INDEMNIFICATION OF TRUSTEES

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Trusts and Estates Law

No Bones About it:
Critical Issues and Essential Updates
in Trusts and Estates Law

1. Basic Principles of Indemnification

In our paper we shall discuss the basic principles of the indemnification of trustees[1] and outline the scope of this right and restrictions placed on trustees. We shall also make some suggestions for best practices to limit trustee liability.

In a previous paper[2] and article[3] Albert Oosterhoff discussed how recent case law had misstated and misapplied the right of trustees to be indemnified for reasonable expenses incurred in the administration of the trust. We shall not revisit that topic in detail, but shall instead give an outline of the principles of indemnification of trustees.

As you know, a trust is not a legal person. So it cannot bring legal proceedings. Nor can it be sued by third parties. Instead, it is the trustee, the manager of the trust, who is a legal person. The trustee holds title to the trust assets and is the only person who can sue and be sued. In the course of the administration of the trust the trustee will incur expenses. The expenses may include legal costs for commencing or defending an action and they may involve liability in contract, tort, or under statute. All these expenses are incurred on behalf of the beneficial owners of the trust. Thus it is not fair that the trustee should have to bear the costs and so, provided that the expenses are reasonably necessary in the administration of the trust, the trustee is entitled to be indemnified for them.

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1 We shall refer only to the office of trustees for the sake of simplicity. However, the rules for indemnification are the same for and apply equally to estate trustees.

2 "Indemnity of Estate Trustees as Applied in Recent Cases," presented to the STEP Toronto Branch Conference on 9 January 2013. We have attached a copy of this previous paper in Appendix "A".

3 "Indemnity of Estate Trustees as Applied in Recent Cases" (2013) 41 Adv. Q. 123.

The word "indemnification" suggests that trustees must first pay expenses out of their own pockets and then seek reimbursement from the trust assets. But this presents a problem. Most trustees do not have the resources to pay the expenses themselves. Nor should they have to. If they did, most persons would not want to accept the office of trustee once they realized what it would cost them. That is undesirable and so it has long been the law and the practice that trustees may pay the costs and expenses out of the trust assets.

There are many English and Canadian cases in which their right to do so has been upheld, including decisions at the highest level of courts. These include Re *Thompson Estate*[4] and *Goodman Estate v. Geffen*.[5] In the latter case Wilson J. stated:[6]

> The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. *Reasonable expenses include the costs of an action reasonably defended*.[7] In *Re Dallaway*[8] Sir Robert Megarry stated the rule thus:[9]
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> > *In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders*; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than the benefit of the fund.

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4 [1945] S.C.R. 343, [1945] 2 D.L.R. 545, at S.C.R. 356, *per* Rand J.
5 [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97.
6 At para. 75.
7 See *Re Dingman* (1915), 35 O.L.R. 51.
8 [1982] 1 W.L.R. 756, [1082] 3 All E.R. 118.
9 *Ibid*., at All E.R. 121, emphasis added.

This principle was codified in Canadian trustee statutes and the Ontario *Trustee Act*[10] now provides:[11]

> **23.1** (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
>
> (a) pay the expense directly from the trust property; or
>
> (b) pay the expense personally and recover a corresponding amount from the trust property.
>
> (2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

With "such a great cloud of witnesses" before them,[12] it is astounding that Canadian courts in the last fifteen years or so held that it is impermissible for a trustee to pay litigation accounts or other expenses from trust funds without court approval or the consent of beneficiaries. It began with *Coppel v. Coppel Estate*,[13] which was an uncontested motion for further directions by a beneficiary of an estate. Counsel was unable to find any authority on point! Clearly, the case was decided *per incuriam*, since there obviously was authority on point. Nevertheless, a number of subsequent cases slavishly followed *Coppel*. The cases are all discussed in the paper and article mentioned above. The article also reviewed the case and statute law which clearly authorized

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10 R.S.O. 1990, c. T.23.

11 This section was enacted in 2001 and replaced its predecessor, s. 33. It should be noted that the recent *Uniform Trustee Act*, promulgated by the Uniform Law Conference of Canada in 2012, http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0029.pdf, is defective in this respect. Section 66 of this Act provides that a trustee may reimburse herself out of the trust property for expenses incurred in the administration of the trust, but it does not expressly permit the trustee to pay the expenses directly from the trust property. Nor does the Act contain the equivalent of s. 23.1(2) of the Ontario Act.

12 That is, cases and statutes. The allusion is to Heb 12:1.

13 (2001), 111 A.C.W.S. (3d) 193, [[2001] O.J. No. 5246 (Ont. S.C.J.).

payment of expenses from trust funds and concluded that the recent cases were wrong. We are happy to tell you that a more recent case, *Furtney v. Furtney*,[14] quoted extensively from the article and applied it.

Furtney concerned a matrimonial dispute. Both parties filed for divorce and sought equalization of net family properties. The husband then died. He had named his elderly brother as his estate trustee, but he was unable to act in that capacity, so the applicant, a son of the deceased stepped in and consented to an order to act as estate trustee. The applicant and his brother were the residuary beneficiaries (as to 30 and 70 percent, respectively) under the deceased's will. There were significant difficulties in determining the values of the respective net family properties, but the court had made an earlier order suspending the administration of the estate to the extent of $2.2 million to ensure that there would be sufficient assets to satisfy the wife's claim for equalization.

In his capacity as estate trustee, the applicant brought a motion for an order directing that the sum of $100,000 be set aside from the estate on account of anticipated legal fees and disbursements to be incurred by the solicitors to the estate trustee.

Mitrow J. granted the relief sought. He referred extensively to the above-mentioned article and applied it. He agreed that both under case law and s. 23.1 estate trustees are entitled to pay expenses, including legal fees and disbursements directly from estate assets, subject to subsequent disallowance by the court. He noted further that the cases do not regard the fact that

[14] 2014 ONSC 3774, 100 E.T.R. (3d) 312.

the estate trustee is also a beneficiary as a valid basis for denying costs. Moreover, he agreed that the applicant had a duty to defend the claims of the wife.

Accordingly, Mitrow J. ordered that the requested sum be set aside for anticipated legal fees and disbursements. However, to protect the wife, he required the solicitors to render accounts quarterly to the applicant, with copies to the wife. The wife would have opportunity to dispute the accounts, and any dispute would be referred to the judge, but if there was no dispute, the accounts should be paid within 30 days. As additional protection for the wife, he repeated the substance of s. 23.1(2) in the order, by giving the wife the right, at trial, to request that all or any part of the amount set aside for legal fees and disbursements be repaid to the estate, irrespective of whether a dispute was filed or whether the court approved the amount. In our view, assuming issues of solicitor/client privilege were properly accommodated through waiver, redaction, or otherwise, this was an eminently sensible order, since it protected the rights of both parties.

2. Recovery of Costs from the Losing Party and from the Estate in Litigation

We shall now consider the recent decision of *Sawdon Estate v. Sawdon*.[15] What follows is a summary of a more detailed commentary of this case written by John O'Sullivan and Sara Beheshti.[16]

In *Sawdon Estate v. Sawdon*, the testator had placed seven bank accounts into joint names with two of his five children but told these two children that the funds in the accounts were to be

[15] 2012 ONSC 4042; 2014 ONCA 101.

[16] "*Sawdon Estate v. Sawdon* and Trustee Indemnification in Estate Litigation," John O'Sullivan and Sara Beheshti, attached as Appendix "B".

distributed equally among all of his children after his death. The residuary beneficiary of the estate, Watch Tower Bible and Tract Society of Canada,[17] claimed that the funds in the bank accounts were held in trust for the estate. The estate trustee was one of the children of the testator and thus had a personal stake in the litigation. The estate trustee and some of his siblings applied to the court to determine whether the funds would go to the two children, to all of the testator's children or to the estate.

At the trial of this issue the court ruled that the bank accounts were held in trust for all of the testator's children and ordered the unsuccessful respondent, Watch Tower, to pay partial indemnity costs to the estate trustee. However, the trial judge refused to order that the estate indemnify the estate trustee for the remainder of his costs in the litigation on the basis that the litigation did not benefit the estate. The estate trustee appealed the trial judge's refusal to order indemnification from the estate.

Writing for the Court of Appeal, Gillese J.A. allowed the estate trustee's appeal and overturned the trial judge's costs decision. Based on an "application of the governing principles", the Court of Appeal made a blended costs order for both the trial and appeal: Watch Tower was required to pay costs to the estate trustee on a partial indemnity basis and the estate was required to indemnify the estate trustee for the balance of the litigation expenses incurred on behalf of the estate.

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[17] Hereinafter referred to as "Watch Tower."

In its reasons, the Court of Appeal begins by referring to the Supreme Court of Canada's decision in *Geffen v. Goodman Estate*[18] that confirms "the long-standing principle that estate trustees are entitled to be indemnified for all reasonably incurred costs, including legal costs." However in the next breath the Court of Appeal points out that the historical practice of ordering the litigation costs of all parties from the estate has been displaced by the "modern approach" set out in its decision in *McDougald Estate v. Gooderham.*[19]

The "modern approach" refers to the new approach to awarding costs in estates litigation. It dictates that costs now follow the event in estate litigation (*i.e.*, loser pay), except where involvement in the litigation engages some public policy consideration that justifies paying a party's litigation costs out of the estate. In *Sawdon Estate v. Sawdon*, the Court of Appeal describes the modern approach to costs as follows:

> [84] … 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. That is, the starting point is that estate litigation, like any other form of civil litigation, operates subject to the general civil litigation costs regime established by section 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43, and Rule 57 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, except in those limited circumstances where public policy considerations apply.
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> [85] The public policy considerations at play in estate litigation are primarily of two sorts: (1) the need to give effect to valid wills that reflect the intention of competent testators; and (2) the need to ensure that estates are properly administered. In terms of the latter consideration, because the testator is no longer alive to rectify any difficulties or ambiguities created by his or her actions, it is desirable that the matter be resolved by the courts. Indeed, resort to the courts may be the only method to ensure that the estate is properly administered.
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> [86] In any event, where the problems giving rise to the litigation were caused by the testator, it is appropriate that the testator, through his or her estate, bear the cost of their

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[18] *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 390-391.

[19] *McDougald Estate v. Gooderham*, (2005), 255 D.L.R. (4th) 435, (Ont. C.A.), at paras. 78-80.

