



SOME THINGS YOU OUGHT TO KNOW ABOUT COSTS IN ESTATE LITIGATION

BY PETER W. LIGHTBODY, RICHARDS BUELL SUTTON LLP, VANCOUVER BC

INTRODUCTION

Lively fact patterns that typify estate disputes have generated a rich and developing body of law on the issue of court costs in British Columbia. Often driven by questionable motives or erratic testamentary choices, estate cases offer

a unique set of factors for the exercise of judicial discretion on costs. Estate disputes bring another unique factor too: the existence at the centre of the storm of the trustee/executor/administrator (hereafter, the "executor"). The executor may play a limited or central role in a dispute,

but always holds a purse and a bundle of responsibilities, and as such faces unique issues on costs.

The discussion below addresses three general costs related subjects and provides some of the legal framework for advocacy in this area.

A. "COSTS FOLLOW THE EVENT" IS THE NOW THE STARTING POINT IN ESTATE LITIGATION

A costs analysis frequently begins with the Rules of Court, specifically Rule 14-1(9). Introduced with the heading "Costs Follow the Event", this Rule tells us that "costs of a proceeding must be awarded to the successful party unless the court otherwise orders". In the good old days of estate litigation, the custom was for all parties to have their costs paid from the estate. Presumably this fostered an "estate as war chest" mentality which might have been attractive for lawyers and litigants, especially unreasonable litigants, but it could not be supported by logic or policy. This brings us to the "modern rule" (as the state of the law was described by Mr. Justice Barrow at para 5 in *Hsia v Yen-Zimmerman*, 2013 BCSC 624). The law is toughened under the modern rule, but not radically.

HISTORICAL

It is helpful to see where the current state of the law came from. Two decisions (each now two decades old) are identified as ushering in the change: (1) Master Horn's reasons in *Lee v Lee Estate* (1993) 84 BCLR (2d) 341, (1993), 50 ETR 297, and (2) Mr. Justice Gow's decision in *Morton v National Trust Co.* [1993] BCD Civ 4219-01 (SC).

Lee v Lee Estate was an action under the *Wills Variation Act*, RSBC 1979, c 435 (hereafter "WVA"). The plaintiffs smartly abandoned their claim to vary the estate of the man they believed was their father after paternity testing revealed he was not their biological father, and their claim was struck on an uncontested summary trial. On the issue of costs, Master Horn stated:

An order for costs in favour of a completely unsuccessful party against a completely successful party is a most exceptional order. The general rule is that costs follow the event and, while a court may depart from this rule, any departure is usually in the way of depriving a successful party of costs and not of awarding costs to an unsuccessful party.

Distinguishing probate proceedings from dependents' relief actions, Master Horn went on to say:

In probate or administration actions or in proceedings for the construction of wills, the rule may be more frequently departed from. In such cases where the validity of a will or the capacity of the testator to make a will or the meaning of a will is in issue, it is sometimes the case that the costs of all parties are ordered to be paid out of the estate. This is upon the principle that where such an issue must be litigated to remove all doubts, then all interested parties must be joined and are entitled to be heard and should not be out of pocket if in the result the litigation does not conclude in their favour. The estate must bear the cost of settling disputes as a cost of administration...

The question to be asked in such case is whether the

parties were forced into litigation by the conduct of the testator or the conduct of the main beneficiaries.

And further:

But the case is different where the litigation does not relate to the validity of the will or the capacity of the testator or the construction of the will. Actions brought under dependants' relief legislation presume the validity of the will and the capacity of the testator and that his intentions are clear. There are not doubts to be settled. The remedies provided by such legislation are directed to the maintenance and support of the dependents of the testator and are based on public policy. The legislation does not invalidate the will, it merely permits the court to vary the provisions made by the testator. So an unsuccessful action under such legislation cannot be said to have been caused by a testator, or to have been necessary to enable the estate to be distributed. The action does not benefit the estate.

In the result, Master Horn ordered the parties to bear their own costs, perhaps departing in principle from his statements above respecting "loser pays" in dependents relief (WVA) cases. But these were unique facts: the deceased in *Lee v Lee Estate* had done nothing to dispel - and may have even fostered - the belief that he was the biological parent, and the dismissal application went unopposed.

