TAB 2

Making Sense of Cost Awards In Estate and Guardianship Litigation: A Witch's Brew?

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13th ***Annual*** **Estates and Trusts Summit**
Day Two - November 18, 2010

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MAKING SENSE OF COST AWARDS IN ESTATE AND GUARDIANSHIP LITIGATION: A WITCH'S BREW?[1] by Justin W. de Vries

> *While the will challenge process serves the important public policy objective of ensuring that courts only give effect to valid wills that reflect the intention of competent testators, it must be open to the courts to sanction, through elevated cost awards, meritless will challenges which are driven by blind emotion, but devoid of any material relevant evidence. To do otherwise would risk undermining the stated intentions of testators and testatrixes and risk exhausting an estate, or inflicting financial harm on a beneficiary, by the pursuit of fruitless objections by a "slighted relative who is denied the testator's largesse." [citation omitted].*[2]

Introduction

As noted by one jurist[3], to the extent that it was not clear prior, the Ontario Court of Appeal made it abundantly clear in *McDougald Estate v. Gooderham*[4] that the modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that some public policy consideration applies, to follow the costs rules that normally apply in civil litigation.

Succinctly put, the goal of awarding costs is to restrict unwarranted litigation and protect estates from being depleted by litigation. Payment of costs from the estate is only justified in limited circumstances where the litigation arose as a result of the actions or omissions of the testator or where the litigation was reasonably necessary to ensure the proper administration of the estate.

Justice Brown perhaps put it best in *Bilek v. Salter*[5] when he stated in the frank terms that he is now rightly famous (or infamous) for:

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[2] *Smith Estate v. Rotstein*, [2010] O.J. No. 3266 (S.C.J.), paragraph 50
[3] Justice R.D. Gordon in *Viau v. Kozicki*, [2010] O.J. No. 1146 (S.C.J.)
[4] (2005), 255 D.L.R. (4th) 435 (Ont. C.A.), paragraphs 78 to 80
[5] [2009] 50 E.T.R. (3d) 227 (Ont. S.C.J.)

> 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 into decisions about whether to litigate estate-related disputes.[6] [emphasis added]

It is now safe to say that over the last two to three years the general principles governing estate litigation have become abundantly clear to the estate bar. For better or worse, those principles have been forcefully articulated by a variety of judges in a variety of settings. The phrase, "buyer beware", loosely construed, can easily be applied to the average estate litigant.

However, it is also safe to say that awarding costs is never straight-forward and the "emotional dynamics" of most pieces of estate litigation makes the situation even more tentative and unpredictable. In fact, it has become nearly impossible to accurately predict how costs will be decided in any particular estate or guardianship proceeding.

Section 131 of the *Courts of Justice Act*[7] ("CJA") leaves an award of cost in the discretion of the court and the court may determine by whom and to what extent the cost shall be paid. Moreover, Section 131 of the CJA is expressly made subject to the *Rules of Civil Procedure* and Rule 57 lists numerous factors the court may take into account in awarding costs. But Section 131 of the CJA and Rule 57 apply with equal measure to all civil litigation matters.

What then makes estate and guardianship litigation different from other civil litigation such that costs become near impossible to predict? One obvious example is where one or more of the parties adopts a "scorched-earth" policy in respect of the litigation and/or behaves in a "reprehensible" manner. Allegations of fraud and impropriety are often common place, with parties pumped up on emotional adrenaline. Such tactics do result in elevated costs awards,

[6] *Ibid.*, at paragraph 5 and 6
[7] R.S.O. 1990, c. C.43, as amended

including costs payable personally on a substantial indemnity or full indemnity basis.[8] While most judges readily condemn such tactics, some judges are more inclined to empathize with the litigant's emotions and temper their cost awards accordingly.

Human nature also comes into play when awarding costs. It is axiomatic that different judges will respond differently to similar situations, especially when it comes to "sorting out" family dynamics. One judge may order costs payable out of the estate while another will order the losing party to pay costs personally. Partial indemnity may be the norm, but quantum can also vary widely, as what is reasonable to one judge may be completely unreasonable to another. Simply put, cost decisions are often contradictory and can be hard to reconcile (though this is generally true in civil litigation matters generally). What we are seeing is that cost awards in estate and guardianship litigation increasingly follow the "loser-pays" principle. The application of that principle, coupled with the traditional discretion that rests with a judge in deciding costs and the ability to sanction "reprehensible" behaviour in estate and guardianship litigation with an elevated cost award, has resulted in costs which are difficult, if not impossible, to predict.

Purpose of Paper

What this paper will attempt to do is to bring some sense and better understanding to cost awards in estate and guardianship matters. It will focus on cost decisions in the last 12 to14 months. Noteworthy cases will be summarized. The end of the paper contains a list of general principles that will hopefully shed some light on how and when costs are awarded and equip the practitioner with a short guide of what to expect (namely, the unexpected).

Summary of Cases – Estate Cases

Kaptyn Estate[9]

The cost decision relates to the will challenge of John Kaptyn's ("Kaptyn") secondary will and codicil. Kaptyn was a successful businessman who left behind a substantial estate. Litigation between his two sons quickly ensued.

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[8] Rule 57.01(4)(d)

[9] *In the Estate of John Johannes Jacobus Kaptyn*, (2008), 43 E.T.R. (3d) 219 (Ont. S.C.J.)

Justice Lederer presided at the will challenge trial and began his cost decision by noting that the problems with the estate arose from the actions, omissions, instructions and decisions of Kaptyn. Moreover, Justice Lederer seemed to put a great deal of emphasis on the fact that the estate trustees were put in place by the will to represent the estate: "They are not here out of choice, hence, it is reasonable they are not to be 'out-of-pocket'".[10] As such, Justice Lederer held that the estate trustees should be paid their costs on a full indemnity scale. Furthermore, the two beneficiaries who incurred substantial legal fees in defending the secondary will were also awarded their costs on a full indemnity scale.

Somewhat unusually, Justice Lederer also awarded the unsuccessful challenger of the secondary will and codicil his costs on a full indemnity basis. In coming to that conclusion, Justice Lederer determined that there was nothing frivolous about the application challenging the secondary will and codicil. According to Justice Lederer, given that the parties could not agree, the examination, as demonstrated through the evidence of the background and facts leading to the execution of the secondary will and codicil, was necessary. Finally, the court held that the remaining three claimants should also be paid full indemnity costs so that all parties received their costs at that scale.

Justice Lederer's decision stands out in that all of the parties to the litigation were awarded full indemnity costs payable out of the estate (which part is discussed below). No doubt, it helped that counsel were more or less of one mind when it came to the awarding of costs (with some notable exceptions) and that Justice Lederer presided over a long and hard-fought will challenge trial; he obviously knew the parties and issues intimately.

The one remaining issue before the court was where the costs should come from, or more particularly, from which part of Kaptyn's substantial estate. Despite being urged by one of the parties that the issue should be put off to the end of on-going litigation regarding the interpretation of various testamentary documents, Justice Lederer held that it was available to him to direct that the costs should be paid from the residue of the primary estate, as opposed to the secondary estate.

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[10] *Ibid.*, paragraph 14

Justice Lederer reasoned that the trial dealt with Kaptyn's entire estate, the estate plan, and the impact of the codicil challenge on the overall estate and not just the secondary estate. Moreover, there was evidence that the overall plan was to have the residue in the secondary estate used to clear the debts owing with respect to the land and corporations within it. According to Justice Lederer this was done so that the grandchildren could receive their bequests debt-free. As such, it was his view that whatever residue there was in the secondary estate should be maintained so that the grandchildren could get their bequests debt-free. The total costs and disbursements awarded amounted to a staggering $1,940,889.70 to be paid out of the residue of the primary Estate.