> resolution. In such situations, it ought not to fall to the Estate Trustee to pay the costs associated with having the court resolve the problems.[20]

Reviewing the facts of the case, the Court of Appeal in *Sawdon Estate v. Sawdon* decided both public policy considerations - the need to give effect to the testator's intentions and the need to properly administer the estate - were engaged in the litigation. The testator's intentions regarding the funds in the joint bank accounts were unclear and the court's intervention was required to determine whether the funds belonged to the estate by way of resulting trust. Thus, the need for proper administration of the estate was the basis for the proceedings. The estate trustee's participation in the litigation was necessary as part of his duty to ascertain and call in the assets of the estate. For that reason the Trustee should be indemnified.

The Court of Appeal's judgment in *Sawdon Estate v. Sawdon* confirmed that the estate trustee's personal interest in the outcome of the litigation does not preclude indemnification for litigation costs out of the estate funds.[21] The estate trustee personally profited from the decision that the property in the joint accounts passed outside the estate and this outcome reduced the value of the estate overall. Nonetheless, the Court of Appeal concluded that the trustee acted reasonably throughout the litigation and the litigation benefited the estate by providing clarity on how the estate should be administered.

The Court of Appeal also confirmed in *Sawdon Estate v. Sawdon* that a costs order in favour of the estate trustee does not derogate from the estate trustee's entitlement to indemnification from

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[20] 2014 ONCA 101, at paras. 84-86.

[21] Since many estate trustees are close friends or family members of the testator, this decision provides some guidance on how the court should treat an estate trustee with a personal interest in the estate and the estate litigation.

the estate for litigation costs not covered by the costs award. By making a blended order for the trustee's litigation costs in the trial and appellate proceedings, the court retained the deterrent and disciplinary function of a costs order while allowing the estate to indemnify the trustee.

Although the result is consistent with the basic principles of indemnification as outlined in the first part of this paper, the Court of Appeal's analysis in *Sawdon Estate v. Sawdon* in some respects conflicts with those basic principles.

The Court of Appeal conflates the principle of trustee indemnification for reasonable legal *expenses*, with the "historical approach" of awarding litigation *costs* to all parties to the litigation from the estate funds. By associating the ills of the historical approach to costs with the principle of trustee indemnification for legal expenses, the Court of Appeal seems to be saying that the principle of trustee indemnification for legal expenses has been applied too broadly and needs to be limited by the modern approach to costs in estate litigation.

In the authorities trustee indemnification is *not* limited by the rules that apply to costs in civil litigation. The two operate entirely separately. In the words of Cullity J. in *Merry Estate v. Plaxton*, in which he considered the effect of the new "costs grid" and Rule 57 costs factors on the principle of trustee indemnification:

> There is no necessary correlation between the amount a losing party in litigation should pay to a successful party and the quantification of a trustee's indemnity for charges and expenses – including legal fees properly incurred.[22]

A trustee who unsuccessfully defends an action against the estate is entitled to be indemnified out of it for costs he has been ordered to pay to the plaintiff, even if the costs order does not specify that.[23]

In the case that established the modern approach to costs in estate litigation - *McDougald Estate v. Gooderham* - the Court of Appeal applies the modern approach to determine whether the estate should bear the cost of the litigation, but not to determine if the estate should indemnify the estate trustee for its litigation expenses.

Trustee indemnification is limited only by the constrictions imposed by the Supreme Court of Canada in *Geffen* – "expenses reasonably incurred" – and by the language of the statute – the expenses must be "properly incurred in carrying out the trust".

By treating the question of trustee indemnification as a costs issue, *Sawdon Estate v. Sawdon* essentially puts the estate trustee in the same position as other parties to the litigation.

It also creates uncertainty around the timing of indemnification for the estate trustee, since, despite the specific permission given by s. 23.1 of the Trustee Act to pay an expense which may

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22 *Estate of Merry v. Plaxton* 2002 CanLII 32496 (ONSC) *per* Cullity J., at para 49.
23 *Re Dingman* (1915), 35 O.L.R. 51 (H.C.).

afterwards be disallowed, the prudent estate trustee should perhaps not pay litigation expenses from the estate before a costs decision determines whether the trustee is entitled to indemnification. As Prof. Oosterhoff notes, few people would agree to take on the role of estate trustee if they were required to bear the expenses of their office personally and recover these costs at a later date.[24] Applications for the court's advance approval may be brought but these are expensive for an estate.

These points and others are more fully developed in the paper at Appendix "B".

3. Are there Limits on the Right of Indemnity?

The short answer to this question is: Yes, there are. The case law and s. 23.1 of the *Trustee Act*, discussed above, make it clear that a trustee is entitled to be indemnified only for expenses that are properly incurred. Further, they state that the court may afterwards disallow the payment or recovery of the expenses from the trust funds if the court is of opinion that the expense was not properly incurred in carrying out the trust. The onus for establishing that the expense was proper is on the trustee.[25]

The question therefore is what expenses are reasonable and proper. The cases provide some guidance on this point. We can gather the following principles from them:

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[24] "Indemnity of Estate Trustees as Applied in Recent Cases," Appendix "A," p. 19.
[25] *Carter v. Blaney* (1989), 34 E.T.R. 229 (B.C.C.A.).

(1) The expenses must have been incurred on behalf of or in the course of the administration of the trust.[26] If they were incurred in a related matter, they are not recoverable even though failure to incur them would have disadvantaged the trust.[27] *Quaere*, however, whether the trust is not unjustly enriched in that situation and that the trustee should be able to recover the expenses on that ground.[28]

(2) Expenses voluntarily assumed by the trustee are not recoverable.[29]

(3) Trustees cannot recover expenses that arose out of their own misconduct.[30]

(4) Legal expenses are recoverable, including expenses incurred for advice on the duties of trustees, the interpretation of the trust instrument, and the amount of the compensation to which the trustee is entitled. So also are costs incurred on an application for advice and directions and on a contested passing of accounts, so long as the costs are not excessive.[31]

(5) With respect to costs of litigation, trustees may be awarded full or partial indemnity for their legal costs, or be denied costs. Can they be indemnified for the difference between what they have been awarded and their actual costs out of the trust funds? They can if the litigation was

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26 Ceepear (School District No. 3069) v. Security Trust Co., [1919] 1 W.W.R. 615 (Alta. S.C.).
27 *Fultz v. McNeil* (1906), 38 S.C.R. 198.
28 See *Waters Law of Trusts in Canada*, 4th ed. by Donovan W.M. Waters, Mark R. Gillen, and Lionel Smith (Toronto: Thomson Reuters/Carswell, 2012), pp. 1211-12.
29 *Vermont Loan & Trust Co. v. Ennis*, [1933] 2 W.W.R. 397 (Sask. C.A.).
30 *Morton v. Miller* (1906), 1 E.L.R. 91 (N.S.S.C.).
31 See, *e.g.*, *Re Kanee Estate* (1991), 41 E.T.R. 263 (B.C.S.C.); *Re Watterworth Estate*, 1995 CarswellOnt 2528 (Gen. Div.); *Chabros v. Anderson*, 2011 ABQB 806, 75 E.T.R (3d) 281, additional reasons 2012 ABQB 517, 79 E.T.R. (3d) 317.

reasonable and proper. This is so even if the trustees need to appeal.[32] And it is so even if the trustees as well as the trust fund benefit from the appeal.[33] Even when trustees are defending accusations of fraud or undue influence, they are entitled to be indemnified if they have acted reasonably in defending the action and if they are vindicated.[34]

(6) Courts do scrutinize the costs of litigation particularly closely and if the trustees have doubts about whether litigation is reasonable and proper, they are well advised to obtain the prior consent of the beneficiaries. The consent of the beneficiaries may not be possible, either because not all have full capacity, or because there is conflict between the beneficiaries and the trustees. In those circumstances the trustees should seek the approval of the court. Doing so will ensure that they are not later required to reimburse the trust because the court concludes that the litigation was unwarranted.

4. Conclusion

It is clear that trustees are entitled to be indemnified for their reasonable and proper expenses incurred in administering the trust. They may incur the expenses themselves and then recover them from the trust funds, or they may pay the expenses directly from the trust funds. The court may later (either in proceedings brought by beneficiaries contesting the expenses, or when the trustees pass their accounts of their own motion or on the application of the beneficiaries)

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[32] See, *e.g.*, *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*, 2011 ONSC, 731, 65 E.T.R. (3d) 113, additional reasons 2011 ONSC 4400, 71 E.T.R. (3d) 185 (cost endorsement), affirmed 2012 ONCA 862; *Sawdon Estate v. Sawdon*, 2014 ONCA 101.

[33] See *Re Thompson Estate*, [1945] S.C.R. 343, [1945] 2 D.L.R. 545, at S.C.R. 357-58, *per* Rand J.; *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97, para. 77, *per* Wilson J.; *Walters v. Woodbridge* (1878), 7 Ch. D. 504 (C.A.), at 510, *per* James L.J.

[34] Goodman Estate v. Geffen, ibid., para. 75, per Wilson J.

disallow some or all of the expenses and require the trustees to repay them. Hence, in case of doubt the trustees are well-advised to seek advice and directions from the court about the appropriateness of a proposed expense before they incur it.

APPENDIX "A"

INDEMNITY OF ESTATE TRUSTEES AS APPLIED IN RECENT CASES

Prepared by
Albert H. Oosterhoff[1]

for the
STEP Toronto Branch Conference on
9 January 2013

1. Introduction

The focus of today's seminar is the law of indemnity for estate trustees, particularly in view of recent court decisions, some of which appear to be limiting the right of estate trustees and trustees. My task is to examine and set out the historic view of the law of indemnity in this context. In doing so, I shall quote extensively from the cases.

My paper is thus quite limited in scope. It does not address the law of indemnity generally. Nor does it examine a number of aspects of the law of indemnity as it affects estate trustees and trustees[2] specifically. Thus, I shall not examine the following topics, even though some of them arise incidentally in the recent cases: (a) the nature and extent of the estate trustee's lien against the estate assets and whether the estate trustee's creditors have a right to be subrogated to the estate trustee's lien; and (b) the circumstances in which trustees and estate trustees are entitled to claim indemnity from trust or estate beneficiaries.

