Estate Litigation Costs – Don’t Wait for the Windfall

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March 10, 2006
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1. INTRODUCTION

It is trite law that costs are a wholly discretionary matter for the Court. This is confirmed by s.21 of the *Court of Queen’s Bench Act*, R.S.A. 2000, c.C-31, Rule 601(1) of the *Alberta Rules of Court*, and Rule 90(h) of the *Surrogate Court Rules*. Such discretion is, of course, to be exercised judicially and upon correct legal principles, as recently observed, in *Dansereau Estate v. Vallee*, 2000 ABQB 288 at para.16.²

Where estate litigation is involved, the Courts have developed a number of traditional approaches to costs which depart in one way or another from those principles found in other types of civil litigation. This Paper will discuss the traditional approach to costs, and then it will track recent developments in the law of costs in estate litigation. The reader will see that some of the traditional approaches to costs are being reformulated, driven partly by a shift in the policy, the reasons being emphasized by present-day Courts. Parties seeking to pursue estate litigation must be aware of these recent developments, particularly the decreasing propensity for the Court to allow all parties’ costs – particularly those who are unsuccessful – to be paid from the estate.

This Paper does not seek to exhaustively review the jurisprudence in this area. Rather, the authors seek to outline what they view as a particular development of interest, and one that has manifested itself quite strongly in Alberta in the last several years. For those seeking a comprehensive survey of the case law on point, we direct you to Dennis J. Pelkie’s two articles, “Costs” presented at the May 1990 Banff Refresher Course, and “Costs in Estate Litigation” presented at the April 2002 Banff Refresher Course. In addition, attached to this Paper are case

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¹ The authors further acknowledge the assistance of Chad Zima, Student-at-Law, for his assistance with the case law research. The author greatly acknowledges the extensive assistance of Monique Petrin Nicholson, without whose help this paper would not have been possible.

² This observation was also cited with approval in the recent judgment of Johnstone J. in *Serdahely (Estate of)*, 2005 ABQB 861 [hereinafter “Serdahely”].
summaries of the most frequently-cited cases on point. The case summaries are divided into six headings for easy reference. The headings are:

- Applications for Advice and Directions/Interpretation of a Will Costs
- Testamentary Capacity Costs
- Undue Influence/Suspicious Circumstances Costs
- Family Relief/Dependent Relief Costs
- Appeal Costs
- Dependant Adult/Power of Attorney Costs

2. **ESTATE LITIGATION**

   (a) **The Traditional Approach**

   (i) **All Parties’ Costs Are Paid Out of the Estate**

   In estate litigation proceedings, the Courts have traditionally exercised their discretion regarding costs in a manner unique to this area of practice. They have done so by frequently awarding costs of all parties to the action to be paid out of the estate on a solicitor-client basis, regardless of the outcome of the matter. This contention is supported in specialized commentary on point, as well as numerous cases.

   One author has described this traditional approach to costs as follows:

   For decades, in the vast majority of estate litigation cases, the courts ordered that all, or most, of the costs of the parties be paid out of the estate. Not only has the court been disinclined to require the unsuccessful party to pay the costs of the successful party, it has also directed that the unsuccessful party be partially or wholly indemnified by the estate.3

   The general rule in this regard is further confirmed by Ian M. Hull. Hull states that where an issue arises in an estate which can be said to reasonably deserve the scrutiny of the Court “it would seem that the costs of all parties will most likely be ordered to be paid out of the assets of the estate on a solicitor-client basis to all parties”.4 The Alberta cases in support of the

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traditional approach to costs are numerous. However, in recent cases, the Courts have departed from the traditional approach. For example, in *Kolacz v. Burdeinei*, [1997] A.J. No. 492 (Q.B.) Justice P. Smith in her judgment on costs, stated (page 2 of Q.L. case):

I am mindful of the growing willingness of the courts to decline in estate matters to award costs wholly against the estate in appropriate circumstances. In my view, the case is one in which the circumstances cry out for a departure from the historical method of awarding costs to be paid from the estate assets.

Justice Smith found that the litigation arose through no fault of the testator, and that the testator’s wishes in the Will were, in fact, crystal clear. The challenge to the Will on the basis of lack of testamentary capacity and undue influence was maintained on exceedingly precarious grounds and the challenger should have known this after the discovery of the plaintiff, executor. As a result, the Court held that in addition to the challenger being deprived of her costs from the estate, she was required to contribute towards the costs of the other parties.

Also, in the very recent case of *Serdahely (Estate of)*, 2005 ABQB 861, although Johnstone J. refers to the traditional treatment of costs in estate litigation by stating, at para. 22: “[h]istorically, estate litigation has been treated somewhat differently. Courts have often ordered that the costs of both parties be paid from the estate”, she then goes on to order the unsuccessful respondents to pay their own costs, and to also pay a portion of the successful applicant’s costs.

