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Trend Watch: Elevated Costs in Estate Litigation

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In estate litigation, there is a presumptive rule that costs are payable on a partial indemnity scale,[i] meaning that the losing party is only required to pay a portion of the successful party's costs. This rule has been touted as striking "the proper balance between the cost benefits to be enjoyed by the successful litigant and the cost burdens to be borne by the unsuccessful parties".[ii] Yet, in light of a growing body of case law in which elevated costs rather than partial indemnity costs have been awarded, it appears that costs are increasingly being evaluated on a case-by-case basis. Elevated costs also may not be as rare and exceptional as lawyers may have once thought,[iii] having been awarded in a variety of contexts, including will challenges,[iv] passings of accounts,[v] litigation involving trusts,[vi] proceedings related to dependants' relief,[vii] applications to remove an estate trustee,[viii] and proceedings under the *Substitute Decisions Act, 1992*.[ix]

Mainstream elevated costs awards include substantial indemnity costs,[x] full indemnity costs,[xi] and, in truly exceptional cases, solicitor-client costs.[xii] However, it warrants noting that elevated costs need not be particularly elevated. The court also has the discretion to award elevated costs at a scale between partial indemnity costs and substantial indemnity costs,[xiii] making elevated costs a more viable solution in cases where the presumptive costs rule can be displaced.

Grounds for Ordering Elevated Costs May Be Expanding

Elevated costs are typically awarded when the court wishes to demonstrate disapproval of a party's conduct.[xiv] There is no doubt that such costs are merited when a party's conduct is reprehensible, egregious and worthy of sanction,[xv] scandalous, or outrageous.[xvi] For example, if one party harasses or threatens another during the course of litigation, elevated costs may be warranted.[xvii]

There are, however, a variety of other, less extreme scenarios in which elevated costs may also be appropriate, including:

1. If the court makes a finding of fraud or attempted fraud;[xviii]

2. If the court finds undue influence, particularly if conduct during the litigation also merits awarding elevated costs;[xix]

3. When allegations of fraud or other reprehensible conduct are made in the litigation but are not proven;[xx]

4. When a party takes an unreasonable position in the litigation, particularly if the party presents insufficient evidence in support of the position, fails to admit facts into evidence that should be admitted, or contests the admission of relevant evidence needed to resolve an issue;[xxi]

5. If a party delays the litigation through conduct such as failing to meet court-ordered deadlines or failing to respond to the other parties' materials.[xxii] However, if a delay cannot be properly attributed to the losing party, awarding elevated costs may be a reviewable error;[xxiii]

6. When a trustee engages in misconduct, such as breaching duties owed to the estate and its beneficiaries, overcharging expenses, and failing to administer the estate promptly.[xxiv] Nonetheless, costs related to trustee misconduct seem to be particularly discretionary, turning on the precise facts before the court. Engaging in unreasonable conduct and acting in a manner that no honest or fair-dealing trustee would act, for example, may not be enough to warrant elevated costs;[xxv] and

7. When an offer to settle has been made under Rule 49.10 of the *Rules of Civil Procedure*,[xxvi] and the party subsequently receives a judgment as favourable or more favourable than the offer.[xxvii] Settlement offers that fall outside the scope of Rule 49, however, may or may not be pertinent to the scale of costs.[xxviii]

Elevated Costs May Be Imposed on a Broad Array of Parties

The variety of parties who have been ordered to pay elevated costs in estate litigation also suggests that such costs awards are not as rare as they once were. In addition to traditional litigants who are represented by counsel, elevated costs have also been awarded against self-represented litigants,[xxix] non-parties who are involved in the proceedings,[xxx] and even counsel whose conduct falls outside the established norms of the legal profession.[xxxi]

The Challenge of Appealing Elevated Costs

Another indicator that elevated costs are no longer reserved for rare or exceptional cases is the fact that these costs awards are so difficult to appeal. Leave is required to appeal elevated costs awards,[xxxii] and will only be granted if the appellant can demonstrate an error of principle or that the costs award is plainly wrong.[xxxiii] Moreover, a failure to follow the presumptive costs rule is not an error of principle. Something more is required to obtain leave, such as the lower court failing to justify the costs award.[xxxiv] If the lower court considers pertinent factors when ordering costs, such as the nature of the parties' allegations, settlement offers made by the parties, and the need to discourage and sanction inappropriate behavior, it is improbable that an elevated costs award will be overturned on appeal, even if the case is not exceptional.[xxxv]

The costs of estate litigation have always been a deterrent to the commencement of proceedings. Given the discretion of the court in determining costs and the growing number of cases where elevated costs have been ordered, it is important that clients considering litigation are aware of the possible costs outcomes, which may have a meaningful impact on the net financial benefit (or loss) resulting from the litigation. Clients should also be encouraged to consider the issue of costs relative to the judge's view as to the merits of their position, rather than in reliance upon presumptive costs rules.