In *Morton v National Trust Co.*, supra, the court dismissed the plaintiff's claim against the force and validity of his mother's will based on lack of capacity. On costs, Mr. Justice Gow summarized the pertinent considerations as follows:

R. 57(9) provides that costs of and incidental to a proceeding shall follow the event unless the court otherwise orders. In probate actions that has been the rule since 1907, subject however, to these provisos:

- (1) Where the testator or the residuary legatees have been the cause of the litigation;
- (2) If the circumstances lead reasonably to an investigation in regard to the propounded document;
- (3) The overriding discretion of the court.

If proviso (1) applies then ordinarily the court will grant the unsuccessful party costs out of the estate. If proviso (2) applies then ordinarily the court will not make an order for costs against the unsuccessful party. cf Hodson LJ in *Cutcliffe's Estate* (1959), P 6 at p 13.

Provisos (1) and (2) are, however, subject to a fourth proviso that even if either is applicable, but the unsuccessful party has advanced but failed to prove pleas of undue influence or fraud, then he is condemned in the costs not only of that charge but of the whole action. *Cutcliffe*, supra at p. 21; *Trites v Johnson*, supra; *Maben v Urquhart* (1969), 1 DLR (3d) 413 (BCSC); *Re Nickle* (1973), 3 WWR 97 (Alta Surrogate Ct).

Mr. Justice Gow awarded costs to the successful defendants – but payable from the estate, not from the plaintiff, who bore his own costs. The plaintiff's decision to abandon his undue influence argument factored into the costs decision.

The reasoning in *Lee v Lee Estate* was adopted by the Court of Appeal in *Vielbig v Waterland Estate*, 1995 CanLII 2544, 121 DLR (4th) 485; 3 WWR 515; 1 BCLR (3d) 76 (BCCA), where the Court of Appeal dismissed the plaintiff's claim to vary her father's will. Mr. Justice Hinds wrote:

Here there was no question of the validity of the will, the testamentary capacity of the Testator, or of the meaning of the will. The Testator was not at fault in some way, thereby contributing to the appellant making an unsuccessful claim against his estate. In my view the general rule must prevail; costs should follow the event. I would not disturb the order of the summary trial judge whereby he dismissed the plaintiff's claim with costs.

In *Jung v HSBC Trust Company (Canada)*, 2007 BCSC 1740, Mr. Justice Silverman distilled the "general approach" to costs gaining momentum in the decisions above. *Jung* was a case where several legitimate questions were raised regarding the drafting and execution of a "do-it-yourself" will. The general approach on costs was summarized as follows:

1. The costs of and incidental to a proceeding will follow the event unless the court otherwise orders.
2. If the cause of the litigation originated from the conduct or errors of the testator (i.e., unclear wording or validity of the will), then the costs of all parties will generally be paid from the estate on a full indemnity basis.
3. If there were circumstances which provided reasonable and sufficient grounds to have brought the action relating to questions of capacity or allege undue influence or fraud, the court will not normally make an order for costs against the unsuccessful party.
4. In an action under dependent relief legislation (i.e., where the proceedings are adversarial in nature and are not brought about by the actions of the testator), costs follow the event.
5. All costs awards are subject to the court's discretion and an overriding test of reasonableness.

In *Jung*, given legitimate concerns about the subject will not caused by the litigants themselves, Mr. Justice Silverman awarded solicitor and client costs payable by the estate to all of the parties. The litigation was obviously viewed as a necessary investigation of a problem caused by the testator.

THE SEARCH FOR TRENDS

A search for trends was undertaken by Anna Laing, who wrote papers on costs for CLE's *Estate Litigation Update*, in 2009 and 2011, to which the reader is referred (Conveniently, Ms. Laing's 2009 paper attaches as appendixes, two previous papers on costs in estate litigation, written for CLE in 1998 and 2001 by Hugh McLellan and Edward Macaulay, respectively).