Greater insight into the traditional rule can be gleaned from a consideration of the policy reasons behind the rule. As summarized by one commentator, there are two general policy considerations in making a costs award in estate litigation matters. Firstly, in such cases the difficulties, conflicts and ambiguities that may be at issue can often be said to stem, at least somewhat, from the actions of the testator. Secondly, the Courts have a responsibility to ensure, on behalf of society in general, that Wills under which estates are distributed are valid and that the provisions of the Will are accurately understood and carried out. Parties concerned in such

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6 *Schnurr, supra* note 3 at 53-54. Johnstone J., in *Serdahely, supra*, expressly cited Schnurr’s summary of these two types of policy concerns.
matters should not, therefore, be as hesitant to bring their concerns to the Courts in matters relating to estates, as they might be in other types of disputes.

The Courts are cognizant that they must strike a balance between safeguarding policy concerns and not encouraging unfounded estate litigation. The Ontario Court, in *Logan v. Herring*, [1990] 19 P.R. 168, stated:

There is, perhaps, too much litigation in this province growing out of disputed wills. It must not be fostered by awarding costs lightly out of the estate.

Parties should not be tempted into a fruitless litigation… by a knowledge that their costs will be defrayed by others. On the other hand, there is the contrasted danger of letting doubtful wills pass into probate by making the costs of opposing them depend upon successful opposition. It is only by the careful adjustment of costs that these opposite risks can be guarded against.

(ii) The Rule in *Mitchell v. Gard*

Upon closer review of the traditional case law on point, it becomes apparent that it is not entirely accurate to characterize the traditional rule as simply one wherein all parties’ costs are paid out of the estate. Regard must be had to the classic and still frequently cited case of *Mitchell v. Gard* (1863), 164 E.R. 1280. In this case, the Court set down the following rules:

- (Rule 1) where the cause of the litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; and

- (Rule 2) if there are sufficient and reasonable grounds (looking to the knowledge and means of knowledge of the party who unsuccessfully opposed probate) to question the validity of the Will, the unsuccessful party may properly be relieved from the costs of his successful opponent.

Thus, it is seen that the traditional approach to estate litigation was never just a blanket policy that all parties’ costs were to come out of the estate. Rather, costs in these types of proceedings deviated from the general rule that costs follow the event in two types of circumstances. These two rules were articulated in the case of *Spiers v. English*, [1907] P. 122, wherein the Court stated:
In deciding questions of costs one has to go back to the principles which govern cases of this kind. One of these principles is that if a person who makes a Will or persons who are interested in the residue have been really the cause of the litigation, a case is made out for costs to come out of the estate. Another principle is that, if the circumstances lead reasonably to an investigation of the matter, then the costs may be left to be borne by those who have incurred them.

The two rules derived from *Mitchell* have come to be known as “the two great principles upon which the Court acts” in estate litigation matters with respect to costs. The two great principles continue to be cited today see, for example, *Stevens v. Crawford*, 2000 ABQB 515 at para. 55.

(iii) Conclusion

It is submitted, therefore, that the traditional approach to costs in estate litigation matters is a delicate concept that is sometimes not understood. It may also be that, for a time, the case law may have disregarded the “two great principles” from *Mitchell, supra*, and begun to award costs out of the estate without further discussion or consideration. The result, for a time, was an anomalous approach to costs in estate litigation, wherein all parties generally received all costs out of the estate.

Whatever the reason behind the body of case law and commentary suggesting that all parties’ costs are to come out of the estate, it seems clear that the Courts are shifting away from such an approach. As such, the case law and commentary suggesting that all costs are to paid out of the estate should be approached with extreme caution, and lawyers ought to discuss the potential cost implications of estate litigation with their clients.

(b) A Shift Away from the Traditional Approach

(i) Introduction

It is now reasonable to say that costs in estate litigation are no longer a forgone conclusion. Those who pursue this kind of litigation should not proceed on the basis that they will be indemnified for their costs out of the estate regardless of the particular circumstances. In other words, those who commence estate litigation proceedings confident in a costs windfall, no matter the outcome or circumstances, do so at their peril.