We shall discover that much of the law of indemnity of estate trustees is fact-driven. By that I mean that each case is unique, not for the applicable principles, but because of its particular facts. The facts vary greatly from case to case and lead to different outcomes when the principles are applied. I shall discuss some of the cases, but I shall by no means survey all of the case law on this topic. There are a number of other sources that provide a broad overview of this law.[3]

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1 Professor Emeritus, The University of Western Ontario, Faculty of Law.

2 Although our topic only concerns estate trustees, I shall speak promiscuously of trustees and estate trustees, since the rules for both are largely identical in the context of indemnity.

3 See, *e.g.*, M.C. Cullity, "Personal Liability of Trustees and Rights of Indemnification" (1996), 16 E.T.J. 115; *Widdifield on Executors and Trustees*, 6th ed. by Carmen S. Theriault, ed. (Toronto: Thomson Carswell, 2002), c. 4. Suzanna Popovic-Montag, "Revisiting a Trustee's Right to Indemnification" (2003). 50 E.T.R. (2d) 161; *Waters' Law of Trusts in Canada*, 3rd ed. by Donovan W.M. Waters, Mark R. Gillen, and Lionel D. Smith (Toronto: Thomson Carswell, 2005), c. 22. See also Jennifer J. Jenkins, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* (Toronto: Canada Law Book, 2011), c. 22.

2. Why Do We Need Indemnity

As most of you will know, an estate is not a juridical person. Neither is a trust. Hence, third parties cannot sue an estate or a trust. The only person they may have had dealings with is the estate trustee or the trustee It is that person whom they must sue. The defendant will undoubtedly incur expenses and costs in the course of the litigation and it is appropriate that she be able to recover them from the estate or trust, assuming they were incurred properly. Similarly, a trust or an estate cannot commence an action. The trustee or estate trustee must do so. Again, if the action is appropriate he should be able to recover the expenses and costs. In other words, third parties deal with a trustee or an estate trustee as principal. She is not an agent for the trust or estate, nor for the beneficiaries. Thus, third parties cannot normally recover their costs from the beneficiaries.

Further, an estate trustee will likely incur various expenses in the course of administering an estate, including typical administration expenses, as well as liability in contract, tort, or under statute. It is not fair that she should bear those herself, but should be able to recover them from the assets of the estate in priority to the beneficiaries.

Consequently, the courts have always held that trustees and estate trustees are entitled to be indemnified for their reasonable expenses. In the early case, *Worrall v. Harford*, Lord Eldon put it thus:

> It is in the nature of the office of trustee, whether expressed in the instrument or not, that the trust property shall reimburse him for all the charges and expenses incurred in the execution of the trust. It is implied in every such deed.[4]

To the same effect is the following statement of Rand J, speaking for the majority in *Thompson v. Lamport*,[5] a case I shall also refer to later in another context:

> The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses properly incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly.

See also *Goodman Estate v. Geffen*,[6] in which Wilson J. stated and applied the following principle:

> The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. *Reasonable expenses include the costs of an action reasonably defended*.[7] In *Re Dallaway*[8] Sir Robert Megarry stated the rule thus:[9]

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4 (1802), 8 Ves. Jun. 4 at 8, 32 E.R. 250 (Eng. Ex. Ch.).
5 [1945] S.C.R. 343 at 356, [1945] 2 D.L.R. 545.
6 [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 42 E.T.R. 97, at para. 75, emphasis added.
7 See *Re Dingman* (1915), 35 O.L.R. 51.
8 [1982] 1 W.L.R. 756, [1082] 3 All E.R. 118.
9 *Ibid*., at All E.R. 121, emphasis added.

> *In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders*; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than the benefit of the fund.

There are many other cases decided by lower Canadian courts to the same effect. The principle of indemnification is thus firmly embedded in Canadian law.

This principle was codified in Canadian statutes in the 19th century.[10] Thus, for example, the Ontario *Trustee Act*[11] now provides:

> **23.1** (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
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> (a) pay the expense directly from the trust property; or
>
> (b) pay the expense personally and recover a corresponding amount from the trust property.
>
> (2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

I draw your attention also to the new Saskatchewan *Trustee Act*.[12] It is in some respects clearer than the Ontario provision and the statutes in some of the other provinces, in that it provides specifically for expenses to settle an action or satisfy a judgment, and for legal fees and costs. Section 43 provides:

> **43.**
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> . . .
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> (3) A trustee may reimburse himself or herself for, or pay or discharge out of the trust money, all expenses reasonably incurred in or about the execution of the trustee's trust or powers.
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> (4) A trustee may:
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> (a) be indemnified out of trust money with respect to:
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> (i) liabilities and expenses, including an amount paid to settle an action or satisfy a judgment, arising out of any matter or thing done honestly and in good faith relating to the exercise or attempted exercise of the powers and duties of the trustee; and

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10 The current statutory provisions are: *Trustee Act*, R.S.A. 2000, c. T-8, s. 25; R.S.B.C. 1996, c. 464, s. 95; C.C.S.M. 1987, c. T160, s. 78; R.S.N.L. 1990, c. T-10, s. 29; R.S.N.S. 1989, c. 479, s. 29; R.S.N.W.T. 1988, c. T-8, s. 5; R.S.N.W.T. (Nu.), c. T-8, s. 5; R.S.O. 1990, c. T.23, s. 23.1, added by S.O. 2001, c. 9, Sched. B, s. 13(1); S.S. 2009, c. T-23-01, s. 43; R.S.Y. 2002, c. 223, s. 8; *Trustees Act*, R.S.N.B. 1973, c. T-15, s. 13(2). Note, however, that most of these provisions are not as extensive as Ontario's s. 23.1. P.E.I. does not have comparable legislation.

11 R.S.O. 1990, c. T.23, s. 23.1, added by S.O. 2001, c. 9, Sched. B. s. 13(1). This provision also applies to estate trustees. See *Trustee Act*, *ibid.*, s. 1, which defines "trust" to extend to and include "the duties incident to the office of personal representative [*i.e.*, estate trustee] of a deceased person." I have always thought it odd that while the *Rules of Civil Procedure* were changed by O/Reg 484/94 to create the title of "estate trustee," corresponding statutory provisions, such as s. 1 of the *Trustee Act* still speak of "personal representative," or in other contexts of "executor" and "administrator," the terms used in the rest of the common law world.

12 *Trustee Act, 2009*, S.S. 2009, c. T-23.01

(ii) legal fees and costs relating to a claim for which this subsection provides an entitlement to an indemnity; and

(b) receive out of the trust money an advance of money for the purpose of meeting an expense for which the trustee may be reimbursed or indemnified pursuant to this section.

(5) A trustee shall repay the money advanced to the trustee pursuant to clause (4)(b) if the trustee is found not to be entitled to be reimbursed or indemnified with respect to the expense for which the advance was made.

3. The Nature of Indemnity

As the word itself suggests, the right to be indemnified implies that estate trustees should bear the costs and expenses themselves first and then seek reimbursement from the estate assets. But this presents a problem. Many trustees and estate trustees do not have the wherewithal to pay the costs out of their own pocket. Nor should they have to. Their office is a socially desirable one which at one time, at least in the case of trustees, was carried out without remuneration.

Of course, a person who has been named to the office does not have to accept it. He may renounce. Most people would probably want to renounce once apprised of the fact that they must pay for all costs and expenses personally and can recover them only afterwards. On that basis few people would agree to take on the office. That is certainly not desirable. And so it has long been the practice and the courts have long since recognized that trustees and estate trustees may pay the costs and expenses out of estate or trust assets. Thus the statutes set out and referred to above also rightly codify this aspect of the principle of indemnity.

4. Limits on the Right of Indemnity

It is obvious that the right to indemnity may be abused by trustees and estate trustees, especially if they take costs and expenses out of the trust fund or estate assets before they are authorized to do so.[13] But even if they pay these initially themselves, they may be refused indemnity subsequently by the courts or be required to repay the trust or estate. The principle set out above and codified in the statutes also recognizes this possibility. The expenses and costs must have been reasonably or properly incurred. If they were not, the trustee or estate trustee is not entitled to be indemnified.

This issue normally arises when the trustees or estate trustees apply to pass their accounts or when they are forced to do so by the beneficiaries. However, it may also arise on an application

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[13] I have eschewed the use of the unfortunate terms “pre-take” and “pre-taking,” which is found in many modern cases. It is undoubtedly convenient shorthand and everyone know what it means, but it is bad English, rather like the term “pre-planning,” which is in common use in the funeral industry. Surely one either takes or one does not and one either plans or one does not. The prefix “pre” means “before,” so the expressions “pre-taking” and “pre-planning” are silly. Literally, they mean that you are not doing anything. Having said this I confess to being shocked that the OED does recognize “preplan” as meaning “plan in advance,” but I am pleased that it does not mention “pre-take.” It is well to recognize that the OED is descriptive in its entries, *i.e.*, it describes what people say, not what they ought to say.

for advice and directions. The onus is on the estate trustee to prove that the expenses were proper.[14]

So the question is what kinds of expenses are reasonable or proper. A singularly unhelpful explanation is that of Lindley L.J. in *Re Beddoe*[15] who said, "the words 'properly incurred' in the ordinary form of order are equivalent to 'not improperly incurred.'" That does not gain us a clearer understanding of the word. For that we need to go the cases.

A number of general principles emerge from the older cases:[16]

> (1) The expenses must have been incurred on behalf of or in the course of the administration of the trust or estate. If they were not, they are not recoverable, even though they were incurred in a related matter and, if not incurred, would have had a deleterious effect on the trust.[17] If they were incurred on behalf of the trust, however, they are recoverable.[18]
> (2) Expenses voluntarily assumed by a trustee are not recoverable.[19]
> (3) Trustees and estate trustees are not entitled to be indemnified for expenses that arose out of their own misconduct.[20]

These principles clearly make sense and continue to be accepted in modern case law. However, their application in particular cases is not always clear. And, as argued by Waters,[21] if the expenses, though incurred outside the scope of the trust, in fact benefit the trust, perhaps the estate should be required to indemnify the trustees on the ground that the beneficiaries are unjustly enriched.