Robinson Estate[11]

Robinson Estate v. Robinson tested the limits of the court's power to rectify a will. The testator, Blanca Robinson ("Robinson"), owned property in Spain, England and Canada. Robinson executed a will in Spain dealing with her European property. A Canadian will dealt with her Canadian property, which Robinson subsequently revised. The solicitor who revised the will routinely added a clause revoking all prior wills. Robinson approved and signed the revised Canadian will. The solicitor was not told about the Spanish will until after Robinson died. An application rectifying the revised Canadian will by deleting the revocation clause was brought.

The applicants claimed that the revocation clause was a mistake and should be deleted. There was affidavit evidence that Robinson did not mean to revoke her Spanish will. The respondent, Blanca's stepdaughter, Ms. Robinson, took the position that the Canadian will had already been probated and could no longer be rectified. Moreover, the language of the revocation clause was clear, unequivocal and approved by Robinson.

Based on the evidence tendered, the court acknowledged that Robinson never intended to revoke her Spanish will and did not realize that the revocation clause did just that. However, the court declined to act. Justice Belobaba held that the equitable power of rectification was aimed mainly at preventing the defeat of testamentary intentions due to errors or omissions by the drafter of the

[11] *Robinson Estate v. Robinson*, 2010 CarswellOnt 4576 (S.C.J.) The decision is currently under appeal to the Ontario Court of Appeal

will. This case was not about a typographical error by the solicitor, the solicitor misunderstanding Robinson's instructions, or the failure to implement Robinson's instructions. The revised Canadian will was drafted in accordance with Robinson's instructions. Justice Belobaba therefore refused to correct Robinson's mistaken belief about the legal effect of the words she had reviewed and approved. The revocation clause could not be deleted and the application was dismissed.

In his subsequent costs decision,[12] Justice Belobaba considered the two applications before the court. According to the court, the two applications clarified an essential question and benefited the estate as a whole. Justice Belobaba held that the estate trustee was right to have applied to the court for advice and directions and that there was good reason for the beneficiaries to litigate the issues of rectification. Justice Belobaba therefore concluded that the estate trustee, together with the two beneficiaries, was entitled to his reasonable substantial indemnity costs out of the estate. However, the court did not extend this award to the lawyer who was at the heart of the rectification. He was unsuccessful on the rectification application and in Justice Belobaba's view his legal costs should be absorbed, not by the estate, but by his professional liability insurer.

Finally, Justice Belobaba declined to order that Ms. Robinson's costs be paid by the solicitor's professional liability insurance, despite the fact the estate was without funds. The issue of solicitor's negligence was not before the court and was the subject of a separate proceeding. Ms. Robinson was invited by the court to pursue her costs claim in the solicitor's negligence action and possibly receive a larger recovery.

The decisions in the *Kaptyn Estate* and the *Robinson Estate* seem to be at odds. It is true that the main players in both estates received elevated cost awards. However, the litigants in the *Robinson Estate*, including the blameless estate trustee who was commended for bringing an advice and direction application, only received substantial indemnity costs payable by an estate that had little or no money. On the other hand, all parties, including the will challenge litigants,

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[12] *Robinson Estate v. Robinson*, 2010 CarswellOnt 6026 (S.C.J.)

in the *Kaptyn Estate* were awarded their costs on a full indemnity basis. The two decisions are difficult to reconcile.

Smith Estate[13]

This is a significant and important cost decision of Justice Brown. The estates bar would do well to read it carefully.

Justice Brown granted a motion for partial summary judgment brought by Lawrence Smith ("Smith") dismissing the amended notice of objection of his sister, Nancy-Gay Rotstein ("Rotstein"), in respect of the 1987 will and the first two codicils made by their mother, Ruth Dorothea Smith ("Ruth Smith"). Ruth Smith died in 2007 leaving behind a substantial estate.

In his April 15, 2010 reasons granting the summary judgment motion, Justice Brown also gave directions for the process to determine the validity of Ruth Smith's third and fourth codicils. The parties then argued costs.

Smith sought costs of $840,718.14 on a full indemnity basis against his sister personally and not out of his mother's estate. For her part, Rotstein did not dispute that her brother was entitled to his reasonable costs and that she, not the estate, should pay them. However, she submitted that Smith should be awarded costs on a partial indemnity basis in the amount of $260,747.14.

By way of background, on December 3, 2007, less than a month after her mother had died, Rotstein objected to the issuing of a certificate of appointment of estate trustee with a will to her brother on the grounds that her mother: (1) lacked testamentary capacity; (2) did not have knowledge of or approve the contents of her will; and (3) was unduly influenced by Smith. Rotstein further asserted that suspicious circumstances existed in respect of the execution of her mother's will.

In determining costs, Justice Brown noted favourably Rotstein's acknowledgment that her brother was entitled to his reasonable costs as against her and not the estate. Justice Brown then

[13] *Smith Estate, supra*, note 2

carefully canvassed the general principles that were applicable in the estates context when awarding costs. Not surprisingly, his starting point was the well-trodden Ontario Court of Appeal decision, *McDougald Estate v. Gooderham.*

Based on *McDougald Estate v. Gooderham*, it is now trite law that two fundamental principles govern the award of costs in estate litigation. First, the starting point remains the general principles for determining the responsibility for costs applicable to all civil litigation. These general principles are expressed in Section 131 of the CJA, Rule 57 of the *Rules of Civil Procedure* and, since January 1, 2010, Rule 1.04 (1.1) - the principle of proportionality. Second, public policy favours a departure from those general principles and the payment of the parties' litigation costs by the estate in two limited circumstances:

1. Where reasonable grounds existed upon which to question the execution of the will or the testator's capacity in making the will; or

2. Where the difficulties or ambiguities in the will that gave rise to the litigation were caused in whole or in part by the testator.

The rationale for the departure from the general principles for awarding costs is that public policy requires courts only to give effect to valid wills that reflect the intention of competent testators. Otherwise, as Justice Brown noted, the discipline imposed on litigants by the infamous "loser pays" principle in civil litigation was viewed by the Court of Appeal in the *McDougald Estate* as appropriate in estate litigation.

According to Justice Brown if individual litigants want to avoid shouldering the cost of will interpretation or will challenge litigation, they must demonstrate to the court that reasonable grounds existed to question the execution of the will or the competency of the testator or demonstrate to the court the presence of a reasonable dispute regarding the interpretation of a testamentary document. Only then will the courts consider whether it is appropriate to award costs of the litigation from the estate rather than apply the "loser-pays" principle. Justice Brown wrote: "The costs inquiry, therefore, will be specific to the facts and issues raised in each

particular piece of Estate litigation – **no general class exception** from the standard civil rules of costs exists for types of estate litigation [emphasis added]."[14]

In terms of the case at hand, Justice Brown noted that Rotstein had clearly failed to present any reasonable grounds in the summary judgment motion upon which to question the validity of Ruth Smith's testamentary documents (i.e. lack of testamentary capacity, lack of knowledge and approval, and undue influence). As a result, Justice Brown held that there was no reason why Ruth Smith's estate should bear the costs of the will challenge, as Rotstein had herself acknowledged.

