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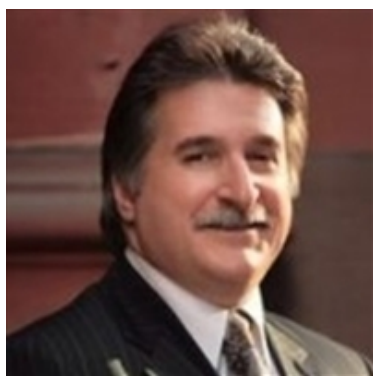
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Estates & Wills & Trusts

Ontario Court of Appeal sticks estate litigants with the tab



A decision by the Ontario Court of Appeal declining to award legal costs to litigants in an estate dispute is a cautionary tale for squabbling families, says Toronto estate litigator and mediator [Charles B. Ticker](#).

Ticker says the parties in [Brown v. Rigsby](#), 2016 ONCA 521, were at odds over their mother's estate. The respondent, appellants at the Court of Appeal, were the executors. Their siblings challenged their handling of matters, and while close to \$160,000 was spent on lawyers by both sides, the parties eventually settled out of

court.

However, the whole affair was unnecessarily protracted, says Ticker, who comments generally and was not involved in the case.

"If the trustees had acted in a reasonable way, and not in their own self-interest, things might have been different. But that wasn't the case. They didn't respond to reasonable requests."

The respondents who were executors of the estate, Janet Rigsby and Paul Shackleton, went to court saying while the parties had settled, they could not agree on who would pay the lawyers' fees. They agreed to have a judge rule on the issue of costs.

Justice Lynne C. Leitch of the Superior Court of Justice, in a March 30, 2015 ruling, looked at the "loser pays" approach common in estate matters today, but struggled to apply it since neither side was a clear winner.

Instead, she ordered both parties to pay their own costs. Rigsby and Shackleton appealed but on June 30, the Court of Appeal dismissed the case and ordered the appellants to pay costs in the amount of \$5,000.

Writing for an unanimous Court, Justice Sarah E. Pepall noted the executors had a duty to respond to their siblings' questions and to deal with their concerns fairly and equitably.

Further, neither of the estate trustees asked for legal costs to be borne by the estate, only that the judge apportion costs.

"However, I would deny the appellants indemnification from the estate on the grounds of both unreasonableness and self-interest," Pepall wrote. "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."

As such, by failing to be candid, aggrandizing their personal holdings at the expense of the estate and the other beneficiaries they were more interested in protecting their own interests, not those of the estate, Pepall ruled.

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“The question of the executors being reimbursed by the estate for their costs should have been addressed by counsel at the hearing of the motion,” Ticker says, noting even then it may not have changed the outcome. “The notion that the estate always pays everyone’s legal costs is wrong. Things have changed and not a lot of people — including some counsel — get that.”

The only time courts will consider the estate paying all parties’ costs is when they're dealing with public policy issues. In estate matters this usually involves being asked to resolve difficulties or ambiguities caused by the testator, such as how they worded their will or set out their instructions, Ticker explains.

"Blended cost awards in which a portion of costs is payable by the losing party and the balance is payable out of the estate are also available when one or more of the relevant public policy considerations is applicable, such as was the case with [Sawdon Estate v. Watch Tower Bible and Tract Society of Canada](#), 2014 ONCA 101."

Ticker says there have been several similar rulings over the years that have set limits on what the estate can reasonably be expected to pay.

“The courts keep issuing these rulings because litigants aren’t getting the message,” he says. “Obviously estate litigation is very expensive. This is not like a commercial litigation matter involving parties where it’s just the cost of doing business. There are emotions at play and often it’s not even about the money. It’s about one party feeling they weren’t fairly treated.”

The clear message is that those acting under a power of attorney or as executors should be transparent and forthcoming and treat other beneficiaries with respect, Ticker says.

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