These principles apply to all costs and expenses incurred by the trustees or estate trustees. It should not matter whether they arose directly in the administration of the estate; whether they are contractual, tortious, or statutory obligations of the trustees; or whether they consist of legal costs incurred in litigation conducted by the trustee or estate trustee on behalf of the estate or trust either as plaintiff or defendant in an action, or as applicant or respondent in applications or motions. However, courts appear to scrutinize legal costs more closely than other expenses, perhaps to prevent unnecessary litigation at the cost of the beneficiaries.[22] One principle that arises out of this closer scrutiny is that trustees are not normally indemnified for the costs of an

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14 *Carter v. Blaney* (1989), 34 E.T.R. 229 (B.C.C.A.).
15 [1893] 1 Ch. 547 at 558 (Eng. C.A.), on appeal from an order of Kekewich J.
16 See generally Waters, *supra* footnote 3, at 1152ff; and Popovic-Montag, *supra*, footnote 3, both for a discussion of the general principles and a wealth of examples in which indemnity was either granted or refused.
17 *Fultz v. McNeil* (1906) 38 S.C.R. 198.
18 Ceepeear (School District No. 3069) v. Security Trust Co. [1919] 1 W.W.R. 615 (Alta. C.A.).
19 See *Vermont Loan & Trust Co. v. Ennis* [1933] 2 W.W.R. 397 (Sask. C.A.).
20 See, *e.g.*, *Tebbs v. Carpenter* (1816), 1 Madd. 290, 56 E.R. 107; and *Morton v. Miller* (1906), 1 E.L.R. 91 (N.S.S.C.).
21 Waters, *supra*, footnote 3, at 1153-54.
22 See, *e.g.*, *Re Foote Estate*, 2010 ABQB 197 at para 16, *per* Graesser J.

appeal, since it may not be for the benefit of the beneficiaries. They should normally be satisfied with the judgment at first instance. However, this principle is also subject to exceptions.[23]

Goodman Estate v. Geffen, already mentioned,[24] is a clear example of such an exception. A person with mental illness had inherited property from her mother. She settled the property upon trust for herself for life, with remainder to her children, nieces and nephews. Two of her brothers and a nephew were named as the trustees. After her death, her son sued the trustees in his personal capacity and as executor of his mother's estate, alleging that the brothers had exercised undue influence over their sister. The trial judge found that there was no undue influence. The Alberta Court of Appeal reversed on the ground of the presumption of undue influence. On further appeal, the Supreme Court of Canada restored the trial judgment, holding that the presumption was rebutted. The trustees obviously had to defend the action and the appeal to the Court of Appeal. But should they have brought the appeal to the Supreme Court? The Supreme Court did not address the issue directly, but appears to have had no difficulty with the appeal. On the issue of costs, the son argued that the trustees should not be allowed their costs out of the estate, since they were acting for their own benefit. However, the court held that there could be no question that the trustees had acted reasonably and were thus entitled to be indemnified. Justice Wilson went on to say:[25]

> Nor can there be any serious question that the appellants in defending the action were acting, not for their own benefit, but for the good of the trust. For [the nephew trustee], of course, defending the action promoted both his personal interest as well as that of his fellow beneficiaries. While we have not been referred to a case in which trustees seeking indemnification from a trust were also beneficiaries of the trust, I do not consider the co-existing interest of trustee and beneficiary a valid basis for denying costs. Similarly, the fact that the Geffen brothers were acting in the interests of their children, nephews and nieces, does not, in my view cast any doubt upon the propriety of their actions.

The court awarded the trustees full reimbursement from the trust property for their actual and reasonable costs, including legal fees, while requiring the son to bear his own costs.

Thus, statements to the effect that when executors are seeking compensation they are to be regarded as ordinary litigants in respect of costs, appear to be incorrect.[26] I submit that since executors are entitled to compensation for the work they have done, their request for compensation is made as an administration expense.[27]

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23 *Smith v. Beal* (1894), 25 O.R. 368 (C.A.)

24 *Supra*, footnote 6.

25 *Ibid*., at para. 77.

26 See, *e.g.*, *Widdifield*, *supra*, footnote 3, at 4-21. *Re Preboy Estate* (1989), 72 Sask. R. 33 at 43 (Surr. Ct.), affirmed (1989), 74 Sask. R. 223 (C.A.).

27 See, *e.g.*, Jenkins, *Compensation*, *supra*, footnote 3, at para. 22:20.20; and *Re Kanee Estate* (1991), 41 E.T.R. 263 (B.C.S.C.), followed in *Re Watterworth Estate*, 1995 CarswellOnt 2528 in which the Ontario Court (General Division) said at para. 38 that the time spent by an estate solicitor responding to the executor's questions concerning compensation to which they are entitled is a legitimate expense and that it is in the estate's best interests that legitimate compensation be paid.

I want to look a bit more closely at another case already mentioned, *Thompson v. Lamport*.[28] It is significant for the broad principles applied by Rand J. The case concerned an action by the executors of a will which directed them to set up a trust for the testator's daughter with a capital sum of $100,000. She was to receive income from the trust for life. She would also receive the corpus if she should survive her husband, but the corpus would fall into residue if she predeceased her husband. The residue of the estate was left to her two brothers. The brothers and a trust company were appointed the executors and trustees. The daughter brought an action against the trustees, alleging various improprieties. The trial judge dismissed the action with costs. The party and party costs, as taxed, were being paid out of the income paid to the daughter. The solicitor and client costs were also taxed and the trustees sought to recover the difference between the two assessments from the trust fund. The daughter objected. On an application, the application judge directed that the difference should be recovered out of the capital of the trust. The Ontario Court of Appeal was of opinion that trustees can only recover costs from a trust if they have benefited it. Here the only benefit was to the residue and so the court directed that the trustees could only recover the difference between the two sets of costs from the residue. The trustees then appealed to the Supreme Court of Canada.

In the course of his judgment for the majority, Rand J. referred to and applied *Walters v. Woodbridge*.[29] The trustee of an estate had obtained court approval for the sale of the partnership interest of the deceased. Pursuant to a compromise, the proceeds were to be held on the trusts of the will. Some beneficiaries then brought a bill in equity to have the court's decree set aside for misrepresentation. The bill was dismissed with costs, but the trustee was unable to recover his taxed costs from the beneficiaries. He brought an application to have his solicitor and client costs taxed and charged against the estate. Lord Romilly dismissed the application for lack of jurisdiction, since the action was defended by the trustee to clear his own character. The Court of Appeal reversed and James, L.J. said the following:[30]

> It is agreeable to me personally that we are not obliged to put a trustee in a position which would be disgraceful to the administration of justice. The Court is very strict in dealing with trustees, and it is the duty of the Court, as far as it can, to see that they are indemnified against all expenses which they have honestly incurred in the due administration of the trust. Lord Romilly says that the trustee here defended himself against a false charge, and was in the same position as any other person who so defended himself; but it was a charge against the trustee in respect of acts done by him in the due administration of the trusts; and his defence was beneficial to the trust estate, for it has been decided that the compromise was an advantageous one. In such a case it is impossible to split the defence, and say that because the trustee at the same time defended his own character he is only to have a part of the costs.

Justice Rand had this to say about the "benefit":[31]

> Now, what are the characteristics of this benefit? There [in *Walters*] the proposed sale required the prior approval of the court, and the effect of the judgment dismissing the bill was to confirm

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28 *Supra*, footnote 5.
29 (1878), 7 Ch. D. 504 (C.A.).
30 *Ibid*. at 510.
31 *Thompson*, *supra*, footnote 5, at 357-58.

> that approval. But what of the case where the trustee carries through a transaction which does not require such an approval? What is to be the measure or test of benefit? Can it be anything more than that the act was properly done within the duty of the trustee? Must the court examine the details of the transaction challenged and find not only propriety but a "benefit" as against what is alleged ought to have been done?
>
> Where the trustee is resisting the assertion of a right by a third person against the trust estate, obviously his action is for its benefit. But a new element is introduced when the complaint is by the beneficiary for a breach of duty, such as fraud or negligence. In that case the trustee is in fact defending both his administrative act and his own interest. In the latter aspect, he has no special privilege in costs over an ordinary litigant: he is in the same position as any other person improperly accused of a wrong, and any outlay over the costs allowed by law must be borne by himself as the price of his own vindication. The question in such cases is whether the personal defence is incidental to that in his representative capacity: if it is, the costs will not be split.
>
> From this the Court of Appeal has drawn the conclusion that in suits by beneficiaries it must appear that the defence is for the benefit of the trust in virtually the same sense as in cases brought by third persons: that the trustee is warding off an attack upon his funds: and the court in fact looked upon the litigation as essentially, if not exclusively, a claim against the residue. But, with the utmost respect, that is not, in my opinion, the principle of *Walters v. Woodbridge*[32] where, as here, the court is called upon to determine whether an act or transaction carried through by the trustee can be said to have been done within his authority and duty: and where the undoing of the act is the direct object of the litigation.

Taking all this into account, Rand J. directed that the solicitor and client costs of the trustees, as well as the costs of the other parties, should be borne by both the trust fund and the residue of the estate in proportion to their respective values.

These cases therefore make it abundantly clear that the basic rule entitles trustees and estate trustees to recover full indemnity costs, including legal costs, out of the funds under their management. However, there is also a caveat and it is an important one, namely, they are only entitled such costs as were reasonably incurred in the administration of the trust or estate.

The cases also make clear that costs are normally recoverable out of the capital of the fund, although in fact the whole fund, including the income, is liable for them And they make clear that the courts should not attempt to make fine distinctions between the extent to which trustees, who are also beneficiaries, have benefited the estate and the extent to which they have benefited themselves in conducting litigation. In other words, there is no distinction between the case of a trustee defending an action by a beneficiary against himself, and the case of a third person who brings an action against the trustee. In all cases the question is whether the trustee's actions were carried out within scope of her authority and whether the expenses were properly incurred. However, if the action is solely for the trustee's benefit, she may have to bear any costs awarded against her personally.

5. The Recent Case Law

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[32] *Supra*, footnote 29.

This brings us to an examination of the cases that are the focus of this seminar. Have they applied the principles stated above correctly and have they found against the estate trustee solely on the facts? Or have they diverged from the established principles? I shall examine them *seriatim*, give a brief statement of the facts, and then consider the foregoing questions.