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This case was upheld on appeal, at 2001 ABCA 195 [Berger J.A. dissenting]. Leave to appeal to the Supreme Court of Canada was refused, at [2001] S.C.C.A. No.483 [hereinafter *Stevens*].
Two themes can be extracted from a reading of the most recent case law on this point. The first theme is that Courts appear to have returned strongly to the application of the “two great principles” from *Mitchell*, particularly the second rule. The second rule in Mitchell provides that unsuccessful parties should not, in fact, be awarded any costs, unless an unsuccessful party’s position has been based on reasonable grounds and the claim has been pursued in a reasonable manner. The second theme is that the Courts are taking more time and care to consider all of the surrounding circumstances and the various factors that come into play when they are exercising their discretion as to costs, which the Courts usually do in other types of civil litigation.

(ii) Recent Alberta Jurisprudence

Criticism of the traditional rule that all costs are to be paid out of the estate can be found sporadically in the case law and commentary, particularly during the 1990s. For instance, in Stevenson & Cote’s *Civil Procedure Guide*, published in 1992, the authors observed: “the Courts tend to be too free in ordering costs of all parties out of the estate…”8. These comments were noted by Veit J. in her 1998 judgment in *Hegedus Estate v. Paul (Public Trustee Of)* (1998) 71 Alta. L.R. (3d) 179 (Q.B.) at para. 23. The writer argued the costs portion of this case, and suffice it to say that although she was successful in convincing the Court to pay all of the costs out of the estate, it was not a small or easy task.

By the year 2000, it seems that the Courts in Alberta shifted away from freely ordering costs to all parties from the estate. A particularly good example of the Court’s reasoning behind this shift can be found in *Stevens v. Crawford*, 2000 ABQB 305. After the Court acknowledged that there was a tradition in estate matters that costs were *prima facie* awarded from the estate to all parties, Belzil J. went on to consider a number of other principles rather than follow the traditional rule. Firstly, he cited *Spiers v. English*, the case in which, as discussed above, the two principles from *Mitchell, supra*, were re-affirmed by the Court.9 Belzil J. then applied the second principle from *Mitchell* by inquiring into whether or not the unsuccessful challengers of the Will had reasonable grounds upon which to be suspicious and pursue investigation of the matter. Belzil J. found that the unsuccessful party should not be awarded any costs from the estate.

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9 At para. 55.
Of particular interest, Belzil J. observed a “recent trend” in Canadian jurisprudence of Courts being less inclined to automatically make costs payable from the estate. He then held, at para. 65: “all circumstances must be considered in deciding the question of costs…a number of factors have to be balanced.” His Lordship also examined those factors, which are typically considered in other types of civil litigation, and which are largely enumerated in r.601(1) of the Alberta Rules of Court. Thus, in Stevens, a shift can be seen towards renewed recognition of the principles from Mitchell, as well as the approach used in other types of civil litigation, in which an examination of numerous factors is to be considered before rendering a decision as to costs.

Following closely on the heels of Stevens is the case Holzel v. Mjeda, 2000 ABQB 549. In Holzel, Rooke J. undertook a lengthy discussion of the jurisprudence on costs in estate litigation, including the Stevens case, and concluded that, while historically costs were regularly awarded from the estate, that practice was declining. Rather, “[i]n order to determine who shall bear the costs, the particular circumstances surrounding the case must be considered”. 10 Rooke J. then went on to consider a number of factors, most notably the approach taken by both parties in conducting the litigation, the reasonableness of the challenge made, and the size of the estate. In the end, Rooke J. denied the unsuccessful challenger his costs, despite holding that the challenger had conducted himself reasonably in the course of the litigation. Rooke J. further ordered that the unsuccessful challenger was to pay the party-party costs of the successful propounder of the Will, on the Schedule C column equivalent to the estimated size of the estate. Such a costs award demonstrates the extent to which the Courts have, in the last five years, been willing to depart significantly from the traditional rule as to costs, by not only denying costs, but also by ordering an unsuccessful party to indemnify the opposing (successful) party to some extent. 11

The most recent Alberta decision on costs is, to the best of the authors’ knowledge, Johnstone J.’s decision in Serdehely (Estate of), 2005 ABQB 861. This case continues in the vein of both Stevens and Holzel. The Serdehely case acknowledges the traditional approach to costs in estate

