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Carving up the "Dripping Roast": Why the Estate May Not Pay Your Legal Fees

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A common misconception among parties involved in estate litigation in Alberta is that the estate is required to pay their legal fees. Accordingly, individuals challenging a will or arguing over its provisions may be in for an unpleasant surprise when the bill comes due.

The Old Rule (the "Old Rule"):

Part of the misunderstanding likely stems from the fact that, in Alberta, up until recently, parties could reasonably expect that all (or at least some) of their fees would be paid from the estate.

Indeed, the Alberta Court of Queen's Bench noted as recently as 2012:

"Historically, it was common practice in estate matters for courts to award costs of all parties out of the estate. This approach, however, has been out of favour for several years."[1]

The New Rule (the "New Rule")

The current judicial view on when the legal fees of a party involved in estate litigation are payable by the estate appears to be as follows:

1. The Court has discretion with respect to costs, but that discretion must be exercised judicially.[2]

2. The "modern" approach to costs in estate litigation requires careful scrutiny of the litigation to restrict unwarranted litigation and protect estates from being depleted by such litigation.[3]

3. Payment of an unsuccessful party's costs out of the estate requires analysis of a number of factors:[4]
    - Did the testator cause the litigation?
    - Was the challenge reasonable?
    - Was the conduct of the parties reasonable?
    - Was there an allegation of undue influence?
    - Were there different issues or periods of time in which costs should differ?

- Were there offers to settle?

4. There is residual discretion where factors such as who initiated the proceedings and the size of the estate may be relevant.[5]

5. Costs for a successful claimant in family relief claims are generally awarded on a solicitor and client basis.[6]

6. Costs in favour of an unsuccessful family relief claimant are an exception to the basic rule that costs follow the event.[7]

7. Estate litigation is no longer treated as an exception to the basic rule that costs follow the event.[8]

8. Costs will normally follow the event in estate litigation, unless the challenge to the estate was reasonable or on the basis of a public policy exception recognizing society's interest in only probating valid wills.[9]

Put simply, the relationship status between: (i) estate litigants; and (ii) automatic entitlement to payment from the estate of one's legal fees has deteriorated from a "committed relationship" to "it's complicated".

Depending on the situation, even estate executors are no longer safe to assume their legal fees or other costs will be recovered from the estate. As noted by the Alberta Court of Queen's Bench in one relatively recent decision:

"I am concerned that a large estate file is perceived by both executors and estate lawyers as a 'dripping roast'. To be sure, in any estate, there is work that must be done. But a large estate value does not justify abandoning all restraint. Both executors and estate lawyers must be judicious with respect to costs they purport to incur against an estate. In this case, both the compensation claimed and the legal costs amassed in pursuing that compensation were out of all proportion to what should have been required and I find the absence of good judgment disquieting. It is to be hoped that the result in this case will remind those involved in future estates of the importance of prudence [emphasis added]."[10]

The Exceptions

Of course, no rule, simple or complicated as it may be, would be complete without exceptions.

Perhaps not surprisingly and adding a twist of irony, the two noted exceptions to the "modern" approach to awarding estate litigation costs recognized by today's Courts come from Victorian England.[11]

They include:

1. Cases where the cause of the litigation takes its origin in the fault of the testator or those interested in the residue; and
2. Cases where there are sufficient and reasonable grounds concerning the testator's testamentary capacity or whether there was undue influence on the testator[12]

(the "Exceptions").

Cases frequently argued to fall under "the fault of the testator" include disputes that involve:

1. The formal validity of a will;

2. The interpretation of a will or trust; and

3. Dependent or family relief claims (and wills variation cases).[13]

The Exceptions come with a significant caveat. The mere fact that a party is challenging the validity of a will, or the interpretation of a will or trust, and appears to fall within one of the Exceptions, does not guarantee that party's legal fees will be paid out of the estate. See, for example, "3" of the New Rule (above) which requires any challenge to have been "reasonable".

The Conclusion

Even if all of the above could be considered straightforward, consider the following conclusion on estate costs reached by the Alberta Court of Queen's Bench:

". . . I am willing to assume that there would be situations other than those described in the two recognized exemptions where a court would conclude that the normal rule of costs should not be applied to estate litigation. However, there is no such exceptional situation here.

In the result, Ms. Christianson is not entitled to costs from the estate; rather, she must pay the estate Schedule C costs. In light of the fact that the costs application was made entirely by letter, even though Ms. Christianson was unsuccessful on the costs application, there should be no additional costs for that application."[14]

In Summary:

1. The Old Rule has been replaced by the New Rule.

2. There are Exceptions to the New Rule.

3. It appears that there may be room for further exceptions to the New Rule and, depending on the circumstances, exceptions to the Exceptions.

4. When in doubt, see "1" of the New Rule (above). Ultimately, and absent enduring agreement by all of the parties, it is up to the Court to decide what costs will be paid out of an estate. (For further reading, see also Rules 1.3, 10.29, 10.31 and 10.33 of the *Alberta Rules of Court*, AR 124/2010 and rules 2, 62, 64, 69, 74, 89, 90, 105, 113, and 115 of the *Surrogate Rules*, AR 130/1995.)

5. NEVER assume that your legal fees will be paid by the estate. Better yet, ask your lawyer.

At McLeod Law LLP, we have experience in providing tools to parties to protect against future challenges to a Will or estate and in effectively resolving any dispute that may arise.

If you have questions or would like further information regarding expert evidence at trial, please contact the authors or any of our Estate Litigation lawyers.

[1] *Chabros v Anderson,* 2012 ABQB 517, at para 7 ["Chabros"]
[2] *Ibid.* at para 7; *Babchuk v. Kutz,* 2007 ABQB 88, at para 5 *["Babchuk"]; Foote Estate, Re,* 2010 ABQB 197, at para 16 *["Foote"].*
[3] *Chabros, supra,* at para 7*; Babchuk, supra,* at para 6; *Foote, supra,* at para 16.
[4] *Foote, supra,* at para 16; *Babchuk, supra,* at para 8.
[5] *Foote, supra,* at para 16; *Babchuk, supra,* at paras 70, 72.
[6] *Foote, supra,* at para 16; *Petrowski v. Petrowski Estate,* 2009 ABQB 753, at para 62 *["Petrowski"].*
[7] *Foote, supra,* at para 16; *Petrowski, supra,* at paras 68, 74.
[8] *Foote, supra,* at para 16; *Petrowski, supra,* at paras 76-78; *St. Onge Estate v. Breau, 2009 NBCA 36 ["St. Onge Estate"].*
[9] *Foote, supra,* at para 16; *Petrowski, supra,* at paras 78-79.
[10] *Chabros, supra,* at para 50.
[11] *Mitchell v Gard* (1863), 164 ER 1280 *["Mitchell"]; Foote, supra,* at para 22; *St. Onge Estate, supra.*
[12] *Anderson Estate, Re,* 2009 ABQB, at para 10 *["Anderson Estate"]; Foote, supra,* at para 22; *St. Onge Estate.*
[13] *Foote, supra,* at paras 21-24; *Riva v Robinson* (2000), 263 AR 389.

[14] *Anderson Estate, supra,* at paras 13-14.