Trustees to absorb their legal costs after battle

Don't take indemnification for granted, warns lawyer

BY MICHAEL MCKIERNAN
For Law Times

A court of appeal decision that ordered two estate trustees to personally bear their own legal costs should serve as a warning to trustees that they cannot take indemnification by the estate for granted, according to a Toronto litigator.

The unanimous three-judge panel in *Brown v. Rigsby* upheld a lower court judge's decision that ordered both sides to absorb their costs after a years-long dispute among siblings over their mother's estate, concluding the trustees should not have their costs covered by the estate because they acted unreasonably and in their own self-interest during the litigation.

"This is a shot across the bow from the court of appeal," says David Morgan Smith, a partner with trusts and estates boutique Hull & Hull LLP.

"They're sending a message to the estates bar and to trustees that the conduct of trustees is going to be scrutinized, and that it will be considered when it comes to costs. I think it will cause everyone who does litigation to pause and consider whether the conduct of the parties is appropriate."

David Morgan Smith says a recent decision awarding costs against trustees shows their conduct will be scrutinized.

"There is still a misconception that the estate will cover everybody's costs," adds Charles Ticker, a Markham, Ont. estate litigator.

Typically, he says a well-behaved trustee will get his or her costs covered, "but there is a caveat.

"They are fiduciaries, which makes them subject to a higher standard of care," Ticker says. "If you fall below that standard, and I think in this case they fell well below, then the court is going to penalize you. Trustees' conduct is always subject to court review, so anyone who undertakes that role has to educate themselves about the duties and responsibilities they have."

Three of Blanche Shackleton's children launched the *Rigsby* case in 2008 against their brother and sister, who were granted power of attorney for their mother's affairs during the later years of her life, and then acted as trustees of her estate. According to Ontario Superior Court Justice Lynne Leitch's March 2015 decision, they were concerned that the value of their mother's estate appeared to have dwindled from around $1 million when she made her will in 1992 to virtually nothing by the time she died in 2007, and initially applied to have the trustees removed and to pass their accounts.

The litigation eventually settled before trial in 2014, but the parties went to court to settle the matter of costs, with the trustees claiming $75,000 costs and the challenging siblings seeking around $80,000. After considering the "loser pays" approach to estate litigation costs, Leitch found success was divided, and ordered each side to bear its own costs.

The trustees appealed that decision, arguing that the judge was wrong to deny them their costs from the estate, since they were duty bound to respond to their siblings' action.

Writing for the court, Appeal Court Justice Sarah Pepall set out the general rules governing trustees' indemnity for legal costs:

- an estate trustee is entitled to indemnification from the estate for all reasonably incurred legal costs;
- if an estate trustee acts unreasonably or in his or her own self-interest, he or she is not entitled to indemnification from the estate; and
- if an estate trustee recovers a portion of his or her costs from another person or party, he or she is entitled to indemnification from the estate for the remaining reasonably incurred costs.

Lou-Anne Farrell, who acted for the three challenging siblings, says her clients were pleased with the court's "common sense" approach to the case.

"The right of indemnification shouldn't be absolute, because that basically gives trustees a free pass on litigation, allowing them to act unreasonably without any way to sanction them," says Farrell, who is counsel to London, Ont. law firm FP Law. "The principle is still there that, in most cases, trustees will be entitled to reimbursement for costs."

After finding Leitch had failed to analyze whether the trustees' conduct "rose to the level of unreasonableness or self-interest that would justify denying them indemnification," the appeal court performed the assessment instead:

"I would deny the appellants indemnification from the estate on the grounds of both unreasonableness and self-interest. In large measure, the parties' dispute centred on a need for the appellants to make disclosure. Their failure to be forthcoming resulted in elevated costs for all parties. Although prior cost awards addressed some of the appellants' conduct, as illustrated by the motion judge's findings, the appellants' behaviour is fairly characterized as unreasonable," Pepall wrote.