5.1 *Coppel v Coppel Estate*[33]

This was an uncontested motion by a beneficiary for further directions. The issue was whether an estate trustee may, without court approval or the consent of all the beneficiaries, use estate funds to pay legal fees incurred in defending an action brought by a beneficiary. Counsel was unable to find any authority on point.

The court noted in passing that the solicitors for the defendant were not the solicitors of the estate, as they claimed, but solicitors for the estate trustee.[34]

> *This is correct, as discussed above.*

However, the court then held that therefore it is impermissible for an estate trustee to pay litigation accounts from estate funds without approval or consent.[35]

> *This is incorrect since there was direct authority to the contrary at the highest level in* Goodman Estate v. Geffen.[36] *Further, s. 23.1 of the* Trustee Act[37] *was enacted in the same year as the* Coppel *case and is clear authority for such taking. In any event, its predecessor, s. 33,*[38] *also allowed it. Accordingly, the decision was made* per incuriam.

In *dictum*, the court went on to say, "…it is also impermissible for non-litigation, but estate-related accounts to be paid without prior court approval or the consent of the beneficiaries."[39]

> *This is also incorrect for the same reason.*

The court directed that the estate trustee reimburse the estate for all legal accounts incurred in defending the action, presumably because it believed that the taking was improper. Also, because the estate trustee failed to respond to the plaintiff's motion, the court awarded the plaintiff substantial indemnity for his costs. It did not award costs to the estate trustee. The case does not indicate whether those costs should be paid out of the estate or by the estate trustee.

> *The costs award may have been appropriate because of the estate trustee's failure to respond to the motion.*

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33 [2001] O.J. No. 8457 (S.C.J.).
34 *Ibid.,* para. 8
35 *Ibid*.
36 *Supra*, footnote 6 and excerpt there quoted in the text.
37 *Supra*, footnote 11, quoted in the text at that point.
38 *Trustee Act*, *supra*, footnote 11, repealed by S.O. 1998, c. 18, Sch. B, s. 16(1).
39 *Coppel*, *supra*, footnote 33, para. 9.

5.2 *DeLorenzo v. Beresh*[40]

Residuary beneficiaries under a will brought a motion in which one of them, having reached the specified age under a testamentary trust, sought to have the estate trustee, who was also a solicitor, transfer the capital of her interest under the trust to her. At the time there were three other proceedings before the court, two being the estate trustee's applications to pass his accounts from the testator's death to the end of 2004, and an application by the residuary beneficiaries for an order removing the estate trustee. The estate trustee had not yet applied to pass his accounts from 2005 to date and it appeared that he may have been dilatory in obtaining a tax clearance certificate. In addition, he had not yet fulfilled certain undertakings. He resisted the claim to transfer the capital to the one beneficiary, since he claimed a lien for compensation and expenses on the estate funds. Meanwhile, he had paid his legal costs in the various proceedings from estate funds.

The court acknowledged that on a passing of accounts the estate trustee is normally fully indemnified for the costs of administration, including legal costs. However, it distinguished such indemnity from legal costs incurred in contentious or adversarial legal proceedings between the estate trustee and beneficiaries, or between the estate trustee and third parties. In such cases each party should pay their own costs until the litigation is finished, after which the court, on the passing of the accounts can determine whether, or to what extent the estate trustee should be indemnified for them. Consequently, the court applied *Coppel*,[41] since the estate trustee had not obtained court approval or consent of the beneficiaries.

> *For the reasons given in the discussion of* Coppel*, I submit that this is wrong***.**

The court also held that while the estate trustee was entitled to a lien, this did not entitle him to withhold payment of the whole of the capital of the beneficiary's interest. The court directed that he pay her 80 percent. It also held that if he should later be found liable for payment of income tax or other expenses, he could make a claim for reimbursement from the beneficiaries.

> *The court may well have been influenced by the estate trustee's delays, but the holding on the lien is troubling. In the circumstances, the order to pay 80 percent to the beneficiary was probably satisfactory, but in other cases a court might, on this basis, defeat an estate trustee's lien entirely.*

5.3 *Craven v. Osidacz Estate*[42]

The deceased stabbed his son to death during an access visit and was about to kill his estranged spouse when he was shot to death by the police. He appointed his brother his estate trustee and the brother and their mother were the sole beneficiaries under the deceased's will. The spouse brought a wrongful death claim against the estate and engaged in litigation with the estate about the sale of the matrimonial home and for dependants' support. The estate trustee used estate funds to pay legal fees in excess of $100,000 to defend these claims. The spouse brought a

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40 [2010] ONSC 5655.
41 *Supra*, footnote 33.
42 2010 ONSC 6637.

motion to restrain the estate trustee from further expenditures from the estate without court approval and directing the estate trustee to repay the moneys already taken to the estate.

The court, citing *Goodman*[43] and *Coppel*,[44] noted that an estate trustee has a duty to defend claims against an estate, so long as the estate assets are expended reasonably. The estate trustee may be indemnified for his costs, but only if the costs were reasonable and properly incurred. When both the estate trustee and others are beneficiaries or otherwise have a personal claim against the estate and their interests conflict, it is improper to use the estate "as a kind of ATM machine from which withdrawals automatically flow to fund the litigation whether reasonable or not."[45] For the estate trustee must use her best judgment about whether to litigate after considering the interests of the beneficiaries and others. If in doubt, the estate trustee should seek the court's approval or the consent of the beneficiaries.

The court refused to order repayment of the moneys already taken, stating that the reasonableness of the taking would be best measured on the passing of the accounts. However, it did restrain the estate trustee from taking further estate funds to pay further legal accounts without the consent of the beneficiaries, including the spouse, or the court's approval.

> *I submit that this was an eminently reasonable order in the circumstances. It confirmed and protected both the right of estate trustees to use estate funds to defend claims against the estate and the right of beneficiaries to prevent unreasonable use of such funds.*

5.4 *Bott v. MacCaulay*[46]

This case is different from the others in that it concerns the claim by a solicitor who was engaged by the estate trustee to perform legal services for the estate, as well as some "executor's work," that is, work normally performed by an estate trustee. The estate trustee had signed a retainer which made a distinction between the two types of services, but it did not, as the court found, entitle the solicitor to claim five percent of the value of the estate as the equivalent of an estate trustee's compensation. The solicitor submitted two accounts, one for the legal services and one for the "executor's work," and paid himself from estate assets. The estate trustee applied to have the second account assessed under the *Solicitor's Act*[47] and submitted an affidavit detailing the "executor's work" he had done. The solicitor claimed that such an assessment could only take place on a passing of account.

The court held that it had jurisdiction to order the assessment, since the solicitor was not solicitor to the estate, but to the estate trustee. Thus, the latter was entitled to have the solicitor's accounts assessed. An estate trustee may agree to pay a particular amount for services rendered to the solicitor but, as the court found, there was no such agreement here.

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43 *Supra*, footnote 6.
44 *Supra*, footnote 33.
45 *Craven*, *supra*, footnote 42, para. 23.
46 (2005), 76 O.R. (3d) 422 (S.C.J.).
47 R.S.O. 1990, c. S.15.

The court also held that if there is no special agreement between the parties, the solicitor may charge only on the normal *quantum meruit* basis, *i.e.*, one based on the time spent, labour, degree of difficulty and other factors. These principles apply to accounts for legal work and for solicitor's work. Even if the retainer amounted to an agreement to pay the solicitor a specific amount, the court would still have power to declare the agreement void on the ground that its terms were unfair and unreasonable.

The court directed the solicitor to deposit the amount taken pursuant to the second account into an interest-bearing trust account pending completion of the assessment.

> *This decision is unexceptional. It applies correct principles and comes to an eminently reasonable conclusion.*

5.5 *Re Vincent Estate*[48]

A beneficiary began proceedings to challenge the validity of his mother's two wills and an estate freeze. This led to litigation between him and his sister, the other beneficiary. The court appointed a trust company as estate trustee during litigation. Prior to March 1, 2010, the estate trustee during litigation, represented by counsel, made three court appearances and the court awarded the estate trustee its costs on a full indemnity basis to be paid from the estate. The parties then reached a settlement which the court approved. The order provided that reasonable legal fees and disbursements relating to the transfer of a condominium to the sister should be paid out of the estate. It also provided that the estate trustee was entitled to be reimbursed for legal costs and disbursements and other properly incurred charges and reasonable out-of-pocket expenses. The son took part in negotiating the terms of the order.

The lawyers' accounts during the litigation had been regularly provided to the beneficiaries after they had been paid and the son had not objected to them. However, when the estate trustee applied to pass its accounts, the son objected to the legal accounts paid during the litigation and for the condominium transfer.

Pursuant to the Practice Direction Concerning the Estates List in Toronto dated 18 February 2009, the parties originally scheduled only a ten minute appointment for directions, adjourned for a hearing on 4 May 2011. In accordance with the practice direction both the estate trustee and the son served draft orders for directions, but the draft order of the estate trustee raised as one issue whether the son was prevented from raising objections on the ground that those objections had already been adjudicated and were subject to existing court orders. Corrick J. held in an endorsement, dated 4 May 2011, that the order approving the settlement estopped the son from objecting to the legal accounts paid before the date of the order, but was entitled to have legal accounts paid after the date of the order assessed. His sister did not object to the passing of the accounts.

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[48] 2011 ONSC 3806 (endorsement, Corrick J, 4 May 2011), reversed 2012 ONSC 940 (Div. Ct., endorsement, 6 February 2012). See also Court File No. 02-105/10 (Judgment on Passing of Accounts, Corrick J., 4 May 2011, and Order of Corrick J., 17 June 2011); and 2011 ONSC 5625 (Reasons for judgment of Corrick J., 26 September 2011).

The endorsement was followed by the judgment of Corrick J., also dated 4 May 2011, passing the accounts as presented. The judgment in turn was followed by the order of Corrick J., dated 17 June 2011, which ordered that the son was estopped from objecting to the legal accounts prior to 1 March, 2010, but permitted him to contest the accounts rendered after that date. He subsequently declined to have those assessed. The judgment was followed by the reasons for decision of Corrick J, dated 26 September 2011. In those reasons, Corrick J. dealt with the daughter's costs and a request for increased costs by the estate trustee. Justice Corrick granted the latter request, passed the estate trustee's accounts to April 30, 2010, assessed the costs of passing the accounts of the solicitor for the estate trustee, and directed that the larger portion of the latter costs, as well as the costs awarded to the sister be paid out of the son's share of the estate.

