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Contentious Matters in Wills and Estates

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Costs in Estate Litigation

Contentious Matters in Wills and Estates

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COSTS IN ESTATE LITIGATION

INTRODUCTION

Estate litigation is unique. A deceased's estate is essentially a gift, but one that often requires the supervision of the courts in its administration. This supervision necessarily results in high legal costs being incurred by parties who seek the court's assistance in parsing the issues that a testator's intentions can cause. It's unsurprising therefore that, in the past, courts were inclined to award costs to be payable out of the estate, rather than having the parties to the litigation bear their own costs. To a certain extent, this resulted in situations where an estate was often treated as a litigation fund used to clarify a testator's intentions.

The likelihood that costs would be paid out of the estate, rather than out of the pocket of the lawyer's client, created a type of "moral hazard" in estate litigation, where a person is more likely to take a risk because the costs of that risk will be borne by someone other than the risk-taker.[1] In the context of estate litigation, this occurs where a lawyer or client is more likely to pursue costly litigation with the expectation that the costs will simply be borne by the estate itself in the end. Justice Clark of the Alberta Court of Queen's Bench, recognizing this trend in estate litigation, made the following remarks in *Re Anderson Estate*:

> I feel obliged in this case to make some general comments. 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.[2]

This paper seeks to highlight the shift in attitude towards costs in estate litigation in Alberta which has occurred over the last two decades. Through a canvassing of the recent caselaw on estate litigation costs, it appears that courts are far more wary of granting litigation costs out of the estate than they were in the past, and that the "dripping roast" is perhaps not as enticing as it once was.

GENERAL RULES FOR COSTS IN LITIGATION

The basic principles governing litigation costs were concisely summarized by Justice Graesser in *Schwartz Estate v Kwinter*:

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[1] Merriam-Webster Online Dictionary, *sub verbo* "moral hazard", online: <https://www.merriam-webster.com/dictionary/moral%20hazard.>.

[2] *Re Anderson Estate*, 2012 ABQB 517 at para 50 [*Anderson*].

> The minutia of the evidence is rarely the deciding factor in a claim for costs. Courts will normally take a bigger picture view of costs, following the basic principles that:
>
> 1. Costs follow the event;
> 2. Usual costs are those provided for in Schedule C of *the Rules of Court*;
> 3. The court has a wide discretion (to be exercised judicially) as to the awarding of costs in any matter;
> 4. A successful party may be denied costs, or awarded costs on a lesser scale, because of his or her conduct during the course of the litigation, or because of the magnitude of the award in comparison with the costs calculated on the usual column;
> 5. Costs on an elevated scale (higher column of costs or multiples of ordinary Schedule C costs) are the exception and not the rule; and
> 6. An award of elevated costs to the successful party requires either that the magnitude of the award is not reflected in the columns in Schedule C (well more than $1.5 million) or some misconduct during the litigation on the part of the unsuccessful party.
>
> These are, at least in Alberta, trite principles for which I need not cite authority. These principles may change, depending on contractual arrangements between the parties, or any specific statutory or regulatory provisions dealing with costs.[3]

These principles are broad, and apply to most if not all forms of litigation. However, as will be seen below, costs in estate litigation have departed from the above principles in unique ways which aim to take into account the public policy considerations inherent to estate litigation.

UNIQUE PRINCIPLES FOR COSTS IN ESTATE LITIGATION

Historically, costs in estate litigation were, to a certain degree, exempt from the general principles stated above. Courts would often simply award the parties' costs out of the estate, with less regard given to the principles laid out in Schwartz.[4] There were several policy reasons behind this trend. The first was that, in many situations it was the conduct of the testator themselves (i.e. in drafting the will) that necessitated the litigation. As such, it was reasonable that the testator's estate bear the costs of the litigation.[5] Secondly, there is a public policy interest in ensuring that only valid wills are

[3] *Schwartz Estate v Kwinter*, 2013 ABQB 147 at paras 111-12.

[4] *Anderson*, *supra* note 2 at para 7.

[5] *Serdahely (Estate of)*, 2005 ABQB 861 at para 22 [*Serdahely*].