"Moreover, the conduct under scrutiny, and the appellants' failure to exhibit timely candour, related for the most part to conduct that pointed to an aggrandizement of their personal holdings at the expense of

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Adopt presumption of undue influence: lawyer

BY MICHAEL MCKIERNAN
For Law Times

Ontario legislators should consider following B.C.'s lead by adopting a presumption of undue influence in will challenges, according to a leading estate litigator in this province.

"It depends which side of a case you're arguing, but on balance, I think a presumption of undue influence would be helpful," says Justin de Vries, the principal at estates and trusts boutique de Vries Litigation LLP.

"Families are complex things, with lots of moving pieces, and the law can be a bit of a straitjacket. Maybe it needs to loosen slightly," he adds.

In 2014, amendments to B.C.'s Wills, Estates and Succession Act introduced a presumption of undue influence in cases where the person challenging the will could show that another person was "in a position where the potential for dependence or domination of the will-maker was present."

The onus then shifts to the person defending the will to show that they did not exercise undue influence over the testator.

Elsewhere in Canada, the burden of proof never shifts in challenges based on allegations of undue influence, leaving plaintiffs facing such a high bar to prove their case that de Vries has labelled it a "Herculean task."

"It's extremely difficult to prove," de Vries says. "The biggest problem is that the deceased has no voice.

"They are dead, and there were no flies on the wall to watch what was going on. In these cases, the deceased was often isolated or cut off from their family, which makes it difficult to gather evidence."

Lisa Haseley, a lawyer with Hull & Hull LLP in Toronto, says the task for plaintiffs is complicated by the fact that the law allows for beneficiaries to exert influence over testators during their lifetime, so long as their efforts fall short of coercion.

"Part of the reason the threshold is so high is because, typically, the assertion of undue influence is made by a person who would likely benefit from the will being overturned," she says. "We always want to make sure that the testator's wishes are followed and observed."

However, de Vries says any presumption could help to level the playing field for plaintiffs without needing to be "overly strong."

"You should be able to rebut the presumption fairly easily, because you want to avoid the danger that you end up with a result that is not correct," he says.

According to de Vries, plaintiffs can often boost their case for undue influence by calling medical evidence about the susceptibility of a particular testator to coercion.

"That's usually one of the production orders we get early on," de Vries says.

"Vulnerability to undue influence grows as you age." **LT**

Case shows risks of being trustee

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the estate and the other residual beneficiaries. In substance, their dilatory conduct served to protect their own interests, not those of the estate."

Ondrej Sabo, a co-founder of Ledroit Law in London, acted for the trustees, and says he takes issue with the characterization of his clients' actions. He says they did not appeal the judgment from the province's top court because they have run out of funds, but they maintain that they acted in good faith during the litigation.

According to Sabo, many of the complaints about slow disclosure related to events before the mother's death, some of them decades old. He says the spiralling cost of the litigation was a factor in the trustees' decision to settle the litigation on the merits, but he says they may have paid a price for giving up their right to challenge some of the "really nasty allegations" made against them by their siblings, none of which were proven in court.

"Had they gone to trial, they might have been successful, but it would have eaten up the entire estate, so they compromised and settled," Sabo says. "If there is a lesson in all this, it would be to be very wary of settling estate litigation on the merits, and leaving the costs up to a judge."

Sabo says judges are put in a difficult position when they are asked to weigh in on the issue of costs without being able to test the evidence in the underlying action.

"They settled the merits for practical reasons, which was a compromise. I'm not sure the decision would have gone the same way if the evidence was put to the test, but that is the risk that was run," he says.

According to Sabo, the case could put people off from acting as trustees in estates cases.

"If I was a trustee, I might say I'm getting out of it, because the risk of having a costs award made against you is very worrisome," he says.

Smith says he will use the case when talking trustee clients through the risks that come with the job.

"It's always good to have a decision from the appeal court. As lawyers, we're always interested in costs decisions because it helps us inform clients about risk assessment," he says.

"Basically, if the court sees any conduct on the part of a trustee that increases legal fees unnecessarily, then they're going to punish it. That's the main lesson to take out of the case." **LT**