Ms. Laing concluded in 2009 that, in *WVA* cases, the courts were "by and large" following the principle that "costs follow the event". But in her 2011 paper, again regarding *WVA* costs, Ms. Laing noted that the Court of Appeal was sowing "seeds of uncertainty". She cited in particular *Hall v Korejevo*, 2011 BCCA 355, where success on appeal was divided, and the panel made an order that costs of both sides be paid from the estate ratably pursuant to s 8 of the *WVA*, a statutory provision which arguably has nothing to do with costs (although, as pointed out by Ms. Laing, there is possible authority for awarding costs "ratably" in *WVA* proceedings in *Rudolph v Lindseth*, 1993 CanLII 372 (BCSC)).

Ms. Laing commented in her 2009 paper that in non-*WVA* litigation, parties ought not to assume costs will be ordered to all parties from the estate. She identified the guiding principles for the court's discretion on costs as (1) whether the proceeding was necessary "to sort out a mess left by the testator" (in which case costs to all from the estate may be supportable based on the authorities; and (2) whether it was "reasonable" on the evidence to pursue or defend the action.

Ali Estate (Re), 2011 BCSC 537, would support these conclusions. In this case, Madam Justice Dardi dismissed an application to rectify a will, but at para. 49 of her decision she ordered the costs of both sides paid from the estate as special costs. She was unable to conclude that it was unreasonable for the petitioner to proceed with the application. Similarly, in *Moore v Drummond*, 2012 BCSC 1702, Mr. Justice Smith dismissed a claim challenging a testator's capacity, and ordered the parties bear their own costs. The court found at paras. 50-51 that there was a reasonable suspicion respecting capacity based on medical evidence from around the time the will was executed, and determined it would not be "fair or appropriate in these circumstances to burden [the plaintiff] with costs".

In *Davey v Gruyaert*, 2007 BCCA 20, a case proceeded to appeal solely on the issue of costs. One might argue that *Davey* too sowed some seeds of uncertainty. The deceased had died without a will. An action was brought by Ms. Gruyaert claiming to be the deceased's common law spouse in order to claim an interest on intestacy under the *Estate Administration Act*, RSBC 1996, c 122. As such, the similarities with a claim under the *WVA* were "obvious", as noted by the Court of Appeal at para. 7 (and on that basis one might argue the decision has application for both *WVA* and non-*WVA* litigation). The trial judge found there was no common law relationship, but nevertheless awarded Ms. Gruyaert party and party costs payable from the estate. This order was appealed by the administratrix and ultimate sole heir, being the deceased's mother. Madam Justice Newbury overturned the costs ruling, citing *Vielbig v Waterland Estate*, supra, as well as an older decision *Re Bowe Estate* [1971] 4 WWR 234 (BCSC). Madam Justice Newbury stated at paras. 7 and 8 that, as in *Re Bowe Estate*, this was "a simple assertion and denial of a claim under a statute" and "the usual rule should have prevailed in this case and Ms. Gruyaert should not have been awarded her costs from

the estate...thus diminishing the estate". But in the result, the Court of Appeal was content that Ms. Gruyaert should bear her own costs, stopping short of an order that she pay the costs of the victor.

The potential for confusion arises from the phrase "usual rule". Based on the result, the Court of Appeal must have meant by this phrase only that the unsuccessful claimant would not have her costs from the estate, and not that she must pay the other side's costs. The problem is that *Re Bowe Estate* easily offers a more onerous interpretation. (Indeed, at para. 4 of *Re Bowe Estate*, Mr. Justice Wilson stated in no uncertain terms that in WVA-type cases "...good cause must be shown for departing from O.65 which says that costs will follow the event. This means not just that an unsuccessful petitioner will not ordinarily recover costs, it means that he will ordinarily pay costs"). Thus, given the reliance on *Re Bowe Estate*, it is perhaps a surprise that the unsuccessful party was not ordered by the Court of Appeal to pay costs. The only "good cause" in *Davey v Gruyaert* was that the claimant's position on the WVA was at least not unreasonable, which leads to the question of whether reasonableness will become the benchmark for "good cause" justifying a departure from a true "costs follow the event" award.

