Recent cases on costs in estate litigation

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The issue of costs in estate litigation is important for clients and practitioners alike. Courts across Canada have trumpeted the "modern approach" to costs in this area, which involves a careful scrutiny of the claims that were made and the conduct of the parties, rather than allowing the estate to be an "ATM machine" for the parties in every case. Three recent decisions of the Supreme Court of British Columbia, dealing with different aspects of estate litigation, provide helpful illustrations of this approach.

The decision of *Henderson v. Myler*, 2022 BCSC 1530 (31 August 2022, MacNaughton J.) involved the costs award following an 11-day trial on whether documents left by Ms. Murray should be validated under s. 58 of the *Wills, Estates and Succession Act*. In a comprehensive decision released last year (2021 BCSC 1649), Justice MacNaughton held that the documents could not be validated. This conclusion was reached, in part, because the effect of such a validation order would have created an intestacy in regards to most of the estate, thereby benefiting the plaintiffs (the intestate heirs). There was clear evidence that Ms. Murray did not want to leave any part of her estate to some of them.

The defendant SPCA was the residuary beneficiary in Ms. Murray's Will and the successful defendant at trial. An order that the SPCA receive its costs from the estate would be pointless, given that it received the residue of the estate. Instead, the Court ordered that the SPCA was entitled to costs from the plaintiff in the fixed amount of $50,000.

Justice MacNaughton held that the plaintiffs were not entitled to their costs from the estate. None of the traditional exceptions for costs in probate matters, dating back to *Mitchell v. Gard* (1863), applied here. The conduct of Ms. Murray was not the "cause" of this litigation. Instead, this proceeding was a "purely adversarial dispute", similar to a wills variation case, as the plaintiffs hoped to obtain a larger share of the estate. It would be unfair if the plaintiffs were awarded costs from estate. Interestingly, the Court comments (at para. 29) that this case is "not a probate action". Such a comment is curious since a proceeding under s. 58 of the *WESA* involves determining whether documents should be admitted to probate, and can only be described as a probate action. It should be noted, however, that the finding of an "adversarial dispute" has been held, in more traditional probate cases, to be a basis for applying the usual rule as to costs, rather than allow an unsuccessful party to be indemnified from the estate.

The Court also ordered that the SPCA be entitled to double costs for the period after a settlement offer made during the trial. Even though this was a short-fuse offer (with a deadline of less than 24 hours), it came after the plaintiffs had completed their evidence, and it ought to have been accepted. The Court further allowed an "uplift" of costs pursuant to s. 2(5) of Appendix B of the *Supreme Court Civil Rules* due to the circumstances of the case. Such factors included the plaintiffs making extensive document demands, and issuing subpoenas, for evidence that had little to no relevance. Instead of referring the issue of costs to the registrar, the Court fixed the costs at $50,000 in fees, plus disbursements.

The case of *Royal Trust Corporation of Canada v. Horner*, 2022 BCSC 859 (9 March 2022, Brongers J.), further decision on costs, 2022 BCSC 729 (4 May 2022) involved whether an estate planning document could be validated under s. 58 of the *WESA*, or rectified pursuant to either s. 59 of the *WESA* or the common law, to fix a clerical error that resulted in an obvious mistake. When updating her estate plan, Mrs. Hoyle inadvertently signed two copies of the same instrument, and did not sign an instrument that amended previous dispositions. In a decision pronounced in March 2022 (2022 BCSC 859), Justice Brongers applied the equitable doctrine of rectification to replace the text of the duplicate instrument with the text of the mistakenly unsigned document so as to ensure that Mrs. Hoyle's intentions were implemented.

The relief sought in the proceeding had been opposed by some respondents. In a subsequent decision released in May 2022 (2022 BCSC 729), the Court considered the costs implications. There was no doubt that the trustee Royal Trust was entitled to full indemnification. The main issue was whether the respondents who opposed the relief sought by the trustee should also be indemnified by the Trust. These respondents argued that they fell within the criteria in *Re Buckton* (1907) and should be indemnified from the estate, as the proceeding was part of administering the Trust.

Justice Brongers held that due to the "modern approach" to costs in estate litigation, the *Buckton* test should not be applied rigidly. He was concerned about creating a perception that there is "nothing to be lost" in pursuing litigation, and the assets of an estate or trust would thereby be depleted. In this case, the participation of the respondents was helpful in some regard, but their opposition was ultimately unfounded on both legal and factual grounds. They were ordered to bear their own costs.

Finally, the case of *Re McCormack*, 2022 BCSC 1046 (23 June 2022, J. Hughes J.), further decision on costs, 2022 BCSC 1660 (22 September 2022) contains an excellent summary of the principles to be applied when awarding costs in *Patients Property Act* matters. There was no dispute that the successful respondents (the husband and adult son of the incapable adult) should be indemnified for their costs from the estate. The issue for the Court was whether the unsuccessful petitioners, the siblings of the incapable adult, should receive any costs.

The Court held that the unsuccessful petitioners should bear their own costs. They may have been motivated by the best interests of their sister at the outset, but their hostility to the respondents soon overshadowed those concerns. All of the criteria in *Re Stewart* favoured the appointment of the respondents as committee, and the main issue for the petitioners became whether a private facility was preferable to a publicly subsidized long term care facility. The petitioners did not appear to consider the expert evidence that moving their sister to another facility would disturb and unsettle her. Since it was

their animosity to the respondents that became the dominant concern, the petitioners were not entitled to any costs from the estate. The Court, however, rejected the argument that the petitioners should pay special costs. Such an order would be "somewhat extraordinary". There was no reprehensible conduct by the petitioners that would justify such an award. Justice Jacqueline Hughes also had concerns that such a costs order would have a "chilling effect" on committeeship applications, and deter persons from bringing forward claims on behalf of an incapable person.

Each of these cases can be described as examples of the "modern approach" to costs in estates litigation. The courts were mindful of the special rules on costs that often apply in this area, but carefully scrutinized the positions taken by the parties in each case and their conduct during the litigation. Awarding costs is ultimately an exercise of judicial discretion and costs awards will be tailored to the specific circumstances. There must be a proper balance between indemnifying persons who act reasonably and in the best interests of the estate or trust, while not encouraging meritless litigation or unreasonable positions with a guarantee of a costs award.

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