of the court where there is room for serious doubt or difference of opinion in respect to the interpretation of a will. He recognized that costs awards cannot be used to deter executors from fulfilling that obligation. However, he found the action of the executor in bringing an application in relation to a proposal that was improvident and opposed by a majority of the beneficiaries was "unnecessary and ill-advised". He ordered the executors to bear their own costs and pay the costs of the responding parties.

82 In *Beaurone v. Beaurone Estate* (1997), 31 O.T.C. 236 (Ont. Gen. Div.), a testator left a will in which she gave a small bequest to one of her sons, the plaintiff, and the balance of the estate to her other son. The plaintiff unsuccessfully challenged the will on the basis of incapacity. Justice McDermid stated that there was nothing incompatible between the need for a court to be satisfied that a testator had capacity and giving effect to Rule 49 offers. He ordered the defendant's costs payable out of the estate on a solicitor and client scale and the plaintiff to pay party and party costs to the estate, stating at paras. 6 and 7:

In my opinion, it is often the case that wills are challenged in the expectation that there is little or nothing to lose by doing so, because at the end of the day, costs will be payable by the estate. The challenger, often a slighted relative who is denied the testator's largesse, has everything to gain and nothing to lose by trying to overturn the will.

Here, the estate is small and the intention of the testatrix will be thwarted if the plaintiff's costs are paid from the estate. The worst that the plaintiff might expect under the

traditional rules is that he would retain his $1,000 bequest and have his costs paid from the estate. He would thereby at least have the satisfaction of ensuring that if he were not to benefit from his mother's estate, neither would his brother. I believe that in such circumstances plaintiffs should be given reason to pause and reflect upon the consequences of unsuccessful litigation before commencing it.

83 In *Marshall Estate, Re* (1998), 50 O.T.C. 357 (Ont. Gen. Div.), Sutherland J. found that an attack on testamentary capacity was unreasonable, there were no reasonable grounds for persisting with the litigation and its continued pursuit was irresponsible. He ordered costs against the unsuccessful challenger on a solicitor and client basis.

84 In *Gamble v. McCormick* (2002), 4 E.T.R. (3d) 209 (Ont. S.C.J.), Greer J. found that there was no reasonable basis to a husband's challenge to the validity of his late wife's will. At para. 13 of her reasons she states:

The cost of the emotional wreckage caused by this trial to all parties, leaving what had been a warm, loving family unit in tatters, is incalculable. None of their lives will ever be the same again. Costs on a solicitor and client basis cannot heal those wounds. It can only pay for the monetary cost of what took place"

85 The modern approach to awarding costs, at first instance, in estate litigation recognizes the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognizes the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

A picture is painted of the good old days, where parties always recouped some if not all of their costs out of the estate, regardless of the merits of their claims, on a routine basis.

In the new universe " the general costs rules for civil litigation apply equally to estates litigation - the loser pays, subject to a court's consideration of all relevant factors under Rule 57, and subject to the limited exceptions described in *McDougald Estate*. "[3] .

To make it very clear Madam Justice Gillese, in *McDougald* wrote:

"Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation."[4]

A BRIEF REVIEW OF VERY RECENT CASES

Abrams v. Abrams was a May 12, 2009[5] decision by Madam Justice Low sitting as a Divisional Court Justice. It dealt with how costs were awarded in an unsuccessful motion for leave to appeal an issue in an estate matter.

The unsuccessful appellant was ordered to pay the costs of the respondents, but at an amount lower than what the respondent stated was his partial indemnity costs. Dockets were very carefully examined, and the issue of proportionality, which I will discuss later in this paper, was raised.

Fiacco v. Lombardi[6] is a September 3, 2009 decision of Mr. Justice Brown wherein he ordered the unsuccessful litigants in a contested Guardianship to pay the costs of the Guardians on a substantial indemnity basis. It should be noted however, that Mr. Justice Brown reduced the amount of those costs by 50%. The claim for costs against the estate of the incapable person was described as preposterous and was denied.