Justice Brown then turned his mind to the appropriate scale of indemnity and whether a full indemnity cost award, as requested by Smith, was appropriate. In considering full indemnity costs, Justice Brown considered the relatively recent decision of the Ontario Court of Appeal in *Davies v. Clarington (Municipality)*.[15] In that case, the Court of Appeal held that full indemnity costs were generally considered to be complete reimbursement of all amounts that a client paid to his or her lawyer in relation to the litigation.

In *Davies v. Clarington*, the Court of Appeal identified the circumstances when elevated costs, namely substantial or full indemnity, could be awarded. Elevated costs were warranted in only two circumstances. The first involved the operation of a Rule 49 offer to settle where substantial indemnity costs are explicitly authorized.[16] The second circumstance was where the losing party had engaged in behaviour worthy of sanction by the court. The Court of Appeal summarized its position as follows:

> [W]hile fixing costs is a discretionary exercise, attracting a high level of deference, it must be on a principled basis. The judicial discretion under Rule 49.13 and 57.01 is not so broad as to permit a fundamental change to the law that governs the award of an elevated level of costs. Apart from the operation of Rule 49.10, elevated costs should only be awarded on a clear finding of reprehensible conduct on the part of the party against which the cost award is being made.[17]

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[14] *Ibid.*, paragraph 10
[15] (2009), 100 O.R. (3d) 66 (C.A.)
[16] Rule 49.10
[17] *Davies, supra*, note 15, paragraph 40

In commenting on Smith's offer to settle, Rotstein made the rather extraordinary claim that Rule 49 did not apply to Rule 74 and 75 estate applications. However, Justice Brown made short work of that submission, which he rejected outright. He held that Rule 49 applied to applications, and Rule 49 made that clear. However, Justice Brown concluded that the result of the partial summary judgment motion, which dealt with the 1987 will and only two of the four codicils, did not trigger the cost consequences set out in Rule 49. Consequently, Mr. Smith was not entitled to his substantial indemnity costs by reason of that rule. Justice Brown then turned his gaze to Rotstein's conduct during the course of the litigation and the results were less than flattering.

Justice Brown held that when assessing the nature of a party's conduct in litigation, a court must keep in mind that the defendant is entitled to put the plaintiff to the proof and there is no obligation to settle an action, although Rule 49 provides significant incentives to do so. So "[t]he thrust and parry of the adversary system", as colourfully described by Justice Brown, did not warrant sanction in and of itself even if the litigation turned out to be misguided.

However, "malicious, counter-productive conduct or the harassment of another party by the pursuit of fruitless litigation" may merit sanction.[18] Justice Brown wrote:

> Cases referred to by the moving party disclosed that courts have awarded elevated, full indemnity costs when: (i) one party was an innocent party to the proceeding and the court concluded that she should not experience any loss as a result of the conduct and action of the defendant which resulted in the litigation; (ii) one party made baseless allegations of wrongdoing or meritless claims of fraud, deceit and dishonesty based on pure speculation against another; or (iii) it was clear shortly after the event in question that the plaintiff was blameless but was required to proceed to trial because of disputes amongst the defendants about the share of liability. [citations omitted][19]

Was Rotstein's conduct reprehensible? Justice Brown considered several factors which he considered to be relevant to answering that question. He acknowledged that the litigation was hard fought on both sides. However, engaging in hard fought litigation does not, in and of itself, attract an award of elevated costs, although it doubtless will result in a very robust award of

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[18] *Foulis v. Robinson* (1978) 21 O.R. (2d) 769 (S.C.J.) at page 776 and *Davis v. Clarington, supra*, paragraph 45

[19] *Smith Estate, supra,* note 2, paragraph 30

partial indemnity costs. Nor did Rotstein's request for notice of a commencement of proceeding pursuant to Rule 74.03(1) constitute an aggressive or adversarial step. However, Justice Brown noted that once a party files a notice of objection, as Rotstein ultimately did, the process is no longer a benign one but becomes "a contentious estate proceeding".

In his reasons, Justice Brown had also criticized Rotstein for filing a notice of objection that consisted of boiler plate allegations lacking any factual particularity. In his cost decision, Justice Brown wrote:

> While such a form of notice is commonly used, the consequences of such a bald notice is that the objector puts in play a host of issues which may, or may not, merit scrutiny. In this case, Rotstein threw in every possible issue except the kitchen sink, so to speak, challenging the validity of her mother's testamentary instruments on every ground, save due execution. As the proceeding unfolded, instead of adducing her personal knowledge of the issues in dispute, she refused to give evidence. Rather she put forward her husband, Max Rotstein, as her evidentiary spokesman. Even then, as I noted in paragraph 33 of my April reasons, objections taken by her counsel during the course of Rotstein's cross-examination blocked efforts by the applicant to obtain information about Rotstein's knowledge of the issues.[20]

Moreover, Max Rotstein admitted on several occasions during his cross-examination that his mother-in-law did, in fact, possess testamentary capacity. Nevertheless, Rotstein persisted during the hearing of the summary judgment motion to claim that her mother lacked testamentary capacity. Justice Brown held that it was obvious that there no absolutely no evidence to support her position. According to Justice Brown, such conduct fell into the category of refusing to admit an issue – testamentary capacity - which should have been admitted thereby triggering Rule 57.01(1)(g).

Justice Brown further concluded that Rotstein's failure to admit that her mother had testamentary capacity constituted conduct that was harassing, as she was clearly prepared to pursue fruitless litigation. Such conduct could attract an award of elevated costs. Justice Brown also reached a similar conclusion with respect to Rotstein's objection that her mother did not know of or approve of the contents of her testamentary instruments.

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[20] *Ibid.*, paragraph 39

Justice Brown further held that Rotstein's allegation of undue influence against her brother was also without merit. Justice Brown had no difficulty find that Rotstein continued to engage in "in a groundless effort to try to portray her brother as 'undue influencer' of their mother"[21] despite her lack of personal knowledge about her parents' affairs due to her self-imposed isolation, together with the evidence tendered by her brother regarding the circumstances surrounding the preparation and execution of the 1987 will and its codicils.

Rotstein also made very serious allegations of misconduct against her brother and yet produced no evidence to support any of those allegations. Such allegations, according to Justice Brown, fell into the category of baseless allegations of wrongdoing and meritless claims of fraud, deceit and dishonesty based on pure speculation against the other party. Such conduct could justify an award of elevated costs. In sum, Justice Brown characterized the nature of Rotstein's will challenge as "harassing".[22]

Justice Brown also found that Rotstein put her brother to huge legal expense by persisting in objections long after it became clear that no evidence existed to give rise to a genuine issue for trial in respect of them. Such conduct tended to lengthen unnecessarily the duration of the proceeding, a factor which was clearly set out in Rule 57.01(1)(e) and relevant to the consideration of costs.[23]

In conclusion and commenting on Rotstein's conduct, Justice Brown wrote:

> While the will challenge process serves the important public policy objective of ensuring that courts only give effect to valid wills that reflect the intention of competent testators, it must be open to the courts to sanction, through elevated cost awards, meritless will challenges which are driven by blind emotion, but devoid of any material relevant evidence. To do otherwise would risk undermining the stated intentions of testators and testatrixes and risk exhausting an estate, or inflicting financial harm on a beneficiary, by the pursuit of fruitless objections by a "slighted relative who is denied the testator's largesse." [citation omitted].[24]

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[21] *Ibid.*, paragraph 43
[22] *Ibid.*, paragraph 46
[23] *Ibid.*, paragraph 47
[24] *Ibid.*, paragraph 50 (citation omitted)

Justice Brown held that Rotstein persisted in a will challenge that should have never been brought in the first place or at least abandoned early on. There was no justification in "law or fact" for Rotstein to have taken her challenge through the hearing of the summary judgment motion. "To engage in baseless, hugely expensive, scorched earth litigation over the validity of a will is litigation conduct that falls into the category of 'reprehensible' and merits the award of elevated costs".[25] In the circumstances, Rotstein was ordered to pay costs on a full indemnity basis.

