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ESTATE LITIGATION AND COSTS: PROTECTING YOUR CLIENT (AND YOURSELF)

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SECTION I: INTRODUCTION

At the outset of litigation, costs can sometimes be a distant thought, as the reality of being saddled with the fees of one's opponent have not yet become tangible. However, judges are lending more consideration to costs, and counsel should be increasingly mindful of that. Years ago costs were not really an area that justified acute attention. Nevertheless, with the development of this area in the estates context, it becomes clear that this last-leg of combat requires strategic thinking from the inception of litigation. The conduct during the proceedings can have a large determination as to how costs are finally apportioned.

The traditional approach to costs awards was altered dramatically by the seminal case of *McDouglad Estate v. Gooderham,* [1] whereby, Justice Gillese ushered in a shift towards the now familiar "loser pays" principle common in civil litigation. Prior to this point, estate litigators did not have very much to fear regarding costs awards, since the norm was to have the costs of litigation paid out of the estate. As such, there was very little risk, and the possibility of large reward, and the estate itself would end up paying all costs.

However, recent decisions have reflected a trend that has taken a more active approach in shielding the estate from payment of costs, and shifting cost consequences onto the parties themselves and even counsel. Increasingly, costs follow the event, and awards are being given on a substantial and full indemnity basis against the unsuccessful litigant.

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[1] *McDougald Estate v. Gooderham*, 2005, CarswellOnt 2407, 17 E.T.R. (3d) 36 (Ont. C.A.).

This paper seeks to bring further attention to the discourse of costs in estates litigation, so that counsel can better protect their clients and themselves from lofty cost awards. The paper will briefly review the statutory basis for costs and move into a review of the traditional and modern approaches to costs awards. Following this, factors that are considered in the analysis of cost awards will be examined; namely conduct of the losing party and their counsel, proportionality, reasonable expectations, and offers to settle - all of which will assist estate lawyers in the litigation process. The final section will be a brief discussion of practice tips. Essentially, the "loser pays" mentality abounds within the realm of estate litigation, and warrants a more astute approach to understanding the factors that are considered in relation to costs awards, which will translate into better advice imparted to clients by their lawyers.

SECTION II: GUIDING PRINCIPLES

Section 131 of the *Courts of Justice Act*[2] gives discretion to the courts in awarding costs. Specifically, section 131(1) states:

> 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. R.S.O. 1990, c. C.43, s. 131 (1).

Additionally, Rule 57.01(1) of the *Rules of Civil Procedure*[3] provides various criteria that courts employ when determining the entitlement of a party as to the quantum of costs. Rule 57.01(1) states that:

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[2] *Courts of Justice Act*, R.S.O. 1990, CHAPTER C.43. s. 131.
[3] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 57.01(1).

> **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;
> (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.

Furthermore, Rule 1.04(1.1) takes into account proportionality, stating that:

> 1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.[4]

[4] *Ibid.* Rule 1.04(1.1).

SECTION III: THE PAST AND PRESENT

A. The Traditional Approach

As stated earlier, the traditional approach dictated that costs would be covered by the estate itself; this is illustrated in the 1863 decision of *Mitchell v. Gard*[5] and the 1907 case of *Spires v. English.*[6] Both cases detail the then-norm of costs being borne by the estate itself. Public policy informed this approach in the sense that access to justice was promoted, and the court costs would not act as a deterrent for pursuing a claim. Brian Schnurr in *Estate Litigation*, states that "…in view of these 'public concerns', the courts have recognized that a party should not have cause to hesitate to bring such issues before the court due to fears of having to bear significant legal costs in so doing."[7] However, in providing a consequence-free environment in an area of law where emotions run high, the table becomes set for the pursuit of frivolous litigation, the unjustifiable depletion of the estate's value, a lessening of the opportunity for settlement, a promotion of litigiousness, and an increase in the volume of cases before the court.

B. The New Era

The Ontario Court of Appeal in *McDougald*[8] welcomed a modern approach to costs in estate litigation. As long as public policy considerations did not interfere, costs would flow as they normally do in other areas of civil litigation. The loser pays concept in this area of law was herein popularized.

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[5] *Mitchell v. Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280.
[6] *Spiers v. English*, [1907] P. 122. (Eng. P.D.A.).
[7] Schnurr, B., Estate Litigation, looseleaf, 2nd ed. (Toronto: Thompson Carswell, 2010).
[8] *Supra* note 1.