Re Bowe Estate was again relied upon in a 2008 WVA case called *MacKinlay v MacKinlay Estate*, 2008 BCSC 1570 (CanLII). The action by adult children of the deceased was dismissed on a summary trial. Mr. Justice Savage ordered that the successful party (the deceased's second wife and sole beneficiary) was entitled to costs payable by the adult children. Mr. Justice Savage expressly agreed with the statement from *Re Bowe Estate* that departing from costs follow the event required good reason and ordinarily the unsuccessful party will pay the winner's costs. *Davey v Gruyaert* was not cited in the reasons. Nor was it cited in *Laing v Jarvis Estate*, 2011 BCSC 1411 (CanLII), where again costs in a WVA action were ordered to be paid personally by the loser. *Re Bowe Estate*, on the other hand, is cited in *Laing v Jarvis Estate* (though not directly - it appears within the text of cited authority).

Davey v Gruyaert was cited in *Eckford v Van Der Woude*, 2013 BCSC 1729, where the identical costs order was made against the unsuccessful claimant: that she bear her own costs. After citing Mr. Justice Silverman's distillation of the law in *Jung v HSBC Trust Company*, supra, the court identified two factors in the case central to the costs analysis: (1) there was some merit to the argument that the will invited litigation, and (2) the plaintiff had suffered a medical condition rendering her unemployable that neither she nor the testator would have foreseen before his sudden death in a car crash. Based on these post-2007 authorities, what we may infer is an evolving trend for courts to draw upon *Davey v Gruyaert* where sympathies fall with the unsuccessful party, and to ignore *Davey v Gruyaert* when they do not.

Developing trends in cases involving testamentary capacity were commented upon by Madam Justice Balance in *Mawdsley*

v Mesheh, 2011 BCSC 923. At para. 36 she wrote:

The current judicial trend has been to characterize an action over the validity of a will as an adversarial dispute among the affected parties, as opposed to litigation in some way encouraged by or springing from the testator's conduct, and to follow the usual rule that the costs of the parties follow the event: *Woodward v Grant*, 2007 BCSC 1549, at para 12; *Maddess v Racz*, 2009 BCSC 1550, at para 59.

This is accurate, and helpful. But the most helpful thing about identifying a trend, ironically, is that it gives practitioners something to be very wary of rather than relied on. If we take anything away from this review of costs it is that discretion (and its partner, unpredictability) control the process. See, for example, the reasons of Mr. Justice Barrow in *Hsia v Yen-Zimmerman*, supra, a careful analysis with no predictable outcome.

Obviously, the size of the estate can have a major import on costs. The impact of this factor is generally not made express in reasons. The appropriateness of this as a factor on costs is debatable and beyond the scope of this paper.

ELSEWHERE IN CANADA

Readers interested in the development of the "modern rule" pertaining to recovery of estate litigation costs elsewhere in Canada, should look at a recent case from Alberta. In *Schwartz Estate v Kwinter*, 2013 ABQB 147, after each side had spent well over one million in legal fees, one party abandoned the litigation (thereby allowing the subject will to be probated), and then threw itself at the mercy of the court on costs. The court summarized the law at para. 113:

In estate litigation, I have no doubt that the so-called "modern rule" applies, such that costs in estate litigation are now being treated in a similar fashion to costs in other civil litigation. The old starting point that the estate should bear the costs of litigation has been replaced with the principle that the parties will normally bear costs as they would in other types of civil litigation, unless the challenge to the will or the estate was reasonable, even though eventually unsuccessful.

Similarly, the "modern rule" in Ontario was recently reiterated thusly in *Sawdon Estate v Sawdon*, 2014 ONCA 101, at paras. 83 and 84:

However, the practice of ordering costs from the estate did not extend solely to estate trustees. Historically in estate litigation, the courts would order the estate to bear the costs of all parties.

The historical approach to costs in estate litigation created the danger that estates would be unreasonably depleted because of unwarranted or needlessly protracted litigation. Consequently, it has been displaced by the modern approach set out by this court in *McDougald Estate v Gooderham* (2005), 255 DLR

(4th) 435, (Ont CA), at paras 78-80: the court is to carefully scrutinize the litigation and, unless it finds that one or more of the relevant public policy considerations apply, it shall follow the costs rules that apply in civil litigation.

Readers interested in the development of the “modern rule” should read also the detailed analysis in the New Brunswick decision of *Breau v The Estate of Ernest St. Onge et al*, 2009 NBCA 36 (CanLII). The court there concluded at para. 69: “Following the lead of Alberta, British Columbia, Manitoba, Ontario and Prince Edward Island, we believe the general rule that “costs follow the event” should apply in estate litigation”.

