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If There's Anything That You Want: Indemnification of Estate Trustee Legal Fees

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There are numerous reasons for acting as an estate trustee: prestige; compensation; overseeing treasured assets; or merely the feeling of having helped wrap up a dear friend or family member's affairs. With this responsibility, however, comes significant risk. Lurking around every corner of estate administration are myriad potential foes: aggrieved beneficiaries; impecunious children; long-spurned creditors; indigent spouses; and, foremost of all, the vexatious litigant.

The alarmed estate trustee, over whom a cloud of litigation hangs, or upon whom the rain already trickles or pours, can find some solace in the law, which states that estate trustees may indemnify themselves for reasonably incurred legal costs. Unfortunately for estate trustees, what constitutes "reasonable" legal costs is a subject coloured with uncertainty, a legal saga that has seen whirls and undulations.

Amidst the confusion, there has been one fixture or constancy: it is reasonable for an estate trustee to claim legal costs from a proceeding in which "the *trust* is a party" rather than one in which "the actions of the *trustee* himself are challenged". In the latter instance, a trustee may still be reimbursed, but his or her entitlement to indemnification is not automatic; it is granted once the trustee vindicates himself or herself.[1] Everything else—whether an estate trustee can use estate funds for personal causes, how to demarcate personal interests from estate interests, what is reasonable conduct, what self-interest comprises, when reimbursement can be made—is enveloped in a degree of shadow.

In this article, we endeavour to shed light upon these shadowed questions. We seek to highlight the prominent and curious cases of the past century or so, as well as to identify the relevant trends, lasting precedents, and anomalies.

The Longstanding Indemnification of Legal Fees

Perhaps mindful of keeping the estate trustee's position desirable given its necessity in society, the Courts have long indemnified trustees as a part of equity.[2] There was, in fact, a prevailing view that legal fees should be paid from estates. That is why we see in old cases like *Mitchell v. Gard* such an emphasis that estates should bear legal costs where the litigation arose from a

[1] *Fenwick v. Zimmerman*, [2008] CarswellOnt 4827 at para. 13
[2] "Revisiting A Trustee's Right to Indemnification", Suzana Popovic-Montag, 2003 *Estates and Trusts Reports (Articles)* 50 E.T.R. (2d) 161.

fault lying "at the door of the testator" or from those with an interest in the estate residue, or where the litigation was reasonable in the circumstances.[3]

In Ontario, the indemnification principle was enshrined in the *Trustee Act*:[4]

> 23.1 (1) Expenses of trustees - 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
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> (b) pay the expense personally and recover a corresponding amount from the trust property.
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> (2) Later disallowance by court - 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.

For well over a century, properly incurred expenses have consisted of reasonably incurred legal fees: "Now, nothing ought, I think, to be adhered to more sacredly than the general principle, which is, that a trustee or executor having done his duty, having faithfully accounted, and having brought forward the estate committed to his charge, should not be deprived of his costs upon light grounds."[5]

The trouble, then as now, arises when courts have been tasked with determining whether a trustee has acted selfishly or for the trust, performed his or her duty or committed a breach.

***Goodman Estate v. Geffen*: When Interests Align**

Goodman Estate v. Geffen involved the allegation that two trustee brothers unduly influenced their sister. It failed, and the brothers sought remuneration for their legal fees. The respondents argued that the brothers, by defending themselves of this charge, were acting out of self-interest and should thus pay personally for their fees.

On first glance, in its analysis the Court seems to have advanced an inconsistency. On the one hand, it endorses Sir Robert Megarry V.C.'s summarization of the costs rule:

> 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

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[3] *Mitchell v. Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280.
[4] R.S.O. 1990, c. T.23
[5] *Birks v. Micklethwaite* (1864), 33 Beav. 409.

> that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.[6]

On the other hand, the Court awarded legal costs to trustees who very much acted "in substance for [their] own benefit". The key word in this quotation is "rather". An estate trustee may act self-interestedly, and receive costs, so long as this conduct does not run contrary to the interests of the estate—*i.e.* "rather than for the benefit of the fund".

Whereas before *Geffen* an estate trustee's costs claim may have been precarious if the overwhelming tinge of the action was self-interest, what we get from *Geffen*, in part, is a greater understanding that benefits can be mutual, not merely exclusive or competing: "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."[7]

This case leant estate trustees and prospective estate trustees more assurance that their legal fees could be recovered; as we shall see, however, this assurance has subsided in recent years.

***McDougald Estate v. Gooderham*: Loser Pays Applies to Estates**

The Ontario Court of Appeal found that the traditional practice that legal fees be absorbed by the estate has been correctly displaced.[8] The "loser pays" principle governs, with some exceptions. If an estate trustee has engaged in unnecessary or ill-advised conduct, or if the legal fees are attributable to his or her administration—and not "at the door" of the testator—then he or she should bear his or her own legal fees. If, however, there are public policy grounds present, such as the need to resolve an ambiguity in the will, then the executor should be indemnified.