The son appealed. He argued that: (a) he did not present evidence in support of his objections at the 4 May, 2011 hearing because it was only a motion for directions; (b) Corrick J. failed to follow the appropriate procedure as contemplated by the practice direction, but decided the substantive issue of estoppel; and (c) therefore the order deprived him of the opportunity to make his case. By an endorsement of 6 February 2012, the Divisional Court accepted the son's argument and set aside all but one of the provisions of the order of Corrick J, of 17 June 2011.

But this is the strange part: While the court set aside the order of 17 June, it did not refer to the Reasons for Decision of 26 December. I understand that the court was not informed of them. The result, I submit, is that those Reasons are still in effect and that leaves the parties in a quandary about where they stand.

> *With respect, I find the decision of the Divisional Court strange. True, the order was made on an application for directions. However, Corrick J. clearly had jurisdiction to deal with the substantive issues under s. 49 of the* Estates Act,[49] *as well as under the* Trustee Act,[50] *and the* Rules of Civil Procedure.[51] *I submit that a Practice Direction cannot override those legal provisions. In addition, it would seem that the son had sufficient opportunity to provide timely details of his objections. Finally, in light of the modern approach to decide matters summarily if there are no reasonable issues for trial, I submit that it made sense for Corrick J. to make the findings and decide the matter as she did.*

5.6 *Zucker v. Moore*[52]

This is a bizarre case that involved numerous applications and orders. We are concerned with three of them. The case concerns the administration of a $42 million estate. The testator left his estate to his three children and named a family friend who was a retired partner of an accounting firm and another partner of that firm as estate trustees. The friend was not active for long as an

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49 R.S.O. 1990, c. E.21.

50 *Supra*, footnote 11.

51 R.R.O. 1990, Reg. 194, as amended.

52 *Zucker v. Moore*, ONSC File No, 01-2521/04, 2011 02 02 (Endorsement of Grace J.); *Zucker v. Moore*, 2011 ONSC 7165 (Endorsement of Greer J.); *Re Zucker Estate*, 2012 ONSC 2262 (Reasons for judgment of Lofchik J.).

estate trustee because of age and was eventually removed. He was paid $500,000 as compensation and the costs of some of the litigation that ensued. The continuing estate trustee was paid $1.2 million in compensation personally, as well as costs of the litigation, and the firm was paid $1.1 million in fees. Two of the beneficiaries raised objections, while the third concurred in their actions. The will was silent on the matter of taking compensation before approval.

The first proceeding was a motion by the beneficiaries for an order requiring the estate trustees to pass their accounts, directing them to repay all moneys taken by them for compensation and prohibiting them from being paid further compensation or reimbursement for legal and accounting fees. Grace J. took note of cases that permitted the taking of compensation before approval, as well as cases and other authorities that objected to the practice. He concluded that such taking appears normally to be unlawful unless the will or the court authorizes it, or all the beneficiaries consent, and possibly also if the estate involves ongoing administration and the interim compensation is reasonable. He held: (a) that the estate trustees were entitled to take interim compensation if the amount is reasonable and the accounts are passed expeditiously; (b) if consent was required, the evidence showed that the beneficiaries consented through 2005; and (3) whether there was consent post-2005 could not be determined on the evidence. He expressed concern about the amount of the compensation taken, but concluded that the estate trustees should not be ordered to repay the amounts taken since the issue was not really the taking without authority, but the quantum. Accordingly, he ordered the passing of the accounts and prohibited the further taking of compensation without court approval or beneficiaries' consent. He also directed the estate trustees to post an irrevocable letter of credit. It was never posted. Meanwhile, the continuing estate trustee was terminated by his accounting firm and he brought an action against it for wrongful dismissal.

The second proceeding was a motion on various issues, including the removal of the continuing estate trustee and an increase in the letter of credit. Justice Greer ordered that alternative security be posted in the form of an irrevocable direction by the continuing estate trustee to the trustees of an *inter vivos* trust of which he was a beneficiary, to assign his interest in the trust to the beneficiaries' law firm in trust. She also directed the estate trustee to assign all his right, title and interest in his lawsuit against his former accounting firm to that law firm and she directed the estate trustee who had been removed earlier to assign his interest under a trust of a condominium to the law firm if the beneficiaries should be successful in their fraudulent conveyance motion against him. In addition, Justice Greer ordered the removal of the remaining estate trustee, replaced him with another person, and directed that the removed trustee take no further compensation from the estate.

The third proceeding was a further motion for directions. Justice Lofchik gave various directions for the trial of issues concerning the compensation and legal costs taken by the original estate trustees.

> *The case is bizarre in that so much court time was taken up to attempt to resolve it, caused, it seems, in large part by the recalcitrance of the surviving estate trustee and by his apparent (though yet to be determined) egregious taking of excessive compensation and reimbursement of legal expenses. In view of the facts, it is surprising that Justice*

> *Grace did not require repayment, which seems to have been the standard response in recent cases, but concluded that the issue should be dealt with on the passing of accounts. I submit that this is the correct approach, but that in circumstances such as this an order prohibiting further taking of compensation or reimbursement of expenses was appropriate. The case is also important on the issue of an estate trustee or trustee taking compensation before court approval on a passing of accounts. The cases disagree on their right to do so. It is to be hoped that an appellate decision will soon provide clarity on this issue.*

5.7 *The Canada Trust Company v. Browne*[53]

This case involved an application by the trustee of an *inter vivos* trust for advice and directions concerning the interpretation of the twice-varied trust. The parties sought payment of their costs from the trust. In the case of the trustee the issue concerned the quantum. In the case of the Children's lawyer and some of the beneficiaries it concerned their entitlement.

The judge of first instance rightly noted the modern rule that costs in estate litigation follow the cost rules that apply in civil litigation cases generally, except when the litigation arose because of the actions of the testator or the residuary beneficiaries, or when the litigation is reasonably necessary for the proper administration of the estate or trust. In the exceptional cases, if the litigation was reasonable, the estate will bear the costs of the litigation. An application for advice and directions is normally regarded as reasonably necessary for the proper administration of the estate, although the estate will not have to bear the costs if the court finds that the application was unwarranted or unnecessary.[54]

The court found that the application was reasonable and properly brought by the trustee and that, in the circumstances, the quantum was reasonable. The court awarded full indemnity costs allocated one-third against income and two-thirds against capital. The court also found that the Children's Lawyer's costs were reasonable and awarded full indemnity costs to be paid from the capital of the trust. Several of the income beneficiaries were represented by counsel, but the court held that their interests were aligned and they were thus entitled to the costs of one counsel on a full indemnity basis, to be paid from the capital of the trust. The court also allowed the costs of another law firm, allocated one-third against income and two-thirds against capital. It awarded no costs to certain capital beneficiaries, because their position in support of the income beneficiaries could have been presented to the court by letter.

> *I submit that this costs decision is unexceptional. It does not concern a taking without approval or consent, but does affirm: (a) a trustee's entitlement to indemnity, including legal costs; (b) the modern rule regarding costs in estate litigation; and (c) the principle that although costs are usually payable from capital, they are the costs of the entire estate or trust, unless otherwise allocated.*

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53 2011 ONSC 731 (application for advice and directions); 2011 ONSC 4400 (costs endorsement of L.A. Patillo J.). 2012 ONCA 862 (the Ontario Court of Appeal affirmed the decision on the application with full indemnity costs to all parties appearing on the appeal payable out of the estate.

54 See, *e.g.*, *Re Preymac* (1964), 45 D.L.R. (2d) 554 (B.C.S.C.).

5.8 *Chabros v. Anderson*[55]

A beneficiary had contested the compensation claimed by the executors. The court held the claim to be grossly disproportionate and reduced the claim by about 60 percent.[56] The parties then sought a decision on the matter of costs.

In the course of the reasons, the court referred to the modern rule regarding costs in estate litigation, but noted that the litigation model did not apply to the circumstances of the case. There is no adversity in interest between the estate and executors in the determining the amount of the compensation, because the estate owes the executors a reasonable remuneration. As regards the legal costs incurred by the executor in respect of the determination of what they are entitled to by way of compensation, they are also entitled to be indemnified for them, but only to the extent that the costs are reasonably and properly incurred.

The court then noted that the solicitor is the solicitor for the executor and not the estate and that the executor can only recover the legal fees from the estate if they are reasonable and proper. It then went on to state, citing *Widdifield*[57] and *Coppel*[58] in support, that without prior court approval or consent of all the beneficiaries, executors may not pay themselves litigation costs in defending proceedings brought by a beneficiary.

The court went on to say:[59]

> It is clear then, that executors are not entitled to assume that their legal fees will be reimbursed by the estate, regardless of circumstances or quantum. If an executor wishes to seek out "gold-plated" legal representation and/or retain counsel to do work not necessarily required by the estate, he may do so, but he may expect to be indemnified only for the portion of that cost reasonably required for the administration of the estate.

Similar sentiments are found in other cases, typically when the conduct of the estate trustees is egregious. Consequently, in *Chabros* the court fixed the legal costs of the estate trustees at less than 10 percent of the amount claimed and awarded full indemnity to the beneficiary, both to be paid from the estate.

> *Clearly the conclusions of the court on: (a) the modern rule about litigation costs and its adaptation on applications for compensation; (b) the principle that the legal costs must be reasonable and proper; and (c) the position that a solicitor is the solicitor for the executors, not the estate, are correct. However, I submit that its conclusion that executors may not pay themselves litigation costs without prior court approval or beneficiaries' consent, is incorrect, for the reasons discussed above under* Coppel.[60]

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55 2012 ABQB 517; 79 E.T.R. (3d) 317.
56 *Chabros v. Anderson* 2011 ABQB 806, 75 E.T.R. (3d) 281.
57 *Supra*, footnote 3 at 4-8.3.
58 *Supra*, footnote 33.
59 S*upra*, footnote 55, para. 15.
60 *Supra*, footnote 33.

6. Conclusion

It would be difficult to draw definitive conclusions about the recent case law, since the cases are very much fact-driven. However, I suggest that we can derive the following principles from the jurisprudence:

1. A trust and an estate are not legal entities. Hence they can neither sue nor be sued. A third party must sue the trustees or estate trustees. The trustees or estate trustees are the proper parties to bring actions against third parties or beneficiaries.