Justice Brown then considered quantum. In doing so, the court was required to take into account the overriding principle of the reasonableness of any cost award.[26] However, Justice Brown did not engage in a line-by-line analysis of the hours claimed. He also held that a court should not second-guess the amount claimed unless the amount is clearly excessive or overreaching. Instead, Justice Brown held that a judge should consider what is reasonable in the circumstances and, after taking into account all of the relevant factors, award costs in a more global fashion.[27]

Justice Brown noted that Rotstein's cost submissions contained an extensive and sophisticated critique of her brother's bill of costs. However, Rotstein did not deliver a bill of costs even though the court had specifically ordered that the parties deliver bills of costs knowing that the resulting cost award would be in the hundreds of thousands of dollars. According to Justice Brown, one of the most effective ways to measure the reasonableness of the expectations of an unsuccessful party is to require the party to file a bill of costs as part of its cost submission: "If the unsuccessful party's lawyer billed, or docketed, huge fees and incurred substantial expenses, then those levels of expenditures would be relevant to the issues of both how much the unsuccessful party could reasonably expect the successful side to claim for costs, as well as the quantum of costs the court might award".[28]

As Rotstein failed to file a bill of costs, Justice Brown placed little weight on the detailed critique she made of her brother's bill of costs. Moreover, in the absence of the requested bill of costs from Rotstein, the court was able to infer that based on the sophistication and complexity of

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[25] *Ibid.*, paragraph 51
[26] *Ibid.*, paragraph 52
[27] *Ibid.*, paragraph 53
[28] *Ibid.*, paragraph 57

Rotstein's submitted materials, the fees she incurred on a full indemnity basis approximated those fees incurred and submitted by her brother. Therefore, Justice Brown rejected Rotstein's submission that her brother had overreached in respect of the time claimed. In concluding, Justice Brown noted:

> I have taken into account the factors set out in Rule 57.01(1); I have commented on the composition of the parties' legal teams, the complexity and importance of the issues, the litigation conduct of the parties, and the issue of reasonable expectations regarding the costs award in light of the conduct of Rotstein; I have also considered the principle of proportionality, which was implicit in the prior rules, and was made expressed in the amendments which came into force on January 1st of this year.[29]

In fact, Justice Brown commented further on the issue of proportionality by quoting favourably from a decision by Justice Gray in *Cimmaster Inc. v. Piccione (c.o.b. Manufacturing Technologies Co.)*:[30]

> The principal of proportionality is important, and must be considered by any judge in fixing costs... However, in my view, the principle of proportionality should not normally result in reduced costs where the unsuccessful party has forced a long and expensive trial. It is cold comfort to the successful party, who has been forced to expend many thousands of dollars and many days and hours fighting the claim that is ultimately defeated, only to be told that it should obtain a reduced amount of costs based on some notional concept of proportionality. In my view... the concept of proportionality appropriately applies where a successful party has over-resourced a case having regard to what is at stake, but it should not result in reduction of costs otherwise payable in these circumstances.[31]

Justice Brown ordered costs payable by Rotstein personally to her brother on a full indemnity basis in the amount of $707,173.00 and $30,407.29 for disbursements, together with applicable GST on both amounts. Tellingly, this was the exact amount set out in Smith's bill of costs, which Justice Brown ultimately concluded was a fair and reasonable. Rotstein had 120 days in which to pay the costs awarded.

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[29] *Ibid.*, paragraph 63
[30] 2010 ONSC 846 (S.C.J.)
[31] *Smith Estate, supra,* note 2, paragraph 63 and *Cimmaster, supra*, paragraph 19

Reid Estate[32]

In *Reid Estate v. Reid*, Bruce Reid ("Bruce"), sought costs paid out of his mother's estate. Reid claimed that his mother's actions caused the ensuing litigation after her death when she purported to transfer a property a month prior to her death. Lynn Reid ("Lynn"), his brother, was completely successful on the two main issues in the application and achieved much greater success at trial than under his earlier offer to settle. The judge hearing the application, Justice Code, wrote that in fixing costs in civil litigation the proper approach was set out by Justice Strathy in *North American Construction (1993) Ltd. v. Regional Municipality of York et al*[33] citing *Boucher v. Public Accountants Council*[34]:

> ... I am required to have regard to the factors set out in Rule 57.01 of the *Rules of Civil Procedure*... The costs award must be fair and reasonable and must take into account the reasonable expectations of the parties [cite omitted]. At the end of the day, taking the factors in Rule 57.01 into account, I am required to stand back and make an award that is just in the circumstances.

In estate litigation, the first thing to consider is whether costs should be paid from the estate or whether costs should follow the event as in ordinary civil litigation. Justice Code was satisfied that the ordinary cost rules should be followed. The litigation was not caused by the mother's decision to transfer title to the property prior to her death. Rather, the litigation was caused by Bruce disputing the legal effect of that transfer. In his decision dismissing Bruce's application, Justice Code had determined that the transfer was clearly gratuitous and the presumption of resulting trust applied to it.[35] According to Justice Code, Bruce took a substantial risk in undertaking the burden of rebutting the presumption of a resulting trust. If the costs of this risky litigation were to be paid out of the estate, it would, according to Justice Code, be substantially depleted. This would have been unfair and unjust to Lynn.

Justice Code then considered Lynn's Rule 49 offer to settle and held that Lynn achieved much greater success at trial than under his offer to settle, which represented a very substantial compromise. The presumptive effect of Rule 49.10 was that Lynn was entitled to partial

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[32] *Reid Estate v. Reid*, [2010] O.J. No. 3076 (S.C.J.)
[33] [2009] O.J. No. 426 (S.C.J.), paragraph 10
[34] (2003), 71 O.R. (3d), 291 (C.A.)
[35] *Reid Estate, supra,* note 32, paragraph 5

indemnity costs up to the date of the offer and to substantial indemnity costs after that date. However, Lynn submitted that substantial indemnity costs should be awarded throughout because of his brother's uncompromising conduct. However, Justice Code did not find that submission to have any merit and the presumptive effect of Rule 49 was followed.

Justice Code then assessed the overall reasonableness of Lynn's costs, which were substantial. He considered the five factors in Rule 57.01 that he described as "particularly important":[36] (a) costs that an unsuccessful party could reasonably expect to pay; (b) the amount claimed and the amount recovered; (c) the complexity of the proceeding; (d) the importance of the issues; and (e) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding.

Justice Code found that the issues at stake in the litigation were important to Lynn and the amount of money at stake was also significant to him, given his modest means. The issues at trial were also factually and legally complex, resulting in a 38 page judgment. A three day trial that ultimately ended in a mistrial also added to the length and cost of the trial through no fault of Lynn. Lynn's counsel also conducted himself responsibly throughout and was helpful and accommodating to Bruce once he became self-represented.

Justice Code also held that Bruce knew he was risking exposure to substantial costs based on the invoices he received from his own solicitor. Indeed, Bruce dismissed his own counsel because of the mounting litigation costs and became self-represented.