The “modern rule” is clearly well-established, but judicial trends springing from it will be difficult to identify where judicial discretion is exercised on a case by case basis.

B. EXECUTOR NEUTRALITY IN WVA ACTIONS, AND COST CONSEQUENCES

The executor is a mandatory party in a WVA action [see Rule 21-6(2), as amended by BC Reg. 149/2013, Sch. 5(a), formerly Rule 8(14)]. The executor is also mandated by the authorities to be a neutral party in a WVA proceeding (see *Ewasew v Ewasew* (1996), 11 ETR (2d) 309 (BCSC)). When the executor is not also a beneficiary, his or her role at court, if any, is generally to provide necessary background respecting the assets and administration. As such, the standard costs order is that the executor’s costs should be paid from the estate on a special costs basis: *Campbell v Campbell*, [1986] BCJ No 1221 (SC).

Of course, an executor is frequently a beneficiary too, which can dismantle the neutrality presumption and raises issues pertaining to costs. When wearing the hat of beneficiary as well as executor, the executor should be careful to keep separate legal accounts for each role, and must also be prepared to address entitlement to costs separately. In *Ewasaw*, supra, the court noted at paras 6 and 7:

Where a beneficiary is not also the executrix it is clear that her or his own solicitor’s costs are payable by the beneficiary and not by the estate. The rule should be no different where the beneficiary is also the executrix, but it will be important to break-out whatever part of the costs are attributable to the executrix’s duties qua executrix as opposed to her actions as a defending beneficiary.

When the executrix’s accounts are eventually passed therefore, the Master or Registrar will be directed not to allow as part of the estate accounts whatever of the petitioner’s legal costs were incurred to defend her personal inheritance from attack.

This excerpt was cited with approval by the Court of Appeal in *Wilcox v Wilcox*, 2002 BCCA 574. In *Wilcox*, the executors presented a lump sum legal bill of \$50,000, and at para. 28 the Court of Appeal queried “whether that sum can be justified

when the executors’ costs are separated from the [WVA] costs incurred...is a matter to be determined when the executors’ costs are passed”.

The executor-as-beneficiary should keep his or her loyalties separate too, or risk an adverse costs award. The first loyalty is to the beneficiaries. In *Wilson v Lougheed*, 2012 BCSC 1166, Madam Justice Ballance awarded special costs for a portion of a trial (and costs for the whole proceeding) against an executor who crossed the line in a highly charged (and publicized) WVA case advanced by his daughter. At para. 25 of the costs ruling, the court wrote:

The law demands that, as executor, Mr. Lougheed comport himself impartially in the WVA Claim. In discharge of his neutral fiduciary role, Mr. Lougheed was expected, at a minimum, to provide the court with an unbiased and accurate information about the date of death assets and liabilities of the estate. He purposefully elected not to do so.

And at para. 26, she held:

While Mr. Lougheed was free to engage in litigation warfare with his daughter in his personal capacity, the scope of his conduct qua executor was significantly constrained. He manipulated his fiduciary office to advance his own personal gain. That conduct is reprehensible and attracts judicial censure in the form of special costs.

Noting that denying the executor costs out of the estate would have “no punitive or deterrent effect” because the executor was the sole beneficiary, Madam Justice Balance went on to award the plaintiff daughter schedule B costs for 10 days of trial, and special costs for the remaining four days.

C. EXECUTOR COSTS IN MATTERS OF ADMINISTRATION

In the ordinary course, an executor (or other trustee) will be entitled to special costs for matters pertaining to administration. *Kanee Estate, Re* (1991), 41 ETR 263 (BCSC) is often cited as authority for this:

It is a commonplace that trustees, who take the onerous and sometimes dangerous duty of being trustees, are not expected to do any of the work at their own expense; they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; that necessarily means that such costs and expenses are properly incurred and not improperly incurred. The general rule is quite plain: they are entitled to be paid back all that they had had to pay out.

Thompson v Lamport, [1945] 2 DLR 544 (SCC) stands as Canadian authority for the proposition that executors are entitled to full indemnity for costs and expenses properly incurred in the due administration of the estate.