As other cases, such as *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada*, have shown, costs order can be blended, meaning that a portion of legal fees can come from the estate and another portion can come from the losing party.[9]

***Georganes v. Bludd*: A Deviation**

In *Georganes v. Bludd*, the estate trustees drew on $55,000.00 in estate funds to pay for legal fees which they had accumulated in defending their personal interests in a home.[10] Justice Price found that these payments were improper and ordered that the trustees reimburse the estate.

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[6] *Goodman Estate v. Geffen*, [1991] CarswellAlta 91 (S.C.C.) at para. 75.
[7] *Goodman Estate* at para 77.
[8] *McDougald Estate v. Gooderham*, [2005] CarswellOnt 2407 (O.N.C.A.) at para. 80.
[9] *Sawdon Estate v. Watch Tower Bible and Tract Society of Canada*, [2014] O.N.C.A. 101 at paras. 96-97.
[10] *Georganes v. Bludd Estate*, [2014] O.N.S.C. 4655 at para. 15.

Whereas in *Geffen* the Court found that an executor could wear two hats, that of executor and that of beneficiary, and have his or her legal fees paid out of the estate, *Georganes* marks a significant departure from this flexibility; instead, the test appears to be, of the two hats the executor is wearing, which is larger and more prominent?

***DeLorenzo* and *Furtney Estate*: Timing**

In *DeLorenzo v. Beresh*, the court said that parties should bear their own costs prior to the resolution of the matter: "Ultimately the issue of whether the trustee is entitled [to] charge the estate with his legal fees may turn on the outcome and it should be determined on a passing of accounts or court application, if not agreed to by the beneficiaries."[11]

However, in *Furtney Estate v. Furtney*, the court took the opposite view: "An estate trustee does not require the consent of the beneficiaries or a court order prior to having litigation expenses, reasonably incurred by the estate trustee, paid from estate funds."[12]

***Brown v. Rigsby*: The Old Road Adjoined by New Scarecrows**

The Court of Appeal in *Brown v. Rigsby* championed the approach in *Geffen*, reiterating that an executor should be repaid for reasonably incurred legal fees, but he or she should bear the legal fees accruing from a self-interested endeavour.

In their application of the law to the facts, the Court decided that the executors should pay, in this instance, because of their "failure to exhibit timely candour", which the Court viewed as both unreasonable and self-interested.[13] The legal costs could be directly traced to the estate trustee's lack of disclosure.

In the wake of *Brown v. Rigsby*, several layers have been added onto the prevailing test. In *Ford v. Mazman*, an estate trustee's "animus" defeated her request for reimbursement.[14] In *Selkirk v. Selkirk*, an estate trustee paid personally owing to his failure to "provide accounts to support his expenditures".[15] In *Sweetnam v. Williamson Estate*, the estate trustees received no reimbursement as the Court found them to be "adversarial and unreasonable".[16]

Concluding Remarks

In days long past the law was generous in its provision of indemnification of legal fees for estate trustees. As time progressed, a whisper grew into a firm voice, asking whether it was fair for an estate—and by consequence, the beneficiaries—to bear the legal costs. There then emerged

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[11] *DeLorenzo v. Beresh*, [2010] O.N.S.C. 5655 at para. 23.
[12] *Furtney Estate v. Furtney*, [2014] O.N.S.C. 3774 at para. 44.
[13] *Brown v. Rigsby*, [2016] O.N.C.A. 521 at paras. 18-19.
[14] *Ford v. Mazman*, [2019] O.N.S.C. 1297 at para. 18.
[15] *Selkirk v. Selkirk*, [2019] O.N.S.C. 298 at para. 14.
[16] *Sweetnam v. Williamson Estate*, [2017] O.N.C.A. 991 at para. 11.

a caveat to the traditional indemnification entitlement: if the trustee's conduct was self-interested or unreasonable, then the estate need not pay. From the ensuing flexible approach in *Geffen*, to the confusion engendered in *Georganes*, and finally to the Court of Appeal's sturdy decision in *Brown*, we now have a good idea of "reasonably incurred legal fees" —despite the common blurred lines between personal interests and estate interests.

If the estate trustee wants future reimbursement, he or she should not act to the detriment of the estate, nor allow selfish concerns to wax too strong, nor engage in any other bad conduct, such as failing disclosure obligations. The estate trustee who is pulled into litigation—owing to the testator's faults, the will's ambiguities, or the aims of beneficiaries—shall receive costs protection. The estate trustee who walks or stumbles into a fight, however, does so at his or her own peril.