Justice Code concluded as follows:

> In total, Lynn Reid claims fees that amount to $130,670 for 472 hours of work in a case that extended over eleven days at two trials. The work was spread over almost 5 years. It is noteworthy that the amount claimed is very similar to the amount Bruce Reid's lawyer billed him up until November, 2008 and prior to the second trial. **This is a useful gauge to what the successful party could reasonably expect to pay.**" [emphasis added][37]

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[36] *Ibid.*, paragraph 15

[37] *Ibid.*, paragraphs 22 and 23

Land Estate[38]

The Land Estate has attracted some notoriety among the estate bar. At first instance, the applications judge granted the application brought by the estate trustee rectifying a typographical error in the will resulting in a reduction in the amount left to each of the respondents from $25,000 to $2,500. The application judge then ordered that cost of the successful estate trustee be paid by the respondents in the amount of $12,334.49. There was no appeal from the decision on the merits. However, the respondents sought to appeal the costs award.

In dismissing leave to appeal, Justice Glithero noted: "It is trite law that costs are a discretionary matter, with that discretion being embodied in Section 131 of the *Courts of Justice Act* and reflected in Rule 57 of the Rules of Practice".[39]

Justice Glithero also expressed the view that it was in error to divorce the reasons on a cost ruling from the reasons given on the application itself: "It is clear that the application judge made finding of the facts which are relevant to not only the outcome of the actual application but to the issue of costs".[40]

Justice Glithero then noted that the usual "loser pay" principle in civil litigation applied with equal measure to estate litigation, but for the important exception where the litigation arose as result of the testator's mistakes or omissions.[41]

In the case before him, Justice Glithero had little sympathy for the respondents. According to Justice Glithero, the rectification application neither brought into question the deceased's capacity to make a will nor the execution of the will. Moreover, where the deceased's capacity to make a will or execute his/her will was challenged, there must be reasonable grounds upon which to make such a claim. According to Justice Glithero, the application judge's found that the evidence favouring rectification was strong. In fact, **there was no evidence to the contrary**. Justice Glithero also expressed his concern that in today's world where high legal fees are often

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[38] *Land v. Binkley Estate*, [2009] O.J. No. 5876 (S.C.J.)
[39] *Ibid.*, paragraph 7
[40] *Ibid.*, paragraph 8
[41] *Ibid.*, paragraph 6

the norm, the respondents proceeded to court not once, but twice (the leave application), to fight over what was a relatively modest sum of money.

In his decision dismissing the leave to appeal, Justice Glithero noted that in exercising his discretion, the application judge properly considered: (a) Rule 57.01(e) - "the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding"; and (b) 57.01(g) - "a party's denial or refusal to admit anything that should have been admitted". Unfortunately, the respondents came up short on both factors.

O'Donovan Estate[42]

In this case, the purported estate trustees sought the opinion, advice and direction of the court with respect to a number of particular questions regarding testamentary documents. Justice Gordon ultimately determined that the 1998 primary and secondary wills and the 1999 codicil were valid. The Children's Lawyer advocated a costs award in favour of all parties on a full indemnity basis, payable from the estate with payment deferred until it was determined whether the estate had any assets and if not, then payable from one of the substantial family trusts.

In addition to the advice and direction application before Justice Gordon, there were several other litigation disputes involving the O'Donovan family arising out of the death of Michael O'Donovan, a successful businessman and entrepreneur. These litigation disputes were at various stages at the time the advice and direction application was argued, but were not expected to be finalized for some time. One of the disputes pertained to the family trusts created by Michael O'Donovan and his wife, Sheila O'Donovan, as part of their estate plan. It was these family trusts that The Children's Lawyer was referring to in the cost submissions.

For her part, Sheila O'Donovan, who was successful on the interpretation application, opposed a cost award in favour of the applicants from the estate, both in their capacity as purported estate trustees and personally (the applicants were two of Sheila O'Donovan's sons).

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[42] *O'Donovan et al v. O'Donovan et al.*, 2010 CanLII 2608 (ONSC)

As Justice Gordon noted, no objections were presented as to the quantum of the various cost claims. In fact, he had carefully reviewed all of the bills of costs and found that the docketed time and hourly rates reasonable. However, Justice Gordon went on to hold that it could not be said that the application was necessary solely as a result of the actions of Michael O'Donovan. A significant factor was the conduct of his solicitor in terms of drafting, record keeping and storage of client documents. Yet no claim had been advanced against that lawyer.

Furthermore, Justice Gordon held that it could not be said that the application was reasonably necessary to ensure the proper administration of the estate: "The result, in my view, was predictable. The moving parties, and their supporters, made the proceeding unnecessarily complicated".[43]

Justice Gordon also concluded that the application was premature and, on the evidence tendered, of no benefit to the estate. In fact, counsel had conceded at the application that there were few, if any, assets in the estate. The wealth accumulated by Michael and Sheila O'Donovan was in the family trusts established by them some years ago. Justice Gordon therefore held there was no merit in pursuing the application until had been determined that there were sufficient assets in the estate.

Given the above, the expenditure of approximately $300,000.00 by all parties was, in Justice Gordon's view, not warranted and the estate should not bear the responsibility for payments of costs. Costs, therefore, followed the event on a partial indemnity scale. Justice Gordon awarded Sheila O'Donovan's costs against the applicants in their personal capacities. According to Justice Gordon, the applicants could not hide behind the label "estate trustees", as they were the operative parties pursuing this application in their personal capacities.[44]

Cotte v. Dabrowski[45]

In this case, it was alleged that as the godson of Sophie Dabrowski ("Sophie"), the plaintiff, Robert Cotte ("Robert"), had been led to believe that he would be included in Sophie's estate and

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[43] *Ibid.*, paragraph 10
[44] *Ibid.*, paragraph 15
[45] *Cotte v. Dabrowski*, 2010 CanLII 3697 (ONSC)

would ultimately become entitled to certain real property Sophie owned. Robert alleged that Sophie's husband, the defendant Ted Dabrowski ("Ted"), had induced Sophie during the course of her lifetime to sell the property to an arm's length third party for $410,000. Robert claimed the sale price was inadequate. Robert further alleged that Ted had forged Sophie's signature and that on Sophie's death, Ted had arranged for the destruction of Sophie's will and documents that would purport to devise or bequeath the property to Robert.

However, Robert ultimately delivered a notice of discontinuance such that the estate and Ted were entitled to their costs pursuant to Rule 23. Robert's position was that there should be no costs award, as he did not have sufficient information available to him to properly assess whether he had a legitimate claim and therefore should be permitted to discontinue his action without costs.

Notwithstanding Robert's pleas of blamelessness, it was, according to Justice Edwards:

> ... one thing ... to pursue litigation without complete knowledge of the facts upon which a claim is based. It is an entirely different matter where allegations of forgery and wrongdoing are made. It is further, another matter, where the litigation is continued right up to the eve of trial and the evidence points in an entirely opposite direction particularly with respect to an inability to prove forgery and wrongdoing... There is an old saying that 'those who live by the sword, die by the sword'. As a matter of law in a civil matter where a plaintiff makes allegations of fraud or forgery and such allegations are not proven, the plaintiff may very well find themselves penalized with costs assessed on a substantial indemnity basis".[46]

In determining an appropriate level of costs, Justice Edwards held that he would be guided by the line of cases which stood for the proposition that where a plaintiff had made unproven allegations of fraud, costs could be awarded on a higher scale. While Robert might have had reasonable grounds on which to formulate an opinion that Ted might have been party to a wrongdoing, that belief, according to Justice Edwards, was ultimately not supported by the facts or the evidence which became available to the plaintiff during the course of the proceedings. Justice Edwards therefore awarded costs on a substantial indemnity basis payable by Robert to Ted.