There is authority for this also in the Rules of Court [see Rule

14-1(6), as amended by as amended by BC Reg. 149/2013, Sch, s. 5(a)]. Rule 14-1(6) addresses costs in “non-contentious” estate matters under Rule 21-5, and reads:

Estate Administration Act

(6) Unless the court on application otherwise orders, if costs are payable for any non-contentious business under Rule 21-5, those costs

- (a) must be assessed as special costs, and
- (b) may be assessed without an order of the court, and subrules (3) and (5) of this rule apply.

Of course, often proceedings under Rule 21-5 are anything but “non-contentious”. Provided that the executor is not to blame for the controversy, special costs should still flow. If there is blame to pin on the executor, costs will depend on the nature and degree of the conduct at issue. *Szpradowski v Spradowski Estate* (1992), 44 ETR 89, came before Mr. Justice Thackeray on a motion seeking that a Registrar’s report following a passing of accounts that was favourable to the executor *not* be confirmed. The learned judge apparently saw the matter quite differently than the Registrar. Describing the acts of the executor as “dishonest” and - to use phrase from *Kanee*, supra, “tainted by serious misconduct”, Mr. Justice Thackray refused to confirm the Registrar’s report and awarded special costs for the entire proceeding against the executor.

Szpradowski was considered in the Ontario decision of *Smullen Estate* (Re), [1995] OJ No. 1899, where the court also “threw

the book” at an executor. The executor sought his costs payable from the estate, but the court took a different view after finding him guilty of breach of trust and having wrongfully resisted an accounting. In the result, judgment was issued against the executor for over \$28,000 in costs. *Smullen* relies upon older English authority in suggesting that very gross neglect rather than true breach of trust might be sufficient to justify an award for costs against an executor:

Mr. Hall also cites In *Re Skinner; Cooper v Skinner*, (1903] 1 Ch D 289, which contains an extract from *Heugh v Scard* (1875), 33 LT 659, where Sir George Jessel, with his customary clarity, summed up as follows: “The question of costs being discretionary, it is impossible to lay down a rule binding on any branch of the Court. But it is, nevertheless, well that executors and trustees should understand what I think to be the proper rule. In certain cases of mere neglect or refusal to furnish accounts, when the neglect is very gross or the refusal wholly indefensible, I reserve to myself the right of making the executor or trustee pay the costs of litigation caused by his neglect or refusal.”

Lesser misdeeds, like delay - even significant delay - may not attract a costs award against an executor personally. For example, In *White v Schuler*, [1967] BCJ No 18, 62 WWR 700, the beneficiary was forced to commence proceedings to get an accounting after years of requests. The court noted there was no true refusal by the administrator to render accounts, nor any improper claim by the executor on the estate, the only real complaint being the administrator’s tardiness in supplying an accounting. The court also highlighted the fact that the administrator was probably a reluctant participant in the estate, having been forced to take over administration due to the incapability of the original trustee, her mother. Relying on *Re Skinner*, cited in *Smullen*, supra, the court noted at para. 14 that this case “fell far short of gross neglect and indefensible refusal”. In the result, costs were awarded from the estate on a solicitor-client basis.

But contrast this with *Reznik v Matty*, 2013 BCSC 1346, where the beneficiaries brought a motion for an interim distribution from an estate that was over 10 years in administration, in part due to land that would not sell. Mr. Justice Funk ordered costs payable to the beneficiary’s by the executor personally. No reasons were given in *Matty*, but one infers the court was of the view that there was no reasonable basis on the facts for the executor to be resisting a distribution all the way to a hearing on the matter.

CONCLUSION

Estate disputes are unique because of the emotion, the nature of the claims advanced, the presence of estate assets (which may or may not fund some or all of the litigation at the end of the day), and due to the role of the executor. Against this backdrop - regardless of whatever trends might be identified - multiple factors will inevitably come to bear on judicial discretion when costs are decided. Such circumstances are ripe for creative argument and good advocacy. V

“Plaintiff-Driven,
Professional & In-depth
Investigations,
Province-Wide”

CALL TODAY OR
VISIT US ONLINE



Experienced • Certified • Creative

Lower Mainland Office:
604-525-3876

Nelson Office:
250-551-3875

www.bcadjuster.com