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[3] *Salter v. Salter Estate* 2009 CarswellOnt 3175 (Ontario Superior Court of Justice) at paragraph 6.
[4] *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.) at paragraph 85.

[5] *Abrams v. Abrams* 2009 CarswellOnt 2519(Ontario Superior Court of Justice)
[6] *Fiacco v. Lombardi* 2009 CarswellOnt 5188

Teffer v. Schaefers [7]is an April 6, 2009 costs decision of Justice Fragomeni of the Ontario Superior Court of Justice. The court decided that regardless of the fact that:

(i) the Applicants were completely successful in removing a lawyer as an attorney for property who behaved scandalously; and

(ii) the attorney may have driven up costs deliberately by taking steps that the Applicants had to respond to;

the Applicant's solicitor had his account reduced by more than $100,000, with half of those costs to be paid by the Respondents personally, and the other half by the Estate.

Key amongst the reasons for the Applicants fee award being reduced was the review of Rule 57.01(1)[8] of the Rules of Civil Procedure and of Section 131 of the *Courts of Justice Act*[9]. They read respectively as follows:

RULE 57.01

> 57.01(1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;

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[7] *Teffer v. Schaefers* 2009 CarswellOnt 5447

[8] R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

[9] *Courts of Justice Act* R.S.O. 1990 c. C-43.

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.

SECTION 131 OF THE *COURTS OF JUSTICE ACT*

131. (1)Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Justice Fragomeni also reviewed in detail the reasons given by Madam Justice Spies in the 2007 case of *Ziskos v. Miksche* [10], a case where a solicitor's fees were reduced from over $1,000,000 to essentially nil.

The completely unreasonable conduct of both the clients and the law firm involved, and the reasonable expectation of what a party could reasonably expect to pay appears to be a key factor in Justice Fragomeni's decision to reduce counsel's fees.

In addition, the court specifically pointed out that counsel must be sure that his or her client had the capacity to provide instructions.

In the words of Madam Justice Spies:

"In my view, before a lawyer can claim costs in a proceeding for particular work done for a client pursuant to a written retainer, where there are issues of the competency of the client as there were in this case from the outset, there is an onus on the lawyer to satisfy the court that the client was competent to and did instruct the lawyer to undertake particular work on her behalf. This will include satisfying the court that the precise nature of the work and the estimated cost of the work to be done and an analysis of the benefits to be achieved were fully explained to the client. Aside from concerns about competency, there is no question that that was not done in this case by Polten & Hodder. I should add that there could be no doubt that even if fully capable and informed, Johanna Miksche would never have reasonably instructed Polten & Hodder to incur legal fees that eclipsed the value of her assets and which if paid by her estate would put her on social assistance."[11]

It should be noted that in this case the main opposition to the applicant was seeking fees of a little more than $89,000.00.

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[10] *Ziskos v. Miksche*, 2007 CarswellOn 7162
[11] *Ziskos v. Miksche*, 2007 CarswellOn 7162

In *Re Kaptyn Estate*[12], Mr. Justice Brown decided that each of the two co-trustees of an estate should bear their own costs (in total $63,168.92) in an estate worth millions for bringing a motion seeking instructions as to whether to sue a solicitor. The court decided that it was the trustee's responsibility to act together to decide such matters, and such costs were not reasonable for the administration of the Estate.

PRACTICAL ADVICE STEMMING FROM THE ABOVE

1. An Estate or a Guardianship retainer is not an ATM machine with respect to all parties' costs.

2. Courts look at the size of the estates and issues involved. Proportionality and what a party could expect to pay are key factors. Very high accounts on low dollar issues or estates are almost sure to be reduced, regardless of whether your client was successful or not, and regardless of the conduct and behaviour of the other side.

3. Fiduciaries can not expect a court to make decisions for them, when those decisions are clearly within their own duties.

4. While the old tariffs and cost grids have not been officially part of Ontario law for many years now, courts still tend to use them unofficially in deciding what appropriate hourly rates are.

In particular the hourly rate of $350.00 seems to be the rate that experience counsel receive. I have attached a copy of the old Costs Grid for your convenience.