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[46] *Ibid.*, paragraphs 1 and 7

Justice Edwards then considered a related cost issue regarding the involvement of the Robert's litigation guardian who was Robert's mother. Justice Edwards was of the view that the substantial indemnity costs that he awarded in the action should be the joint and several responsibility of both the Robert and his litigation guardian.

Finally, Robert had urged the court to take into account his alleged impecuniosities and had filed an affidavit in support of that position. However, no information was provided to the court regarding the financial wherewithal of the litigation guardian. Moreover, the evidence of Robert as to his impecuniosity suggested that the only source of income he had was from a disability pension, but there was no evidence concerning either his assets or the assets of his mother who was acting as litigation guardian. The court was therefore not prepared to take into account allegations of financial impecuniosities given the lack of information provided by Robert.

Borisko Estate[47]

In his original decision, Justice Belobaba granted the application by the beneficiaries to replace the estate trustee and for certain related orders. In his cost decision, Justice Belobaba noted that the beneficiaries were completely successful and that the estate trustee should have stepped aside as soon as he lost the trust and confidence of the beneficiaries. However, and unfortunately, the trustee prolonged the dispute and caused needless and costly litigation.

In arriving at his cost decision, Justice Belobaba concluded that the normal "loser pays" cost rule applied as the application did not engage any of the public policy considerations listed in *McDougald Estate v. Gooderham*. Accordingly, costs followed the event and the trustee was required to pay the costs personally. However, Justice Belobaba declined to award costs on a substantial indemnity basis despite the urgings of the beneficiaries. The main reason for rejecting the substantial indemnity costs scale was that the trustee's conduct, although rude, insulting and belligerent, was not in Justice Belobaba's view reprehensible, scandalous or outrageous to justify the higher scale.[48]

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[47] *Borisko v. Borisko Estate*, [2010] O.J. No. 2945 (S.C.J.)
[48] *Ibid.*, paragraph 6.

Justice Belobaba reiterated the common refrain that his primary obligation as a judge in fixing costs was to consider the factors set out in Rule 57.01(1) and fix an amount that was fair and reasonable to the unsuccessful party rather than an amount fixed by the actual costs incurred by the successful litigant.[49] Justice Belobaba found that it was fair and reasonable to fix costs at $16,000 all inclusive. Another consideration that Justice Belobaba bore in mind was that the value of the estate was modest – in the range of $40,000. As such, even if he had been inclined to award costs on a substantial indemnity basis, Justice Belobaba would not have awarded more than $15,000 or $16,000 in order to comply with the proportionality requirement.

McMichael Estate[50]

Justice Strathy was asked to address the costs of the application of Mr. Zimmerman to pass his accounts as attorney for property for Signe K. McMichael and as trustee of the Signe McMichael Trust. The objectors were John Fenwick and Penny Fenwick, in their capacity as estate trustees of the Estate of Signe McMichael and the McMichael Canadian Collection, the residuary beneficiary of Signe McMichael's estate. The objectors asked that their costs be paid by Mr. Zimmerman personally and on a full indemnity basis. The Fenwicks claimed costs of $167,978.52 and the McMichael Canadian Collection claimed costs of $116,383.67. In coming to his decision, Justice Strathy noted that full indemnity costs were reserved for those exceptional circumstances where justice can only be done by complete indemnity.[51]

Justice Strathy was satisfied that the time spent by the lawyers for the objectors was reasonable and appropriate in the circumstances, as were the hourly rates. Justice Strathy also noted that Mr. Zimmerman was a lawyer and therefore would have understood the amount of time and effort that the objectors had invested in obtaining an accounting from him. He also would have been familiar with litigation and with the principles applicable to costs including the costs payable by a trustee who had failed to properly account.

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[49] *Ibid.*, paragraph 7 and *Boucher, supra* 34, note at paragraph 26
[50] *Zimmerman v. McMichael Estate*, [2010] O.J. No. 3022 (S.C.J.)
[51] *Ibid.*, paragraph 4

Justice Strathy also found that the objectors had been substantially successful as Mr. Zimmerman was ordered to pay nearly $500,000.00 in compensation improperly taken. Justice Strathy also found that the application was unduly complicated as a result of the actions of Mr. Zimmerman in failing to properly present accounts and failing to respond to appropriate objections. Justice Strathy commented that while the issues were important to the estate trustees and to the McMichael Canadian Collection, the issues "were also important, in a broader sense, in relation to the court's supervisory responsibility over the conduct of guardians and trustees".[52]

Justice Strathy found that the steps taken by the objectors were proper, reasonable and necessary. There was, in fact, no reason to reduce the costs claimed by them. By contrast, Mr. Zimmerman's approach to the litigation was to delay, deny and obstruct. Simply put, the court found that his actions prolonged the proceeding and increased the objectors' costs and given his conduct there was no reason why Mr. Zimmerman himself should not personally pay the costs that were incurred in bringing him to account. Moreover, the court found that it would be unfair and unreasonable for the estate or the McMichael Canadian Collection to bear any part of the costs.

Summary of Cases – Guardianship Cases

Cabiles Guardianship[53]

The original guardianship application by Amalia Cabiles' sister, Susan Dinglasan, was dismissed by the court apart from the issue of visitation. Amalia Cabiles' husband was the respondent along with the Public Guardian and Trustee ("PGT").

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[52] *Ibid.*, paragraph 10

[53] *Dinglasan v. Cabiles et al.*, 2009 CanLII 28642 (ONSC)

In arguing costs, the husband took the position that the application was frivolous and ought not to have proceeded. For her part, the applicant argued that the husband's costs were excessive. Furthermore, the applicant provided letters to the court suggesting that the application could have been settled by way of a consent order for visitation by the applicant of her sister and that until the application was served, there had been no visitations for more than a year.

Justice Wilson held that under Rule 57.01 of the *Rules of Civil Procedure*, and pursuant to its discretion under Section 131(1) of the CJA in awarding costs, a court **must determine a cost figure that was fair and reasonable in all the circumstances**. Justice Wilson wrote: "The general rule is that costs follow the event, but costs must be proportional and the amount of costs must be within the reasonable contemplation of an unsuccessful party".[54]

In her reasons, Justice Wilson noted that the husband was successful in opposing the application and saw no reason why costs should not follow the event. However, the court ultimately held that the quantum of costs sought by the husband was excessive. According to Justice Wilson, it was obvious from the correspondence that what motivated the sister to launch her application was a desire to have regular visits with her injured sister. In fact, in her original reasons dismissing the application, Justice Wilson noted that it was unfortunate that consent arrangements could not be worked out between counsel regarding visitation.[55]

As stated above, Justice Wilson held that time spent by the husband's counsel on the application was unwarranted. For example, the sum of $6,720.52 was sought for a period of less than one week from the date counsel was retained to a court attendance to argue a consent adjournment. While the court appreciated that the husband's counsel had to respond to the application, she did not have to retain experts to provide capacity opinions as the assessments that had already been contemplated as part of the incapable's rehabilitation. Moreover, there were no cross-examinations and the hearing of the original application was completed before the lunch break. Lengthy facta were not filed and according to Justice Wilson, the 100 hours of time that was spent by the husband's counsel, given the nature of the application, was excessive.