2. It follows from the first principle that trustees and estate trustees are personally liable for the costs of litigation and, indeed, for any expenses of administration.

3. The basic principle that an estate trustee and a trustee are entitled to be indemnified out of estate or trust assets for expenses they have incurred in administration is undoubted in the case law and is codified in statute. The proviso is that the expenses are reasonable and properly incurred.

4. The fact that an estate trustee or a trustee benefits incidentally from the costs incurred, even in proceedings by a beneficiary against the trustee or estate trustee, does not disentitle her to indemnity. However, if the proceedings are exclusively for the estate trustee or trustee's benefit, she must pay the costs personally.

5. The third principle also applies to the costs of litigation, whether the litigation is brought by the estate trustee, a beneficiary, or a third party, subject to the same proviso.

6. It is, however, true that courts will look more closely at the costs of litigation than at other costs because they seek to prevent the depletion of an estate by unnecessary litigation, at the cost of the beneficiaries.

7. The case law and statute permit estate trustees and trustees to take such expenses out of the assets they administer, unless the trust instrument provides otherwise. Cases that hold otherwise must be regarded as wrongly decided. However, the court will in due course, usually on the passing of accounts, determine whether the expenses taken were reasonable and proper. To the extent they were not, the estate trustees or trustees will have to reimburse the trust or estate and they may be charged with interest on they amount disallowed.

8. If a trustee or estate trustee is unsure about a proposed expense, such as the cost of litigation, he should obtain the consent of the beneficiaries or the approval of the court.

9. It would be desirable for an appellate court to clarify the circumstances in which trustees and estate trustees may take interim compensation from the funds they administer before they seek to have their accounts passed.[61]

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[61] The remarks of Misener J. in *Re William George King Trust* (1994), 2 E.T.R. (2d) 123, para 12 (Ont. S.C.J.), a case involving an application to pass accounts, have much to recommend them, I submit. He acknowledged the general rule that estate trustees and trustees are prohibited from taking interim

compensation without approval, but thought the general rule ought not to apply to a continuing trust such as the one before the court. He said:

> Passing accounts is an expensive procedure. It is expensive to the beneficiaries and, in theory at least, to the public as well. It seems to me that, unless the beneficiaries insist that it should be otherwise, accounts in a continuing trust such as this ought not to be passed any more than every three years. Even that seems too frequent to me. It is unfair to ask trustees to defer their compensation for that period of time. Applications for interim allowances are expensive as well, and so should be discouraged. The alternative is the so-called prepayment or pre-taking. So long as the trustees pay themselves for services already rendered (i.e. in arrears), and so long as the amount taken does not exceed what is fair compensation for those services, I see nothing at all wrong with it when, as I have said, the administration of the trust or of the estate is a continuing one. Indeed, I think it is the right thing to do.

APPENDIX "B"

SAWDON ESTATE V. SAWDON AND TRUSTEE INDEMNIFICATION IN ESTATE LITIGATION

John O'Sullivan and Sara Beheshti *

It is well-settled law that estate trustees are entitled to be indemnified for their reasonable expenses in the administration of an estate. In Ontario, Section 23.1 of the *Trustee Act* allows estate trustees to pay properly incurred expenses directly from the estate assets or to be reimbursed for personal payment of such expenses from the estate as they occur. Such payment may be denied at a later date by a court if it determines that the expense was not properly incurred in carrying out the trust. While the principle and mechanics of trustee indemnification as set out in Section 23.1 are clear, this apparent clarity disappears where the estate trustee is involved in litigation relating to the estate. As noted by Professor Oosterhoff, the recent case law on trustee expenses in estate litigation puts into question the long-established law of trustee indemnity.[1] In February 2014, the Ontario Court of Appeal in *Sawdon Estate v. Sawdon*[2] addressed the issue of trustee indemnification for litigation costs and expenses.

Case Facts and History

In *Sawdon Estate v. Sawdon*, the testator had placed seven bank accounts into joint names with two of his five children but told these two children that the funds in the accounts were to be distributed equally among all of his children after his death. The residuary beneficiary of the estate, Watch Tower Bible and Tract Society of Canada,[3] claimed that the funds in the bank accounts were held in trust for the estate. The estate trustee was one of the children of the testator and thus had a personal stake in the litigation. The estate trustee and some of his siblings applied to the court to determine whether the funds would go to the two children, to all of the testator's children or to the estate.

At trial of this issue the court ruled that the bank accounts were held in trust for all of the testator's children and ordered the unsuccessful respondent Watch Tower to pay partial indemnity costs to the estate trustee. However, the court refused to order that the estate indemnify the estate trustee for the remainder of his costs in the litigation on the basis that the litigation did not benefit the estate. The estate trustee appealed the trial judge's refusal to order indemnification from the estate.

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1 Albert H. Oosterhoff, *Indemnity of Estate Trustees as Applied in Recent Cases* (2013), 41, The Advocates Quarterly 123.

2 *Sawdon Estate v. Sawdon*, 2012 ONSC 4042; 2014 ONCA 101 (CanLii).

3 Hereinafter referred to as "Watch Tower."

Court of Appeal Decision

Speaking for the Court of Appeal, Gillese J.A. allowed the estate trustee's appeal and overturned the trial judge's costs decision. Based on an "application of the governing principles," the Court of Appeal made a blended costs order for both the trial and appeal: Watch Tower was required to pay costs to the estate trustee on a partial indemnity basis and the estate was required to indemnify the estate trustee for the balance of the litigation expenses incurred on behalf of the estate.

In its reasons, the Court of Appeal begins by referring to the Supreme Court of Canada's decision in *Geffen v. Goodman Estate*[4] that confirms "the long-standing principle that estate trustees are entitled to be indemnified for all reasonably incurred costs, including legal costs." However the Court of Appeal points out that the practice of ordering litigation costs from the estate had been applied to all parties to the litigation and that this "historical approach" to costs in estate litigation has been displaced by the "modern approach" set out by the Court of Appeal in *McDougald Estate v. Gooderham.*[5]

The modern approach dictates that costs follow the event in estate litigation, except where involvement in the litigation engages some public policy consideration that justifies paying a party's litigation costs out of the estate. In *Sawdon Estate v. Sawdon*, the Court of Appeal describes the modern approach to costs as follows:

> [84] … 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. That is, the starting point is that estate litigation, like any other form of civil litigation, operates subject to the general civil litigation costs regime established by section 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43, and Rule 57 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, except in those limited circumstances where public policy considerations apply.
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> [85] The public policy considerations at play in estate litigation are primarily of two sorts: (1) the need to give effect to valid wills that reflect the intention of competent testators; and (2) the need to ensure that estates are properly administered. In terms of the latter consideration, because the testator is no longer alive to rectify any difficulties or ambiguities created by his or her actions, it is desirable that the matter be resolved by the courts. Indeed, resort to the courts may be the only method to ensure that the estate is properly administered.
>
> [86] In any event, where the problems giving rise to the litigation were caused by the testator, it is appropriate that the testator, through his or her estate, bear the cost of their resolution. In such situations, it ought not to fall to the Estate Trustee to pay the costs associated with having the court resolve the problems.[6]

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4 *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 390-391.

5 *McDougald Estate v. Gooderham*, (2005), 255 D.L.R. (4th) 435, (Ont. C.A.), at paras. 78-80.

6 *Supra* note 2, at paras. 84-86.

Reviewing the facts of the case, the Court of Appeal in *Sawdon Estate v. Sawdon* decided both public policy considerations - the need to give effect to the testator's intentions and the need to properly administer the estate - were engaged in the litigation. The testator's intentions regarding the funds in the joint bank accounts were unclear and the court's intervention was required to determine whether the funds belonged to the estate by way of resulting trust. Thus, the need for proper administration of the estate was the basis for the proceedings. The estate trustee's participation in the litigation was necessary as part of his duty to ascertain and call in the assets of the estate.

The Court of Appeal confirmed that the estate trustee's personal interest in the outcome of the litigation does not preclude indemnification for litigation costs out of the estate funds.[7] The estate trustee personally profited from the decision that the property in the joint accounts passed outside the estate and this outcome reduced the value of the estate overall. Nonetheless, the Court of Appeal concluded that the trustee acted reasonably throughout the litigation and the litigation benefited the estate by providing clarity on how the estate should be administered.

The Court of Appeal also confirmed that a costs order in favor of the estate trustee does not derogate from the estate trustee's entitlement to indemnification from the estate for litigation costs not covered by the costs award. By making a blended order for the trustee's litigation costs in the trial and appellate proceedings, the court retained the deterrent and disciplinary function of a costs order while allowing the estate to indemnify the trustee.

COMMENTARY

Section 23.1 of the *Trustee Act* and *Geffen v. Goodman Estate*

In Ontario, Section 23.1 of the *Trustee Act*[8] provides that trustees are to be indemnified for all expenses properly incurred in carrying out their trustee duties:

> *Expenses of trustees*
>
> *23.1 (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,*
>
> *(a) pay the expense directly from the trust property; or*
> *(b) pay the expense personally and recover a corresponding amount from the trust property. 2001, c. 9, Sched. B, s. 13 (1).*
>
> *Later disallowance by court*
>
> *(2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust. 2001, c. 9, Sched. B, s. 13 (1).*[9]

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7 Since many estate trustees are close friends or family members of the testator, this decision provides some guidance on how the court should treat an estate trustee with a personal interest in the estate and the estate litigation.

8 *Trustee Act, 2009,* S.S. 2009, c. T-23.01.

Section 23.1 applies to all trustees, including estate trustees,[10] and makes no distinction between litigation costs and other expenses incurred by trustees. A review of the case law indicates that the courts rarely refer to Section 23.1 of the *Trustee Act* in decisions relating to a trustee's indemnification for litigation costs.[11] Likewise in *Sawdon Estate v. Sawdon*, the Court of Appeal does not refer to Section 23.1 of the *Trustee Act* in its analysis, although this is a statutory right of all trustees in Ontario.