This shift addresses the concerns previously referred to in terms of litigants bringing frivolous claims against the estate, and consequently depleting the estate. It creates an arena where risk is a real factor, and as such, litigants and their counsel would have to evaluate their positions more carefully before advancing their claims. Justice Gillese, for the majority of the Court of Appeal, states that:

> The modern approach to awarding costs, at first instance, in estate litigation recognises the important role that courts play in ensuring that only valid wills executed by competent testators are propounded. It also recognises 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.*[9]

The Court of Appeal limits costs payable out of the estate to two situations; the first situation is where litigation is necessary due to the fault of the testator's actions or omissions, and secondly, where litigation is necessary for the proper administration of the estate.[10]

In the 2009 decision of *Salter v. Salter Estate*[11], Justice Brown, while harkening to key aspects of the *McDouglad* decision, concluded that estate litigation is a "subset of civil litigation" and "like any other form of civil litigation, operates subject to the general civil litigation costs regime

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[9] *Supra* note 1 at para 85. [Emphasis added].
[10] Upenieks, Ed and Kiran Gill "Costs in Estate Litigation: A Paradigm Shift in Approach" (2011) Law Society of Upper Canada, 14th Annual Trusts and Estates Summit at page 7.
[11] *Salter v. Salter Estate*, 2008 CarswellOnt 4902 (endorsement dated March 6, 2009); *Salter v. Salter Estate*, 2009 CanLII 28403 (ON S.C.) (further costs endorsement dated June 4, 2009).

established by section 131 of the *Courts of Justice Act* and Rule 57 of the *Rules of Civil Procedure*."[12]

The *Salter* case involved a motion brought by a wife against the estate of her ex-husband, for a declaration that she was the sole beneficiary of various assets owned by the husband prior to his death. In *Salter*, Justice Brown found that:

> […] parties cannot treat the assets of an estate as a kind of ATM machine from which withdrawals automatically follow 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 charge to notional dynamics of most pieces of *estate litigation an even greater need exists to impose the discipline of the general costs principles of 'loser pays' in order to inject some modicum of reasonableness into decisions about whether to litigate estate related disputes*.[13]

SECTION IV: FACTORS UTILIZED IN THE ANALYSIS OF COSTS

A. Conduct

i) Regarding the Losing Party

Many recent decisions have embraced *McDougald*, and have shown the Court's penchant for saddling the losing party with costs. This is typically linked with specific conduct and behaviour as exhibited by the losing party. This notion of conduct becomes a pivotal factor in the modern costs analysis.

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[12] *Salter v. Salter Estate*, 2009 CanLII 28403 (ON SC) at paras. 5 and 6.
[13] *Ibid* at para. 6. [Emphasis added].

In *Smith v. Rothstein*[14], Mr. Smith brought a motion to expunge an Amended Notice of Objection filed by his sister, Ms. Rothstein. The dispute regarded a Will and 5 codicils of their mother.

In April of 2010, Justice Brown granted the motion for partial summary judgment as sought by Mr. Smith, and dismissed the Amended Notice of Objection of his sister, in regards to the Will and the first 2 codicils.[15] Directions were given in relation to determining the validity of the third and fourth codicils. It was found that the Notice of Objection was based on a multitude of allegations, including questions surrounding the mother's mental capacity, and Mr. Smith's undue influence over his mother, all of which were unfounded and lacked evidentiary support.

In July 2010, Justice Brown dealt with the cost submissions of the parties in *Smith*[16]. Mr. Smith claimed costs of $840,718.14 on a full indemnity basis and sought the court's direction that the cost be borne by the sister personally, and not by the estate. In response, Ms. Rothstein advanced that the costs should be on a partial indemnity basis, and in the amount of $260,747.14.[17] in determining costs, Justice Brown states that:

> […] only where parties can demonstrate that *reasonable* grounds existed to question the execution of the will or the competency of the testator, or in the presence of a *reasonable* dispute about the interpretation of a testamentary document, will the courts consider whether it is appropriate to award costs of the litigation from the estate, rather than apply the "loser pays" principle. The costs inquiry will therefore be specific to the facts and issues raised in each particular

[14] *Smith v. Rotstein*, 2010 ONSC 2117 (CanLII).
[15] *Ibid.*
[16] *Smith v. Rotstein*, 2010 ONSC 4487 (CanLII).
[17] *Ibid.* at para. 2.

> piece of estate litigation – no general class exceptions from the standard civil rules of costs exist for types of estate litigation.[18]

When addressing the appropriate scale of costs, Justice Brown refers to the Court of Appeal decision of *Davies v. Clarington (Municipality).*[19] In *Davies*, the action arose out of a train derailment that took place in Bowmanville; the settling defendants were appealing a full indemnity cost award in the amount of $509,452. There, the Court of Appeal substituted an award of $300,000, stating that the original award was unreasonable and that the settling defendants could not have *expected* that they would be faced with an award of that magnitude. The Court of Appeal in *Davies* references a situation where full indemnity costs are justified, namely where the unsuccessful party had engaged in *malicious or counter-productive behaviour*, including "harassment of another party by the pursuit of fruitless litigation."[20]

In the same vein, the court in *Smith,*[21] found that Ms. Rothstein's behaviour and conduct were reprehensible, and justified elevated costs. Her allegations lacked any factual basis and her conduct while in litigation was unreasonable and unsubstantiated. Justice Brown goes on to state that:

> While the will challenge process services 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*

[18] *Ibid.* at para. 10.
[19] *Davies v. Clarington (Municipality) (2009),* 100 O.R. (3d) (C.A.)., 2009 ONCA 722.
[20] *Apotex v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. C.J.) cited in *Ibid.* at para. 45.
[21] *Supra* note 16.