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[54] *Ibid.*, paragraph 5

[55] *Dinglasan v. Cabiles et al.*, 2009 CanLII 14570 (ONSC), paragraph 13

The court also held that the quantum of fees sought by the husband could not have been within the expectation of the applicant when the application was brought. Justice Wilson then fixed what she described as a reasonable sum for the costs which were awarded to the respondents, payable by the applicant personally.

No doubt the fees charged were excessive, but guardianship litigation can be remarkably expensive. However, Justice Wilson was also likely motivated by the fact that the applicant was a person of modest means who simply wanted to see her sister. The courts have become all too cognizant of the cost of litigating and, as a result, ensuring that the "middle-class" have access to justice. As such, the "reasonable expectations" of a party(s) provides the court with a convenient means (or excuse depending on your perspective) to fix a more "reasonable" quantum for costs. Counsel would do well to remember the "reasonable expectations" of the party(s), not to mention the court, when dealing with individual of modest means or an estate of modest value.

Draper v. Fader[56]

The applicant, Trudy Draper ("Trudy"), was the sister-in-law and a former attorney for property and personal care of the respondent, Alma Gornicki ("Alma"). Rose Fader ("Rose") was Alma's personal care and personal support worker. Trudy brought an application seeking some 22 grounds of relief. She sought, for example, an accounting from Rose, suspension of the February 2009 grant of power of attorney by Alma in favour of Rose, preservation of Alma's property and a capacity assessment.

However, the application was halted in its tracks when a qualified capacity assessor gave the opinion that Alma had capacity to manage her property, to name a new power of attorney in February 2009, and to instruct counsel. As a result, the only issue before Justice Parayeski was the issue of costs.

Counsel for Trudy argued that the "usual" rule that costs follow the cause should not apply despite the fact that the application was wholly successful (except that of Rose being found not to be an appropriate person to serve as Alma's attorney for personal care, given she was Alma's

[56] 55 E.T.R. (3d) 205 (Ont. S.C.J.)

caregiver). According to Trudy's counsel, there were suspicious circumstances that existed at the time the application was commenced that were sufficiently serious, or potentially serious, to warrant Trudy bringing her application. Justice Parayeski wrote: "... while it is true that it is often hindsight that rationalizes an unsuccessful party being obliged to pay a successful litigant, such is not the normal result in cases addressing power of attorney issues".[57] Justice Parayeski accepted that the appropriate approach in these types of cases was that unless the applicant had acted unreasonably or in bad faith, he or she should be granted his/her costs out of the estate and, it follows, not required to pay anyone else's costs.

Justice Parayeski went on to note that this approach was not a hard and fast rule to be "slavishly followed in all similar cases".[58] According to Justice Parayeski, the existence of such a rule should not and would not derogate from the broad discretion that rests in the court to address costs. However, in the case before him, Trudy was not unreasonable in bringing her application. Moreover, there was no evidence of bad faith on the part of Trudy. As such, Trudy was awarded her costs out of the estate on a partial indemnity basis.

Concerning Rose's costs, the question before the court was whether the estate should pay her costs. Justice Parayeski wrote: "[w] hile in many ways she is responsible for the existence of 'suspicious circumstances' mentioned above, she would not likely have been involved in this litigation but for her role as attorney for property. Accordingly, it is fair and appropriate that she be paid her costs on the full indemnity scale out of the Estate of Gornicki".[59]

This is a significant decision in terms of power of attorney disputes. The upshot seems to be that hindsight should not be used as a crutch by the courts when awarding costs. Moreover, unless the applicant acted unreasonably or in bad faith when faced with suspicious circumstances early on, costs should be payable out of the incapable's estate. However, if suspicious circumstances existed, which were not immediately or adequately addressed by Rose, and Trudy ultimately settled her application when a capacity assessment was provided, why is it that Trudy was not

[57] *Ibid.*, paragraph 6
[58] *Ibid.*, paragraph 7
[59] *Ibid.*, paragraph 8

entitled to an elevated cost award (substantial indemnity basis if not full indemnity)? Trudy seems as innocent as Rose and only motivated by her concern for her sister-in-law.

Futerman v. Futerman[60]

Harold Futerman ("Harold") was 75 years old and a person under disability. He had a long history of mental illness stemming back to 1985. At the time of the costs hearing, he was suffering from severe dementia and aphasia. He was unable to speak or communicate in any reasonable way and he was confined to a wheelchair.

The applicant was Harold's wife and claimed to be his guardian for personal care. His brothers, Jack Futerman ("Jack") and a second brother who was deceased, had been his former guardians of personal property until Harold requested that the PGT assume that role. Harold's spouse brought an application to remove the PGT as Harold's guardian of property and to appoint herself in that role. She had proposed that Harold live with her and that she would receive financial support from his estate. Jack opposed the application on the basis that Harold's medical condition required him to receive institutional medical care.

Ultimately, with the assistance of the court, the parties resolved the issues with the PGT remaining as Harold's guardian of property. Moreover, Harold would continue to reside at Baycrest with further financial information concerning Harold's assets shared by the PGT. However, the issue for support for Harold's spouse was not resolved and was ordered to proceed to a hearing.

Jack sought substantial indemnity costs from his brother's estate. Harold's spouse also claimed costs on a substantial indemnity basis from her husband's estate. The PGT agreed that Jack's evidence and participation in the application were necessary and did not object to Jack's claim for substantial indemnity costs from his brother's estate. However, the PGT objected to the cost claimed by Harold's spouse contending that the main thrust of the application was not successful. The PGT also contended that the application for an accounting was premature.

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[60] [2009] O.J. No. 1529 (Ont. S.C.J.)

Justice Roberts ultimately held that Harold's spouse should not receive full indemnity for her costs. Justice Roberts found that the principal focus of the spouse's application was to be appointed guardian of property for Harold and to have him live with her. However, based on evidence from Harold's physicians, the applicant's proposal appeared to be contrary to Harold's best interests and did not have a reasonable chance of success. Moreover, there was no sworn evidence filed by Harold's spouse to support a request to remove the PGT as guardian of property. Harold's spouse also did not have the requisite abilities to manage Harold's property and, in fact, some of her actions created enormous, unnecessary expense to the estate. Justice Roberts wrote: "Based on the evidence filed, it is highly unlikely that Mrs. Futerman would have been appointed as guardian of property for Harold Futerman had the application proceeded".[61]

While Justice Roberts was not prepared to order that Harold's spouse pay Jack's costs, she declined to award Harold's spouse her costs of the application:

> I am of the view that the application ought not to have been brought in this manner. If Mrs. Futerman wanted to seek increased support and financial information for her support claim, she should have brought an application for that relief instead of an application for guardianship of property and respecting the residence of Harold Futerman, which was without merit. Had she done so, the participation of Jack Futerman and his attendant costs would likely have been unnecessary.[62]

[61] *Ibid.*, paragraph 18
[62] *Ibid.*, paragraph 20

Bennett v. Gotlibowicz[63]

In an earlier endorsement, Justice Brown had dealt with issues relating to both the guardianship of the property and personal care of Irene Gotlibowicz ("Irene") and invited the parties to file written cost submissions.