[12] Re Kaptyn Estate, 2009 CarswellOn 3224

5. It is important to bring, at the very least, a detailed Bill of Costs to every hearing. Form 57 B, which is the "costs outline" called for under the rules should be brought with you if at all possible.

I have had judges ask me to submit a Bill of Costs at the end of a consent Guardianship hearing where the PGT has agreed that my fees, which were provided to them in writing in advance of the hearing, are to be paid on a full indemnity basis out of the assets of the incapable.

6. There are Estate and litigation cases that actually get heard outside of Toronto. Don't expect a court to be as knowledgeable on the costs issues outside of Toronto. A factum dealing with the case, including costs, is extremely useful in Toronto, and absolutely essential outside of the city.

7. It seems to me that the most important advice that I can give you is to be EXTREMELY CAREFUL in advising your clients about costs. BE BLUNT and VERY CLEAR with them. Explain to them that not only could they not get their own legal fees out an estate, even if they are successful, but they could have to pay some or all of the other sides.

DO SO IN WRITING, AND AT EVERY STEP IN THE LITIGATION.
FAILURE TO DO SO CAN LEAD TO AN UNHAPPY CLIENT, AND MORE IMPORTANTLY AN UNHAPPY LAWYER WHEN HE OR SHE GETS SUED FOR NOT TELLING THE CLIENTS IN WRITING ABOUT THEIR RISKS.

Estate litigation is extremely emotionally charged. One of your principal jobs as your client's advocate is to extremely objective in your advice to them.

You must make it clear that taking unreasonable steps, even if they are on the side of angels, will cost them.

You must make it clear that size counts, and the failure to consider that could be ruinous.

The End

TARIFF A

Solicitors' Fees and Disbursements Allowable under Rule 58.05

PART I — COSTS GRID

Where students-at-law or law clerks have provided services of a nature that the Law Society of Upper Canada authorizes them to provide, the fees for those services may be assessed and allowed under this costs grid.

Where counsel has special expertise, his or her hourly rate classification may be varied accordingly.

1. Fees other than Counsel Fee

Hourly rates for pleadings, mediation under Rule 24.1 or Rule 75.1, financial statements, discovery of documents, drawing and settling issues on special case, setting down for trial, pre-motion conference, examination, pre-trial conference, settlement conference, notice or offer, preparation for hearing, attendance at assignment court, order, issuing or renewing a writ of execution or notice of garnishment, seizure under writ of execution, seizure and sale under writ of execution, notice of garnishment, or for any other procedure authorized by the Rules of Civil Procedureand not provided for elsewhere in the costs grid.

Note: On July 3, 2004, Part I is amended by striking out "mediation under Rule 24.1 or Rule 75.1" and substituting "mediation under Rule 24.1". See: O. Reg. 284/01, s. 38 (2).

	Partial Indemnity Scale	Substantial Indemnity Scale
Law Clerks	Up to $80.00 per hour	Up to $125.00 per hour
Student-at-law	Up to $60.00 per hour	Up to $90.00 per hour
Lawyer (less than 10 years)	Up to $225.00 per hour	Up to $300.00 per hour
Lawyer (10 or more but less than 20 years)	Up to $300.00 per hour	Up to $400.00 per hour
Lawyer (20 years and over)	Up to $350.00 per hour	Up to $450.00 per hour

2. Counsel Fee — Motion or Application

	Partial Indemnity Scale	Substantial Indemnity Scale
0.25 hour	Up to $400.00	Up to $800.00
1.00 hour	Up to $1,000.00	Up to $1,500.00
2.00 hours (half day)	Up to $1,400.00	Up to $2,400.00
1 day	Up to $2,100.00	Up to $3,500.00

3. Counsel Fee — Trial or Reference

	Partial Indemnity Scale	Substantial Indemnity Scale
Half Day	Up to $1,500.00	Up to $2,500.00
Day	Up to $2,300.00	Up to $4,000.00
Week	Up to $9,500.00	Up to $17,500.00