> *costs 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[…][22]

Justice Brown then turns to the issue of quantum and states that the courts are obliged to consider what is reasonable in the circumstances. While employing principles of proportionality, Justice Brown ordered full indemnity costs of $707,173.00 , together with disbursements of $30,407.29, payable to Mr. Smith by Ms. Rothstein personally.

Ms. Rothstein appealed this decision to the Court of Appeal[23], however the Court of Appeal only remitted for Justice Brown's consideration "the issue of the quantum of the fees claimed,"[24] and indicated that Justice Brown did not give Ms. Rothstein's critiques about the fees enough consideration. Ms. Rothstein's leave to appeal to the Supreme Court was dismissed.

At the direction of the Court of Appeal,[25], Justice Brown undertook a more detailed analysis of Ms. Rotstein's cost critiques, and gave them "adequate consideration."[26] In the end, Justice Brown "concluded that the full indemnity cost he [Mr. Smith] claimed are fair and reasonable."[27] Ms. Rothstein was left with a sizable cost award against her, because as Justice Brown states,

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[22] *Supra* note 16 at para. 50 [Emphasis added].
[23] *Smith Estate v. Rotstein* ,2011 ONCA 491 (CanLII).
[24] *Ibid.* at para. 66.
[25] *Smith v. Rotstein*, 2012 ONSC 4200 (CanLII).
[26] *Ibid* at para. 52.
[27] *Ibid.*

"the lack of reasonableness in the positions advanced by Ms. Rothstein factored in the award against her personally."[28]

In the *Estate of John Johannes Jacobus Kaptyn*[29], the court witnesses the "never-ending saga of two brothers [Henry and Simon] incessantly fighting over their father's sizeable estate."[30] Justice Lederer concludes that the litigation was indeed a result of the testator's actions and omissions, and as such one of the exceptions to the "losers pay" principle was invoked. The Will challenge in this case was not frivolous, and was based on reasonable grounds. As such, it would be proper for costs to be paid from the estate itself. Costs were awarded against the estate on a full indemnity basis and amounted to $1,940,889.70.

Following this award came a series of applications and motions in the *Kaptyn*[31] case. The costs sought were connected to 4 days of argument relating to 2 Interpretation Applications before Justice Brown, coupled with the costs of 14 associated pre-hearing motions heard by other judges. These other judges had reserved the costs of those motions to the judge hearing the Interpretation Applications, namely Justice Brown.[32] While making his finding as to costs, Justice Brown states that:

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[28] *Ibid.* at para. 50.
[29] *The Estate of John Johannes Jacobus Kaptyn,* (2008), 43 E.T.R. (3d) 219 (Ont. S.C.J.).
[30] Harvey, Ian, "Blended families can complicate estates" The Bottom Line (August 2012) at 6.
[31] *Kaptyn v. Kaptyn*, 2011 ONSC 542 (CanLII).
[32] *Ibid.* at para. 1.

> Litigious families like the Kaptyns cannot reasonably expect that unlimited judicial resources are available to devote to their internecine quarrels. Judicial resources in the Toronto Region are not infinite. On the contrary, the Toronto Region lacks an adequate judicial complement to meet the demands of present day litigation.[33]

Justice Brown finds that, Henry and Simon were not entitled to recover from the Primary or Secondary estate the full amount of costs claims, which were approximately $1,639,000, and $1,164,000 respectively. Instead, they were awarded $350,000 each. Justice Brown held that the "difference between the total amounts claimed and the amounts that [were] awarded must be borne personally by each Henry Kaptyn and Simon Kaptyn."[34]

Following the Interpretation Motions, Justice Strathy, as he was then, was appointed to case manage the estate litigation. In 2012, he provided a cost order dealing with various proceedings personally heard throughout 2011 and 2012. [35] Within his reasons, he spoke to the way that behaviour can influence cost awards. He indicated that Henry had "generally taken an unreasonable, self-interested and poorly informed position" while Simon had "generally taken a more reasonable, balanced and informed position." [36] It was found that it was reasonable that the former "should bear the substantially greater share of the costs."[37] While the cause of litigation was the testator himself, the actions of the beneficiaries helped to dictate how costs were apportioned.