Justice Brown considered the general principles governing costs awards in capacity litigation before considering the case before him. In *Fiacco v. Lombardi*[64], Justice Brown wrote in part:

> The exercise of the court's discretion in respect of cost claims in capacity litigation should reflect the basic purpose of the SDA – to protect the property of a person found to be incapable and to ensure that such property is managed wisely so that it provides a stream of income to support the needs of the incapable person: SDA, Sections 32(1) and 37. To that end, when faced with a cost claim against the estate of an incapable person, a court must examine what, if any, benefit the incapable person derived from the legal work which generated those costs.[65]

Justice Brown also noted that *McDougald Estate v. Gooderham* was equally applicable to capacity litigation. As such, the general cost rules for civil litigation applied equally to guardianship litigation – the "loser pays" principle - subject to a court's consideration of all relevant factors under Rule 57. According to Justice Brown, 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 was no reason why such a discipline should be absent from guardianship litigation.

In considering whether the PGT was entitled to its costs, Justice Brown held that Irene received a significant benefit for the legal work performed by the PGT. Her family members were unable to co-operate to make treatment decisions on her behalf such that Justice Brown appointed the PGT as her guardian of the person. The motion material filed by the PGT was comprehensive and greatly assisted in understanding the incapable's medical condition and treatment needs. Therefore, Justice Brown was satisfied that the PGT should receive an award of costs for the motion payable out of the incapable's estate.

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[63] [2009] O.J. No. 3781 (Ont. S.C.J.)
[64] [2009] O.J. No. 3670 2009, Can LII 46170 (ONSC)
[65] *Ibid.*, paragraph 3

After taking into account the factors enumerated under Rule 57 and the principles set by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario*[66], Justice Brown held that the quantum of costs requested by the PGT was reasonable. Justice Brown also found the legal work performed by BMO Trust as guardian of Irene's property in respect of the proceedings provided value her since it involved, in essence, "a report to the court on the state of the administration of her property and the determination of several property management issues".[67] BMO Trust's reasonable legal fees were ordered paid by the estate. However, Justice Brown did not think it was necessary to fix the amount. The appropriate form in which to review the reasonableness of the legal fees incurred by BMO Trust in respect of the motion as guardian of the incapable's property was on a passing of accounts.

Guideposts: A Practitioner's Guide (in no particular order)

1. Characterize estate applications as interpretation applications or applications for advice and direction.

2. Portray litigation as arising out of actions and omissions of the testator. However, do not "oversell" your case as you risk alienating the judge.

3. If an application can be characterized as benefitting the entire estate, a litigant is more likely to receive a favourable cost award.

4. Remind the court that proportionality is not akin to hindsight. Proportionality is over-resourcing a file having regard to what is at stake.

5. Where the parties are of modest means or the estate of modest value, the court will likely place greater weight on the "reasonable expectations" of the parties.

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[66] (2004), 71 O.R. (3d) 291 (C.A.)

[67] *Bennett, supra,* note 62, paragraph 11

6. Hard-fought litigation is not "reprehensible" behaviour *per se* and will not automatically attract an elevated cost award. However, it will doubtless result in a "robust" award of partial indemnity costs. Therefore, be prepared and prepare your client - tough or inflexible positions have their price.

7. You can safely assume that the costs associated with "risky litigation" will not be paid out of the estate.

8. Learn to control your client especially in emotionally driven or family dynamics litigation.

9. Avoid frivolous will challenges. This is especially true as summary judgment motions are more readily granted (and more likely to be brought) under the new rules effective January, 2010.

10. Take a good hard look at your case at the beginning, after the exchange of affidavits or pleadings, examinations, court appearances, and pre-trials. The more you learn, the more you should proceed with caution.

11. Be willing to abandon your case if and when necessary or find a creative way to settle a weak case. Watch out for Rule 23 (discontinuance and withdrawal) cost consequences.

12. Avoid "boilerplate" or "kitchen sink" notice of objections.

13. Particularize your will challenge objections. Only plead objections that will allow you to later claim that you had reasonable grounds to object and commence litigation. Be prepared to jettison objections you cannot prove on a balance of probabilities.

14. Marshall limited resources and concentrate on winning arguments and meritorious positions. The court will be more likely reward you with a favourable cost award.

15. Advise clients to tone down emotional responses, as they will only cloud sound judgment and likely lead to findings of "scorched earth" litigation, "reprehensible" behaviour and higher cost awards.

16. File a detailed bill of costs with tasks performed, hours spent and hourly rates. Take your time and be prepared to produce your redacted dockets. Detailed bills of costs give the court insight into the parties' "reasonable" or "unreasonable" expectations.

17. Request that the other side(s) delivers a detailed bill of costs.

18. Exchange bills of costs before you prepare written cost submissions. The more you know, the better you can tailor your submissions.

19. Make a Rule 49 offer as soon as realistically possible. Comply with the formal requirements - in writing, 7 days before the hearing and not withdrawn before hearing. Make sure your offer is a real offer and offers a compromise.

20. Even if it is not a Rule 49 offer, the court will take all settlements offers into consideration although not bound by Rule 49 cost consequences. The court appreciates the effort to settle.

21. Mediate – in most cases, the sooner the parties step outside of the court process and settle, the better. Parties can agree on their costs at the mediation with the estate paying all parties' reasonable costs. Courts will rarely interfere with consent settlements if a motion to approve the settlement is required (NB: watch out for settlements involving minors).

22. Estate trustees are not given a free pass. A client will not be able to hide behind the title of "estate trustees" if his/her actions attract the ire of the court. Costs can be paid personally.

23. Do not allow the parties' personal animosity to overwhelm the litigation. Estate and guardianship litigation is not about "payback" or righting past family "wrongs" or "slights". Litigation is not a "cure-all". In fact, it is anything but.

24. Where suspicious circumstances are ultimately answered or explained away in power of attorney disputes, the applicant should be prepared to call it a day. The applicant will have a better chance that his/her partial indemnity costs will be paid out of the incapable's estate if he/she concedes defeat earlier, rather than later in the litigation process when the opposing party will have invested significant time and dug in his/her heels.

25. Full indemnity costs will likely be ordered by the court where an "innocent party" litigant remains neutral and his/her participation is needed for a full evidentiary record to be disclosed.

26. In power of attorney disputes, the "loser-pays" principle apples. At a minimum, a party(s) will have to demonstrate to the court that he/she were acting in the best interests of the incapable.

27. In power of attorney disputes, consider other options: involving the PGT; mediation (for example, to ensure visitation or consultation); applications for directions under the *Substitute Decisions Act*.[68]

[68] S.O. 1992, Chapter 30, as amended

28. Be helpful and accommodating to self-represented litigants. Conduct yourself professionally throughout and lend a hand where needed. The judge will notice and look more favourably on a cost award.

29. Ensure there are reasonable grounds on which to rectify testamentary documents. Do not overreach. Rectification is not a panacea.

30. Choose your battles carefully. Endless litigation (motions, appeals, etc.) will attract the ire of the courts.

31. Litigation guardians are treated no better or worse than other litigants. Litigation guardians can be personally liable for costs.

32. Rude, insulting and belligerent behaviour will not automatically result in an elevated cost award. Reprehensible, scandalous or outrageous behaviour is required (but your reputation will be in the dumpster).

33. Depending on the judge, unless the applicant in a power of attorney dispute has acted unreasonably or in bad faith, costs will be paid out of the incapable's estate.

34. If a litigant, including a litigation guardian, is on the hook for costs, but impecunious, ensure that appropriate evidence of impecuniosity is filed with the court. Take nothing for granted.

35. On an application to pass cost or when fixing the costs of an estate trustee during litigation at first instance, fix the scale but not the quantum. Quantum can be determined by the parties at a later date.

36. Follow and subscribe to allaboutestates.ca.