Section 23.1 codifies the long-standing principle of trustee indemnification, which was established in the case law[12] and reiterated by the Supreme Court of Canada in *Geffen v. Goodman Estat*e. In *Geffen v. Goodman Estat*e, the Supreme Court of Canada affirms that the right to indemnification extends to litigation expenses:

> [75] The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. Reasonable expenses include the costs of an action reasonably defended: see *Re Dingman* (1915), 35 O.L.R. 51. In *Re Dallaway*, [1982] 3 All E.R. 118, Sir Robert Megarry V.C. stated the rule thus at p. 122:
>
> > In so far as [an estate trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.[13]

<u>*Sawdon Estate v. Sawdon*, Trustee Indemnification and the "Modern Approach" to Costs in Estate Litigation</u>

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9 *Supra* note 8, s. 23.1.

10 *Supra* note 1, at p.126 footnote 11.

11 *Supra* note 1.

12 As noted by Oosterhoff in his paper, "the courts have always held that trustees and estate trustees are entitled to be indemnified for their reasonable expenses." *Supra* note 1, at p. 125. Professor Oosterhoff refers to the early English case, *Worrall v. Harford*, in which Lord Eldon states:

> It is in the nature of the office of trustee, whether expressed in the instrument or not, that the trust property shall reimburse him for all the charges and expenses incurred in the execution of the trust. It is implied in every such deed. *Worrall v. Harford* (1802), 8 Ves. Jun 4. At 8, 32 E.R. 250 (Eng. Ex. Ch.)

Oosterhoff also refers to *Geffen v. Goodman Estate*, which is discussed in this paper, and *Thompson v. Lamport*, in which the Rand J. states on behalf of the Supreme Court of Canada:

> The general principle is undoubted that a trustee is entitled to indemnity for all costs and expenses property incurred by him in the due administration of the trust: it is on that footing that the trust is accepted. These include solicitor and client costs in all proceedings in which some question or matter in the court of the administration is raised as to which the trustee has acted prudently and properly. *Thompson v. Lamport* [1945] 2 D.L.R. 545. 1945 CarswellON 97 (S.C.C) at 356.

13 *Supra* note 4, at para. 75.

Although the result in Sawdon Estate v. Sawdon is consistent with the basic principles of trustee indemnification set out in Section 23.1 and *Geffen v. Goodman Estate*, the Court of Appeal's analysis in *Sawdon Estate v. Sawdon* in some respects conflicts with those basic principles.

In *Sawdon Estate v. Sawdon*, the Court of Appeal describes the trustee's entitlement to indemnification for litigation expenses as follows:

> [82] In *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353, at pp. 390-391, Wilson J., writing for the court on this issue, reiterated the long-standing principle that estate trustees are entitled to be indemnified for all reasonably incurred costs, including legal costs. She quoted with approval the following statement from Re Dallaway, [1982] 3 All E.R. 118, at p. 122:
>
> > In so far as [an estate trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.
>
> [83] 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.
>
> [84] 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 D.L.R. (4th) 435, (Ont. C.A.)[14]

In the above passage, the Court of Appeal conflates the principle of trustee indemnification for reasonable legal (including litigation) expenses, with the "historical approach" of awarding litigation costs to all parties to the litigation from estate funds. By associating the ills of the historical approach to costs with the principle of trustee indemnification, the Court of Appeal implies that the principle of trustee indemnification for legal expenses has been applied too broadly and should be limited by the modern approach to costs in estate litigation.
However, the practice of awarding costs in estate litigation out of the estate funds must be distinguished from the estate trustee's right to indemnification for litigation expenses. In *McDougald Estate v. Gooderman*, Gillese J.A. reviewed the basis upon which costs have been awarded in estate litigation:

> [78] The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate. See *Mitchell v. Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280 and *Spiers v. English*, [1907] P. 122.

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[14] *Supra* note 2, at paras. 82-84.

> Public policy considerations underlie this approach: it is important that courts give effect to valid wills that reflect the intention of competent testators. Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity.
>
> [79] *Traditionally, Canadian courts of first instance have followed the approach of the English courts. While the principle was that costs of all parties were ordered payable out of the estate if the dispute arose from an ambiguity or omission in the testator's will or other conduct of the testator, or there were reasonable grounds upon which to question the will's validity, such cost awards became virtually automatic.* [Emphasis Added]
>
> [80] However, the traditional approach has been – in my view, correctly – displaced. The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation.

From the above passage in *McDougald Estate v. Gooderman*, it is apparent that the traditional or historical approach was based on an automatic application of the rule in *Mitchel v. Gard*, and is unrelated to the principle of trustee indemnification. As noted already, the principle of trustee indemnification is based on the notion that trustees should not personally bear expenses reasonably incurred in carrying out their duties, and draws its authority from s.23.1 of the *Trustee Act* and a long line of cases including *Worrall v. Harford*, *Thompson v. Lamport*, and *Geffen v. Goodman Estate*.[15]

The "modern approach", which is meant to impose discipline in the payment of costs awards out of the estate, does not also purport to limit the trustee's right to indemnification. In the authorities, trustee indemnification is not limited by the rules that apply to costs in civil litigation. The two operate entirely separately. In the words of Cullity J. in *Merry Estate v. Plaxton*, in which he considered the effect of the new "costs grid" and Rule 57 costs factors on the principle of trustee indemnification:

> There is no necessary correlation between the amount a losing party in litigation should pay to a successful party and the quantification of a trustee's indemnity for charges and expenses – including legal fees properly incurred.[16]

A trustee who unsuccessfully defends an action against the estate is entitled to be indemnified out of it for costs he has been ordered to pay to the plaintiff, even if the costs order does not specify that.[17]

In the case that established the modern approach to costs in estate litigation - *McDougald Estate v. Gooderham* - the Court of Appeal applies the modern approach to determine whether the

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15 See footnote 12.

16 *Estate of Merry v. Plaxton* 2002 CanLII 32496 (ONSC) *per* Cullity J., at para 49.

17 *Re Dingman* (1915), 35 O.L.R. 51 (H.C.).

estate should bear the cost of the litigation, but not to determine if the estate should indemnify the estate trustee for its litigation expenses. Using the modern approach, the *McDougald* Court of Appeal decided that costs should follow the event: the appellant residuary beneficiaries, as the losing parties in the appeal, would personally pay costs to the respondent estate trustee. Without reference to the modern approach, the *McDougald* Court of Appeal confirmed that the estate would indemnify the trustee for any amount not covered by the costs order.[18]

The modern approach to costs awards in estate litigation – which applies the loser pays model to estate litigation – properly aims to protect estate funds from being depleted by automatic costs awards to all parties. In *Sawdon Estate v. Sawdon*, the Court of Appeal introduces this approach to the question of trustee indemnification because, as it points out, an unfettered right to indemnification risks unfairly depleting estate funds.[19] But Geffen v. Goodman Estate and Section 23.1 of the Trustee Act already place limits on trustee indemnification. Section 23.1 requires that expenses be "properly incurred in carrying out the trust." In Geffen v. Goodman Estate, the Supreme Court of Canada allows indemnification for "reasonable" expenses and for the "costs of an action reasonably defended" provided the trustee did not act "unreasonably or in substance for his own benefit."

Implications of Applying the "Modern Approach" to Trustee Indemnification

The Court of Appeal in *Sawdon Estate v. Sawdon* notes that the estate trustee should not bear the cost and risks of estate administration:

> [86] In any event, where the problems giving rise to the litigation were caused by the testator, it is appropriate that the testator, through his or her estate, bear the cost of their resolution. In such situations, it ought not to fall to the Estate Trustee to pay the costs associated with having the court resolve the problems. As Kruzick J. observed in *Penney Estate v. Resetar*, 2011 ONSC 575 (CanLII), 2011 ONSC 575, 64 E.T.R. (3d) 316, at para. 19, if estate trustees were required to bear their legal costs in such situations, they might decline to accept appointments or be reluctant to bring the necessary legal proceedings to ensure the due administration of the estate.[20]

Yet the application of the "modern approach" to trustee indemnification, threatens to put estate trustees in the same position as the other parties to the litigation. The court must provide reasons to indemnify the estate trustee using the same criteria used to award costs to any other party to the estate litigation.

In *Sawdon Estate v. Sawdon*, the Court of Appeal does not refer to the principle of indemnification as the sole basis for ordering the estate to pay the trustee's litigation expenses. In

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[18] If the court determines that the normal costs rules apply, the estate trustee's litigation costs may be paid in whole or in part by another party where the trustee is the winning party. Conversely, the estate may be ordered to pay costs if unsuccessful in the litigation. However, this question of costs is separate from the issue of whether the trustee will be indemnified from the estate for whatever expenses and costs are ultimately incurred in the litigation.

[19] *Supra* note 2, at para. 84.

[20] *Supra* note 2, at para. 86.

other words, the right to indemnification does not flow from the fact that the trustee is carrying out his duties, as it does in *Geffen v. Goodman Estat*e and Section 23.1 of the *Trustee Act*. Not affirming the estate trustee's inherent right to indemnification creates a less certain path to indemnification. This creates personal financial risk and uncertainty for estate trustees who are forced to litigate as part of their duties serving and representing the estate. This is particularly troublesome for the estate trustee who is pulled into litigation while serving the estate.

Regarding the timing of trustee indemnification for expenses, as Oosterhoff notes, few people would agree to take on the role of estate trustee if they were required to personally bear the expenses of their office and recover these costs at a later date.[21] In practice, estate trustees pay costs relating to their duties directly from the estate. This practice has been recognized by the courts and in the legislation.[22] Specifically, Section 23.1 of the *Trustee Act* which allows estate trustees to pay for expenses directly from the estate or take reimbursement for expenses already paid.

By treating the question of trustee indemnification as a costs issue, *Sawdon Estate v. Sawdon* creates uncertainty around the timing of indemnification for the estate trustee. For maximum safety, it might be advisable for trustees to wait for a costs decision that determines their right to indemnification for litigation expenses, or apply to the court to authorize payment of interim litigation expenses from the estate. This however is likely to increase an estate's legal expenses.

Conclusion

The Court of Appeal in *Sawdon Estate v. Sawdon* introduces the modern approach to costs awards in estate litigation, to the question of trustee indemnification for legal expenses. This sits uncomfortably with the old principle of trustee indemnification expressed in *Geffen v. Goodman Estate* and codified in Section 23.1 of the *Trustee Act* which together provide that Ontario trustees are entitled to indemnification for expenses reasonably incurred in carrying out their duties, including legal and litigation expenses.

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21 *Supra* note 1, at page 127.

22 *Supra* note 1, at page 128.