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[33] *Ibid.* at para. 33.
[34] *Ibid.* at para. 51.
[35] *Kaptyn v. Kaptyn* , 2012 ONSC 3766.
[36] *Ibid.* at para. 11.
[37] *Ibid.*

In the recent decision of *Zandersons Estate (Re),* Justice MacPherson provides reasons that illustrate the 'loser pays' approach. In this case, the Applicant had a financial interest in the estate, which gave rise to a conflict in being able to fairly and impartially administer said estate. The deceased's grandmother came forward and consented to be appointed as Estate Trustee, and additionally stated that if she was also found in conflict, a neutral lawyer should be appointed. The Applicant refused this proposal and continued through the court system. The Applicant was not successful and as a result of taking an unreasonable position and rejecting third-party alternatives, the court held that the Respondents were entitled to costs.[38] The Applicant submitted that costs should be paid out of the estate. However, given that the Applicant was in a conflict of interest, it was reasoned that she should not have maintained her position that she be appointed Estate Trustee.

While the Applicant was held to bear responsibility for "persisting with her unreasonable position" the court did not find that this justified costs being awarded on a substantial indemnity basis.[39] The Judge went on to reject any suggestion that the costs be borne by the estate, as the necessity of the motion was based on the "unreasonable position taken by the Applicant" and she was required to make the payment personally.[40]

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[38] *Zandersons Estate (Re),* 2011 ONSC 6755 (CanLII) at para. 6.
[39] *Ibid.* at para. 13.
[40] *Ibid.* at para. 14.

The foregoing cases show how a client's behaviour and position can leave them saddled with substantial or partial indemnity costs. While there are times when costs may be ordered to be paid by the estate, clients cannot escape the consequences of reprehensible behaviour and unreasonable positions as seen in *Smith, Kaptyn,* and *Zandersons*, in which case they will not be reimbursed for their costs, and may even be ordered to personally pay costs.

ii) Regarding the Lawyer

Costs can be covered by the estate itself, or by the losing party, however, *counsel* ought to be aware that they too can also personally fall victim to a lofty cost award. Specifically, the *Rules* hold that:

> **57.07** (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,
> (a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;
> (b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and
> (c) requiring the lawyer personally to pay the costs of any party. O. Reg. 575/07, s. 26.
> (2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court. R.R.O. 1990, Reg. 194, r. 57.07 (2); O. Reg. 575/07, s. 1.
> (3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order.

In 2012, the Ontario Court of Appeal clarified costs orders as made against lawyers, in *Galganov v. Russell.*[41] The case does not pertain to estates matters specifically, but the principles are applicable. It was determined that counsel did not act in bad faith; however, his conduct during a constitutional challenge had caused unnecessary costs.

The Court of Appeal states that the "governing principles in awarding costs personally against a lawyer were set out by the Supreme Court of Canada in *Young v. Young*, where the Court states:

> The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay.[42]

The Court of Appeal made reference to *Carleton v. Beaverton Hotel Reflex,*[43] and the two part legal test of liability of a lawyer for costs contained therein. The first step is, "to inquire whether the lawyer's conduct falls within rule 57.07(1) in the sense that it caused costs to be incurred unnecessarily."[44] The second step is to use the "extreme caution principle" meaning that "these awards must not only be made sparingly, with care and discretion, only in clear cases and not

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[41] *Galganov v. Russell (Township),* 2012 ONCA 410 (CanLII).
[42] *Young v. Young* , 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3, at pp. 135-136 as cited in *Ibid.* at para. 13.
[43] *Carleton v. Beaverton Hotel Reflex* (2009), 96 O.R. (3d) 391 (Div. Ct.).
[44] *Supra* note 41 at para. 18.

simply because the conduct of the lawyer may appear to fall within the circumstances described in rule 57.07(1)."[45]

As highlighted in the case, counsel's defence may be limited based on the solicitor-client privilege, which counsel must maintain. The Court of Appeal has said that the conduct of the client and the lawyer must be assessed separately, as counsel "should not be responsible for advancing a weak case if instructed to do so by Galganov and Brisson [the clients]."[46] Additionally, further guidance was given that hindsight cannot be used to evaluate the lawyer's actions. Counsel in this case did suffer from a lack of preparation which did cause court time to be wasted. The Court of Appeal states that "even if Brickey [the lawyer] were negligent, his conduct would [not] merit an award of costs against him personally, given the dictate of the Supreme Court of Canada in *Young*."[47] They continue that "the rule was not intended to allow the frustration of the opposing party's counsel to be taken out against a counsel personally because he or she went down a series of blind alleys with his or her clients' instructions or approval."[48] As a cautionary note, this finding does not mean that counsel will be fortunate enough to escape financial liability every time.

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[45] *Supra* note 43 as cited in *Supra* note 41 at para. 22.
[46] *Supra* note 41 at para. 29.
[47] *Ibid.* at para. 42.
[48] *Ibid at* at para. 43.

