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Wills, Trusts & Estates

Will challenge litigation costs: When should you team up?

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(May 20, 2021, 1:50 PM EDT) -- Will challenge litigation involving multiple parties with differing interests can be complex and expensive. Following trial, a judge is left to decide which of the parties before the court should be entitled to be indemnified with respect to their costs, to what extent and from whom.

The recent costs decision of Justice Arthur Gans in the matter of *Kates Estate v. Fatica* 2021 ONSC 2630, provides an interesting analysis with respect to all of these issues. The decision is instructive for counsel considering a will challenge as to when the risk of a negative costs award, if unsuccessful, will arise and is also instructive to counsel representing parties sharing the same interest or position.

The first issue Justice Gans considered was whether a "blended costs" award might be appropriate. A blended costs award occurs where some costs are to be paid from the estate and some personally from the losing party.

The principal issue at trial in *Kates Estate v. Fatica* 2020 ONSC 7046, was whether Helen Kates had testamentary capacity at the time she made codicils to her will in 2011. Two nieces of Kates objected to the codicils being admitted into probate, suggesting there was a lack of testamentary capacity, while the named estate trustees as well as a group of charities who benefited from the codicils and Kates' grandchildren asserted that the codicils were valid.

At trial Justice Gans found that Kates did have testamentary capacity to make the 2011 codicils. With respect to costs, the issue for Justice Gans was how to deal with the requests for costs made by the four represented successful parties, and who should pay those costs.

The modern approach to costs in estate litigation is that absent public policy considerations, costs should follow the event and be governed by the regime provided by the *Courts of Justice Act* and decisions involving civil litigation — loser pays.

The Court of Appeal in *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada* 2014 ONCA 101, confirmed that the public policy exceptions to the principle of loser pays would primarily involve the need to give effect to valid wills that reflect the intention of competent testators and the need to ensure that estates are properly administered.

The Court of Appeal in *Sawdon Estate* found that a blended costs award could balance these public policy considerations with the need to discourage unnecessary litigation.

In *Kates*, the public policy concern over testamentary capacity led Justice Gans to adopt a blended costs award approach notwithstanding his clear findings at trial that testamentary capacity had been well established.

The issue for Justice Gans, in providing a blended costs award, was at what point should the costs of

the successful parties begin to be paid by the objectors and not from the estate.

Justice Gans held that upon production of the drafting solicitors file the objectors would have known that there was clear evidence to support a finding of testamentary capacity despite medical evidence which raised concern.

Justice Gans further held that upon receiving a substantial Offer to Settle shortly before trial it was not reasonable for the objectors to have continued the litigation through to trial.

In the result, Justice Gans picked a point in the litigation between the production of the solicitor's file and the delivery of the substantial Offer to Settle and awarded costs out of the estate to the successful parties prior to that date and against the objectors personally after.

With respect to the issue as to whether some or all four of the successful parties should receive costs, Justice Gans referred to Justice Laurence Pattillo's decision in *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne* 2011 ONSC 4400, to hold that not all of the successful parties should be fully indemnified.

Justice Gans held that when the interests of parties before the court in an estates matter are aligned, it is incumbent upon the parties to agree upon single representation or risk receiving reduced costs or no costs at all.

Justice Gans supported the requests of the moving estate trustees for their costs and the request of counsel for the charities but reduced the costs requested by a third estate trustee who had separate representation and of the Kates grandchildren suggesting that those counsel could have made "cameo" appearances or maintained a "watching brief."

The suggestion that multiple parties agree upon single representation is problematic in practice. Counsel's obligations are foremost to the clients who first retained them and so it may be difficult to balance instructions from multiple parties if parties with similar interests are required to retain a single counsel.

Trial counsel should ensure, however, that they work co-operatively to ensure that a duplication of roles does not occur, particularly if they intend to request costs following trial.

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