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[i] *Feinstein v. Freedman*, 2014 ONCA 446 at para. 21.

[ii] *Williams v. Provost*, 2022 ONSC 3255 [*Williams*] at para. 33. For an excellent summary of legal principles governing costs awards, see paras. 12-21.

[iii] *Ibid*. at para. 33.

[iv] See, for example, *Lyons v. Todd*, 2019 ONSC 2269 [*Lyons*]; *Columbos v. Columbos*, 2014 ONSC 1342, additional reasons 2014 ONSC 2263 [*Columbos*].

[v] See *Larwill v. Larwill*, 2022 ONSC 6145 [*Larwill*]; *Wall Estate*, 2019 ONSC 5063 [*Wall*]; *Aber Estate, Re*, 2015 ONSC 5123 [*Aber*].

[vi] See *Javid v. Watson*, 2022 ONSC 5803 [*Javid*].

[vii] See *Richard v. Quesnel (Estate)*, 2021 ONSC 7404 [*Richard*] at para. 28.

[viii] See *Meuse v. Taylor*, 2022 ONSC 1436 [*Meuse*].

[ix] *Substitute Decisions Act, 1992*, S.O. 1992, c. 30. See *Rudin-Brown et al. v. Brown*, 2021 ONSC 6313 [*Rudin-Brown*].

[x] See, for example, *Lyons*, *supra* note 4; *Richard*, *supra* note 7; *Rudin-Brown*, *ibid*.

[xi] See *Columbos*, *supra* note 4 [2014 ONSC 2263]; *Javid*, *supra* note 6; *Wall*, *supra* note 5.

[xii] *Estabrooks Estate v. Barry*, 2016 NBCA 55 at paras. 44-45, 48. Also see *Bukkems Estate (Re)*, 2014 ABQB 678 at paras. 7-16.

[xiii] See *Gefen v. Gefen et al.*, 2022 ONSC 6259 [*Gefen*] at paras. 123-124.

[xiv] *Lyons*, *supra* note 4 at para. 30.

[xv] *Ibid.* at para. 28.

[xvi] *Williams*, *supra* note 2 at paras. 34-35; *Clayton v. Clayton*, 2022 ONSC 4893 [*Clayton*] at para. 38; *Aber*, *supra* note 5 at para. 66.

[xvii] *Lyons*, *supra* note 4.

[xviii] See *Bayford v. Boese*, 2021 ONCA 533 at para. 4.

[xix] See *Rudin-Brown*, *supra* note 9 at paras. 31-35.

[xx] See *Zachariadis Estate v. Giannopoulos*, 2020 ONSC 588, affirmed 2021 ONCA 158 [*Zachariadis*]; *Meuse*, *supra* note 8; *Rudin-Brown*, *ibid.*

[xxi] See *Columbos*, *supra* note 4 at paras. 4-5; *Gefen*, *supra* note 13 at para. 123.

[xxii] *Grier v. Grier*, 2022 ONSC 147 [*Grier*] at para. 35.

[xxiii] *Ducharme v. Thibodeau*, 2023 ONCA 60 at para. 4.

[xxiv] *Larwill*, *supra* note 5 at para. 28.

[xxv] *Clayton*, *supra* note 16.

[xxvi] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 49.10.

[xxvii] *Aber*, *supra* note 5 at para. 66.

[xxviii] See *Clayton*, *supra* note 16 at paras. 50-54.

[xxix] See *Irmya v. Mijovick*, 2016 ONSC 5276.

[xxx] *Grier*, *supra* note 22 at para. 35.

[xxxi] See *Javid*, *supra* note 11.

[xxxii] Leave will not be necessary if a costs appeal is coupled with a substantive appeal: see *Ducharme Estate v. Thibodeau*, 2022 ONCA 661 at para. 4.

[xxxiii] See *Baran v. Cranston*, 2022 ONSC 6636 at paras. 28-31.

[xxxiv] See *Aber*, *supra* note 5 at paras. 51, 64, 66.

[xxxv] *Zachariadis*, *supra* note 20 at para. 45 (C.A.).