In *Teffer v. Schaefers,*[49] Justice Fragomeni deals with a motion seeking an order authorizing the interim appointment of an institutional trustee, to handle the affairs of Ms. Schaefers, an incapable person, along with the removal of her Attorney, who happened to be her solicitor Peter Verbeek. There were concerns regarding Ms. Schaefers' capacity, and as such, representations were made by the Public Guardian and Trustee, leading to section 3 counsel being appointed for Ms. Schaefers, in accordance with the *Substitute Decisions Act* .[50]

Justice Fragomeni finds that there was "strong and compelling evidence of neglect on the part of Mr. Verbeek" and that his "conduct clearly demonstrates an inability to understand and perform his duties diligently."[51] During the analysis of costs, section 3 counsel sought substantial indemnity costs against Mr. Verbeek personally. Despite Mr. Verbeek's attestations that costs ought to be paid out of the estate, Justice Fragomeni found that Mr. Verbeek failed to acknowledge Ms. Schaefers' incapacity, to act diligently, and comply with court orders and the reasonable requests of section 3 counsel; all of which "unduly and unnecessarily lengthened the proceedings."[52] This resulted in a substantial indemnity cost award against Mr. Verbeek personally, requiring him to personally pay $64,429.62 of the total $124,429.62 cost award. [53]

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[49] *Teffer v. Schaefers* 2009 CanLII 21208 (ON .S.C.).
[50] *Substitute Decisions Act*, 1992, S.O. 1992, CHAPTER 30, section 3.
[51] *Teffer v. Schaefers*, 2008 CanLII 46929 at para. 52.
[52] *Supra* note 49 at para. 41
[53] *Ibid.* at para. 57.

In *Miksche Estate v. Miksche*[54], the law firm Polten & Hodder was potentially liable for legal costs when their conduct garnered significant rebuke from Justice Brown. The conduct of counsel was classified as an attempt "to perpetrate a naked cash grab" on his elderly clients,[55] and described as "scandalous and in breach of their duties as officers of this court."[56] Despite the harshly worded ruling and possible award against the lawyer personally, the issue of costs was ultimately settled amongst the parties themselves. Nevertheless, counsel ought to be mindful of their actions, ethics, and strategy when engaging in their practice.

B. Proportionality

The ubiquitous concept of proportionality is the starting point for all costs awards in estate litigation, and is codified in section 131 of the *Courts of Justice Act*, and Rules 57.01. Additionally, Rule 1.04(1.1) was enacted on January 1, 2010 during an extensive overhaul in response to criticisms of the litigation system; these changes endeavoured to better incorporate proportionality.

Proportionality is examined by Justice Brown in a recent commercial list decision where he carries out a detailed analysis of costs in *Harris v. Leikin Group Inc*.[57] His honour states that "the overall objective of fixing costs is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual

[54] *Miksche Estate v. Miksche* 2009 CarswellOnt 6770.
[55] *Ibid.* at para. 75.
[56] *Ibid.* at para. 2.
[57] *Harris v. Leikin Group Inc.* , 2013 ONSC 3300.

costs incurred by the successful litigant."[58] In examining what this means, Justice Brown takes into account the "use of associates, students, and clerks" when assessing if there are "signs of disproportionality."[59] In this particular case, there was nothing "excessive given the factual density of the issues." [60] The case is useful in principle, in the sense that it illustrates how the so-called factual density of a dispute, the time period across which facts extend, and the type of claim being made, can be considered when making costs awards.

Justice Brown, during his 2012 reconsideration of the costs award in *Smith,*[61] as directed by the Court of Appeal, held that "proportionality is met in the sense that the response that Mr. Smith had to construct in response to his sister's objections were proportionate to the issues which she had put in play."[62]

In the case of *Pytka v. Pytka*[63], involving an application for dependent relief commenced by the testator's daughter and minor granddaughter, the costs award was reduced substantially during the proportionality analysis. The principle of proportionality, is said to "require a demonstration by the party seeking an award of costs that reasonable efforts were made to delegate, where feasible, work from a higher-billing lawyer to a lower-billing one, or to articling students and

[58] *Ibid.* at para. 5.
[59] *Ibid.* at para. 27.
[60] *Ibid.* at para. 27.
[61] *Supra* note 25 at para 50.
[62] *Ibid.*
[63] *Pytka v. Pytka* 2010 ONSC 6406; CarswellOnt 8659.

law clerks."[64] The Bill of Costs, as provided showed that "no such delegation occurred in this case."[65] A 50:50 split of time between senior and junior lawyers was applied in this case and seen as reasonable. Substantial indemnity costs in the amount of $86,014.00 were sought, but Justice Brown awarded $59,700.00 against the loser.

