

# **An Update on Costs: Spinning the Wheel of Fortune in Family Feuds**

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## UPDATE ON COSTS: SPINNING THE WHEEL OF FORTUNE IN FAMILY FEUDS

### INTRODUCTION

This is a discussion on certain costs decisions involving recent Alberta estate litigation. Several papers have been written by Alberta lawyers on estate litigation costs, including Dragana Sanchez-Glowicki's paper: "Estate Litigation Costs" (Canadian Bar Association (Alberta Branch) Mid-Winter Meeting 2013), Helen R. Ward's paper: "Costs in Estate Litigation – A Balancing Act" (Canadian Bar Association (Alberta Branch) Mid-Winter meeting, 2003), and Dennis Pelkie's papers on costs: "Costs in Estate Litigation" (2002 Lesa Banff Refresher Course) and "Costs" (May, 1990 Lesa Banff Refresher Course).

We will note some interesting judicial commentary and trends. We will also remind ourselves that as we go down the litigation path for our clients, we must stop and pause at every turn, to consider if our client's position continues to be a reasonable one. If we fail to consider the reasonableness of our position, our clients, if unsuccessful, may be sanctioned with an elevated level of costs that is intended to penalize them.

### BACKGROUND

Surrogate Rule 90(h) states as follows:

- 90 On an application under this division the court may
- (h) direct the payment of costs, including penalizing any person who required formal proof of the will if it became clear during the proceedings that
- (i) the application was frivolous or vexatious,
  - (ii) the person caused undue delay, or
  - (iii) the person had no substantial basis for requiring the scrutiny of the court.

Surrogate Rule 113(2)(k) states:

At a hearing to pass interim or final accounts the court may allow and direct payment of costs.

Rules 10.29 through 10.33 of the Alberta Rules of Court state as follows:

### **General rule for payment of litigation costs**

10.29(1) A successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party, and the unsuccessful party must pay the costs forthwith, notwithstanding the final determination of the application, proceeding or action, subject to

- (a) the Court's general discretion under rule 10.31 [*Court-ordered costs award*].
- (b) the assessment officer's discretion under rule 10.41 [*Assessment officer's decision*],
- (c) particular rules governing who is to pay costs in particular circumstances,
- (d) an enactment governing who is to pay costs in particular circumstances, and
- (e) subrule (2).

(2) If any application or proceeding is heard without notice to a party, the Court may

- (a) make a costs award with respect to the application or proceeding, or
- (b) defer making a decision on who is liable to pay the costs of the application or proceeding until every party is served with notice of the date, time and place at which the Court will consider who is liable to pay the costs.

### **When costs award may be made**

10.30(1) Unless the Court otherwise orders or these rules otherwise provide, a costs award may be made

- (a) in respect of an application or proceeding of which a party had notice, after the application has been decided,
- (b) in respect of a settlement of an action, application or proceeding, or any part of any of them, in which it is agreed that one party will pay costs without determining the amount, and
- (c) in respect of trials and all other matters in an action, after judgment or a final order has been entered.

(2) If the Court does not make a costs award or an order for an assessment officer to assess the costs payable when an application or proceeding is decided or when judgment is pronounced or a final order is made, either party may request from an assessment officer an appointment date for an assessment of costs under rule 10.37 [*Appointment for assessment*].

### **Court-ordered costs award**

10.31(1) After considering the matters described in rule 10.33 [*Court considerations in making a costs award*], the Court may order one party to pay to another party, as a costs award, one or a combination of the following:

- (a) the reasonable and proper costs that a party incurred to file an application, to take proceedings or to carry on an action, or that a party incurred to participate in an application, proceeding or action, or
- (b) any amount that the Court considers to be appropriate in the circumstances, including, without limitation,
  - (i) an indemnity to a party for that party's lawyer's charges, or
  - (ii) a lump sum instead of or in addition to assessed costs.

(2) Reasonable and proper costs under subrule (1)(a)

- (a) include the reasonable and proper costs that a party incurred to bring an action;
- (b) unless the Court otherwise orders, include costs incurred by a party
  - (i) in an assessment of costs before the Court, or
  - (ii) in an assessment of costs before an assessment officer;
- (c) do not include costs related to a dispute resolution process described in rule 4.16 [*Dispute resolution processes*] or a judicial dispute resolution process under an arrangement described in rule 4.18 [*Judicial dispute resolution arrangement*] unless a party engages in serious misconduct in the course of the dispute resolution process or judicial dispute resolution process;
- (d) do not include, unless the Court otherwise orders, the fees and other charges of an expert for an investigation or inquiry or the fees and other charges of an expert for assisting in the conduct of a summary trial or a trial.

(3) In making a costs award under subrule (1)(a), the Court may order any one or more of the following:

- (a) one party to pay to another all or part of the reasonable and proper costs with or without reference to Schedule C [*Tariff of Recoverable Fees*];
- (b) one party to pay to another an amount equal to a multiple, proportion or fraction of an amount set out in any column of the tariff in Division 2 of Schedule C [*Tariff of Recoverable Fees*] or an amount based on one column of the tariff, and to pay to another party or parties an amount based on amounts set out in the same or another column;