In the July 2010 *Smith*[66] decision, as discussed above, Justice Brown, in his costs endorsement, references Justice Gray in *Cimmaster Inc. v. Piccione (c.o.b Manufacturing Technologies Co.)*[67] stating that:

> [t]he principle 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 a 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 were a successful party has over-resourced a case having regard to what is at stake, but it should not result in a reduction of costs otherwise payable in these circumstances.*[68]

It may take one counsel but an hour to make a myriad of allegations in the estates context, and yet take the opposing counsel hundreds of hours to fully address all of them. As such, counsel should be aware of how broadly they cast their litigation net, when making claims. On the other hand, counsel must also be aware that is not necessary to respond in the most thorough and

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[64] *Ibid.* at para. 21.
[65] *Ibid.* at para. 21.
[66] *Supra* note 16.
[67] *Cimmaster Inc. v. Piccione (c.o.b. Manufacturing Technologies Co.)* 2010 ONST 846.
[68] *Ibid.* at para 19.[Emphasis added].

detailed way to every allegation made against their client. Every action has a reaction, and when it comes to estate litigation, practitioners must ensure that their *reaction* is proportional to the force exuded against them.

C. Reasonable Expectations and a Bill of Costs

Coupled with proportionality in trying to assess the quantum of costs awards, is factoring in the reasonable expectations of the losing party. It is logical that the losing litigant can expect that if they bring numerous issues forward, and spur a long drawn out legal battle, the costs will be higher against them. The Court of Appeal in *Boucher v. Public Accountants Council*[69], states that:

> The failure to refer, in assessing costs, to the overriding principle of reasonableness, can produce a result that is contrary to the fundamental objective of access to justice. The costs system is incorporated into the *Rules of Civil Procedure*, which exist to facilitate access to justice. There are obviously cases where the prospect of an award of costs against the losing party will operate as a reality check for the litigant and assist in discouraging frivolous or unnecessary litigation. However, in my view, the chilling effect of a costs award of the magnitude of the award in this case generally exceeds any fair and reasonable expectation of the parties… *In deciding what is fair and reasonable, as suggested above, the expectation of the parties concerning the quantum of a costs award is a relevant factor*.[70]

A document that can be of extreme utility in framing what is proportionate fair and reasonable as to the expectations of the losing party, specifically in the context of a large award, is *their* Bill of Costs.

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[69] *Boucher v. Public Accountants Council* 2004 CanLII 14579 (ON C.A.).
[70] *Ibid.* at paras. 37-38. [Emphasis added].

In his July, 2010 decision on costs in *Smith,*[71] relating to the original April 2010 action, Justice Brown states that:

> *One of the most effective ways to measure the reasonableness of the expectations of an unsuccessful party is to require that party to file a Bill of Costs as part of its costs submissions.* If the unsuccessful party's lawyers billed, or docketed, huge fees and incurred substantial expenses, then those level 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 that the court might award[72]

Later, at the appellate stage, the Court of Appeal stated that "there is no requirement for the losing party who is not seeking costs, to file a Bill of Costs although it is preferable that he or she does so."[73] As such, we see that a Bill of Costs can assist; if both parties expended the same amount on the "same legal steps, then arguably, that provides a measure of objective reasonableness, as well as benchmarking the reasonableness of expectations about a possible cost award if one loses."[74]

Without the Bill of Costs, it is difficult to field complaints regarding excessive costs. Justice Brown cites Winkler J., as he then was, who observed in *Risorto v. State Farm Mutual Automobile Insurance Co.,* that an attack on the quantum of costs where the Bill of Costs of the losing party is not before the court, "is no more than an attack in the air."[75]

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[71] *Supra* note 16.
[72] *Ibid* at para. 57. [Emphasis added].
[73] *Supra* note 23 at para. 50.
[74] *Supra* note 25 at para. 58.
[75] *Risorto v. State Farm Mutual Automobile Insurance Co*. (2003), 64 O.R. (3d) 135 S.C.J at para. 10 as cited in *Supra* note 25.

Justice Brown inquiries generally in his 2012 reconsideration of costs in *Smith* that:

> If reasonableness is an objective standard, in the absence of information about the amount of costs expended by the losing side to what sources can a motion judge look for guidance in discerning the concrete tangibles of objectively reasonable costs?[76]

There are qualitative factors that are meant to assist with determining what is reasonable in relation to fees claimed. The *Rules* provide qualitative considerations such as the unsuccessful party's expectations, complexity of the case, the importance of the issues, vexatious behaviour of litigants, and proportionality among other factors, all of which are useful. However, Justice Brown rightly asks, "how does one transform, in an objective fashion, these qualitative factors into quantitative terms?"[77] With the absence of a cost grid, the "general principles of the *Rules*, while helpful, provide no concrete dollar and cents guidance on how much time or money objectively should be spent on any particular step in a proceeding."[78] As such, losing counsel should be willing to assist in the assessment of costs and uncovering reasonable expectations by filing their Bill of Costs.

D. Offers to Settle

Another tool used by the Judiciary when fixing costs, which may impact the strategy of practitioners, is the offer to settle. As referred to above in *Davies*, the Court of Appeal, draws

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[76] *Supra* note 25 at para. 59.
[77] *Ibid*.
[78] *Ibid*.

attention to the notion that when determining the appropriate cost scale, a Rule 49 offer is a consideration that must be taken.[79]

There is some case law that suggests that Rule 49.10 should not apply to estate litigation matters because it is incompatible with the nature of estate litigation to apply a rule that is designed to encourage settlement of adversarial contentious proceedings.[80] For example, in a contested Will matter, where the mental capacity of the deceased testator is at issue, making an offer to settle, or acceptance, can appear incongruous with the positions of the parties.

Nevertheless, as in other areas of law, Rule 49 *does* apply in estate litigation, and it can have significant cost consequences. The Court of Appeal in *Davies* states that elevated costs are warranted when a reasonable offer to settle is made. [81] Offers to settle can be used as a determinative factor to justify an award on a substantial or full indemnity basis. Under the Rule 49 regime, should a party to a proceeding make an offer that meets the formal requirements, and the offer is rejected by the opposing party, cost consequences will likely follow "depending upon the result of the proceeding as measured against the terms of the offer."[82]

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[79] *Supra* note 19 at para. 29.
[80] See the case of *Re Olenchuk Estate* (1991), 43 E.T.R. 146, 4 C.P.C. (3d) 6 at para. 13; *Perilli v. Foley Estate*, 2006 CanLII 9608 (ON SC) at para. 4.
[81] *Supra* note 19 at para 28 as cited in *Supra* note 16 at para 18.
[82] *Supra* note 16 at para. 22.

In the Court of Appeal decision of *Cummings v. Cummings*,[83] Justice Blair supported Cullity J. in exercising his discretion to order that the parties bear their own costs. This case involved a dependant support claim against the estate of the deceased. During the analysis it was determined that a reasonable offer to settle had been made by the Respondents, but was rejected by the successful Applicants. This subsequently became a factor of consideration when determining the issue of costs. As such, the reasonableness of the rejection of a reasonable offer is a salient factor when assessing how to apportion costs awards in estate litigation.

Even absent a formal Rule 49 offer, courts continue to favour litigants who have their minds directed towards settlement, and this is taken to be a mitigating factor when determining costs. In *Stevens v. Fisher*,[84] Justice DiTomaso adjudicates a case involving a common law spouse who brought an application for support as a dependant against the deceased's estate. DiTomaso J. found that, in this case, it was not appropriate to award costs against the losing party personally stating:

> Both parties reasonably believed that they had a good claim to the proceeds of the Group Life Insurance Policy. Both parties proceeded without the acrimony and rancour often found in these types of cases. Rather, each attempted to resolve the matter short of trial. Each attempted to co-operate with the other in order to place the issues before the court for ultimate determination.[85]

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[83] *Cummings v. Cummings*, 2004 CanLII 9339 (ON CA).
[84] *Stevens v. Fisher* , 2013 ONSC 3112 (CanLII).
[85] *Ibid.* at para. 35.

Whether it be a formal offer to settle, or an attitude that is evident to the courts, attempting to truncate litigation will typically be taken as a positive consideration when apportioning costs.

SECTION V: PRACTICE ADVICE

A. During Litigation

While it may not seem like it while the adrenaline is running and you move through the court process – the content of your argument, behaviour, and reasonableness are being evaluated with a fine tooth comb. In a world with more transparency and a request for accountability, lawyers and their clients have to be aware of their position and conduct, because these factors will return at the conclusion of the proceeding.

When commencing litigation and filing a Notice of Objection, it is imperative to, as best one can, separate the very tangible emotions from the true facts. Launching claims out of emotionality, absent of logic, do not have positive cost consequences for the losing party. Lead with the strongest arguments and avoid the generic boilerplate pleadings.[86] Meanwhile, responding counsel should attempt to obtain particulars of pleadings from opposing counsel.[87] Both counsel should have a discussion about the cost implications of the matter. Additionally, counsel should attempt to employ ways to curb the litigation process; as such, motions for summary judgment, offers to settle and requests to admit may be appropriate avenues to take.

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[86] *Supra* note 10 at page 21.
[87] *Ibid*.

When it comes to making cost submissions, it is important to take the time to construct something that is detailed, clear and accurate. All parties should submit a Bill of Costs, as it is a useful tool to the Judiciary when assessing the reasonable expectations of the losing party. Lastly, if counsel is given directions by the court as to the length of costs submissions, they ought to be strictly followed.[88]

B. Managing the Solicitor-Client Relationship

Lawyers should always follow best practices; writing a retainer letter to the client confirming the scope of the retainer and the hourly rates is key. Also, avoid acquiring any phantom clients. Report to your client on a consistent basis, and keep them abreast with the developments of the case as well as concerns. Where necessary, get the client to sign off, or give their written approval of offers or actions which could have large costs consequences. This is especially true if you have advised the client against a particular course of action.

Lawyers must have frank discussions with clients who want to proceed with litigation. Additionally, should a client wish to persist in the face of likely failure, it is imperative to control their expectations with reminders of the likelihood of success and explanations of the merits of the case. Importantly, the potential costs consequences that may befall them personally must be

[88] *Ibid.*

explicitly outlined. The common understanding may be that costs are paid out of the estate, however, clients need to know the risk that they may be left financially accountable at the end of an unsuccessful stint in court.

Justice Brown in *Harris v. Leikin Group Inc* provides guidance to prospective litigants, stating that:

> "[the] plaintiff should consider, with great care, which persons it wishes to bring into its lawsuit – how wide a net a plaintiff cases has concrete cost consequences […] A plaintiff must reasonably expect that the greater the number of defendants it beings into a lawsuit, the more likely it will be that the resulting costs of all defendants will exceed significantly the costs incurred by the plaintiff."[89]

As such, counsel ought to explain to plaintiffs that they should be mindful of who is dragged into litigation, because should the complainant lose, they may be liable for the costs to the numerous defendants. This would likely result in the complainant being liable for costs which greatly exceed their own.

Furthermore, Justice Brown in his 2012 reconsideration of costs as directed by the Court of Appeal, in *Smith,* states that:

> If one litigant puts in play a host of unreasonable issues, the other litigant cannot be tagged as acting unreasonably in simply responding fully to the issues raised by the other."[90] Essentially providing a reminder as to the essence of our system

[89] *Supra* note 57 at para. 64.
[90] *Supra* note 25 at para. 50.

> he says that "in an adversarial litigation system, one usually responds to all issues raised by the other side.[91]

The risks as discussed, and the costs that may be involved should be set out in a letter to the client. Constantly re-evaluating strategy is key to effective and efficient practice. Counsel should not rigorously litigate every possible issue, but rather strategically choose where to engage their best efforts.

As far as dealing with opposing counsel, sharp practice should always be avoided along with the pitfall of becoming a 'hired gun.' If it is clear that opposing counsel is being unreasonable and furthering litigation unnecessarily, set out in a letter your views, including the foundation of those views. In the letter, you should state that you will be seeking costs on a higher scale. However, keep in mind that this can be risky; for example if you informed opposing counsel that you will be seeking substantial indemnity, and *you* lose and try to argue that the costs scale should be partial indemnity, you will appear inconsistent and damage your credibility.

Resource management is also an area that practitioner should turn their minds to. Lawyers should be "delegating down the staffing pyramid as many tasks as it reasonably can" as it can help to maintain proportionality.[92] Splitting the tasks among associates of senior and junior levels can promote efficiency as well as minimize the pecuniary impact of litigation. At the same time, while splitting the tasks is prudent, having too many lawyers on the file opens you up to

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[91] *Ibid.*
[92] *Supra* note 57 at para 39.

criticisms of over-lawyering the matter. For example, utilizing 5 articling students in a relatively straight-forward matter, for a brief amount of time, may not be the wisest way to delegate work.

SECTION VI: CONCLUSION

Costs are a fundamental piece of the estate litigation puzzle. Fixing costs is a discretionary, rather than mechanical exercise and one that requires careful consideration. Since the traditional costs approach has been superseded by the so-called "losers pay" approach, costs are becoming a new battleground after the war.

You should attempt to minimize the behaviour of their clients that would breed disdain from the judiciary, namely, unreasonableness and reprehensible behaviour. Advising clients in this regard, in this particular area of law where emotions can run high, is vastly important. Lawyer must use the realities of the foregoing costs decisions to assist in their advising of clients to help minimize cost consequences and maximize efficiency. The conduct of client and counsel cannot be understated as they play a large role in determining costs awards.

Additionally, in seeing factors utilized in the cost analysis, lawyers can continue to advocate for their clients, while being mindful of the large extent to which proportionality, reasonable expectations, and offers to settle are relevant at the conclusion. Through being mindful of the cases referenced in this paper, as well as the germane factors, counsel can tailor their approach to minimize their clients and their own financial exposure at the conclusion of proceedings.

While costs are determined at the end, they should not be left until that moment for consideration by counsel. From the inception of litigation, costs should be a reoccurring factor that is revisited continuously throughout. Estate practitioners should advocate zealously for their clients, but also inform them of the financial risks and pitfalls of their positions. Many times, litigants want to proceed on a principled basis, and it is the lawyers' role to advise that sometimes a principled position devoid of logic and evidence can result in large financial penalties.

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