10 At para. 30.
11 Similarly, consider Stiles Estate v. Stiles (2003) ABQB 603, in which the unsuccessful challenger of a Will was denied her costs and ordered to pay the executor’s fees on a party-party basis. Unfortunately, Hutchinson J. provides no reasons for this disposition. However, the case should be considered significant in the sense that it was upheld in its entirety on appeal, although again without any substantive reasons. See 2004 ABCA 341.
litigation, as well as the policy reasons behind that approach. However, the Court in Serdehely notes two competing policy reasons. Firstly, the discouragement of unnecessary litigation is cited. This policy goes hand in hand with the concept that a party may not challenge a Will with impunity when it comes to costs. Secondly, awarding costs out of the estate may have the effect of penalizing beneficiaries, which in some circumstances can be an unfair and inequitable result. As such, Johnstone J. stated that the “merits” of the challenge must be examined which she then proceeded to do. She also discussed, at length, the parties’ conduct during the course of the litigation. In the end, Johnstone J. held that, although the unsuccessful challengers had reasonable initial grounds for commencing the litigation, once they were in receipt of all relevant information from the cooperative opposing party, they should have withdrawn their claim because such disclosure made it clear that their suspicions were groundless. In the end, the unsuccessful parties were denied their costs and ordered to pay the solicitor-client costs of the opposing party from the point in time that they were in receipt of all information necessary to conclude that their claim was baseless.

(c) Conclusion

The preceding review of the most recent comprehensive decisions on point reveals that the Courts have altered their approach from the traditional rule in two significant ways. Firstly, the second principle from Mitchell, dealing with the costs of the unsuccessful parties, is now consistently applied, resulting in thorough analysis conducted by the Court of the merits of the unsuccessful party’s position. This thorough analysis has led to two modern principles. One principle is that unsuccessful parties should not receive any costs where their claim was frivolous or vexatious. The second principle is that a party may, in relation to serious misconduct in conducting the litigation, be required to indemnify the opposing party, either partially or wholly. It should perhaps be noted, however, that there is some potential danger in relying on hindsight to assess the reasonableness of an unsuccessful party’s challenge to a Will. As provided in

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12 At para. 23.
13 See also the case of Van Hecke v. Van Brabant Estate [1987] A.J. No. 102 (ABQB). The Court in this case held that up to a certain point in the litigation the challengers are to receive their costs, but from the point in time when they knew they should have stopped the litigation, from that point onward they are responsible for the costs.
Mitchell, this assessment should be carried out with a strong emphasis on the knowledge and means of knowledge, at various times during the course of the litigation, of the party who unsuccessfully commenced the challenge.

The second development that emerges most clearly from the recent jurisprudence is the extent to which the Court’s analysis on costs in estate litigation is becoming increasingly akin to that found in other types of civil litigation. Rule 601(1) enumerates a number of factors that the Court may consider in exercising its discretion as to costs. Consideration of these factors is becoming increasingly evident in the jurisprudence on costs in estate litigation. For instance, the Courts more frequently take into consideration the size of the estate, conduct of the parties in conducting the litigation, the parties’ relative cooperation among themselves or lack thereof, and whether or not, at some stage, a particular position became frivolous, vexatious or unnecessary.

3. CONCLUSION

It would appear that the gap between costs in estate litigation and costs in other types of civil litigation may be narrowing. Arguably, there is still less potential for serious exposure to costs in estate litigation than in other types of civil proceedings. However, parties in estate litigation matters ought to make thorough analyses of their various positions both prior to commencing any proceedings, as well as periodically throughout the course of the litigation. It is no longer appropriate to rely blindly on the windfall of costs out of the estate. Solicitors involved in estate litigation matters should, therefore, take the same amount of time and care in counselling clients as to risks of exposure in costs as would be appropriate in any other kind of civil litigation.

A final comment, and somewhat of a rule of thumb by which we end this Paper on is:

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14 One cautionary tale can be found in Stiles Estate v. Stiles, 2003 ABQB 317, in which a wife unsuccessfully challenged her late husband’s Will, alleging lack of capacity and possible undue influence. Despite the finding of the Court that there were compelling grounds for inquiry into the validity of the Will, the wife was denied her costs and ordered to pay the party-party costs of the executor. The trial judge provided no reasons with respect to the disposition on costs. The wife unsuccessfully appealed the judgment in its entirety, her appeal being dismissed with essentially no reasons. Because of the lack of reasoning on costs both at the trial level and on appeal, the case is not particularly helpful to practitioners, other than as an example of the potential risk that one’s client may be exposed to in pursuing estate litigation, even where there are legitimate grounds for suspicion.
(a) if an unsuccessful party is allowed to collect costs from an estate, the costs awarded will usually be solicitor-client costs; or

(b) if an unsuccessful party is required to pay costs, the costs ordered will usually be party-party costs.\(^{15}\)

CASE SUMMARIES

1. APPLICATIONS FOR ADVICE AND DIRECTION / INTERPRETATION OF A WILL COSTS


Facts: The deceased and her husband, prior to the deceased’s death, cohabited together as man and wife for a period of 58 years. They had four children, all of which are adults.

One of the two executrices of the Will made an application to interpret the words “all of my worldly possessions” in the Will. She made the application because without the Court application, her sister, who was the other executrix refused to agree that the Will was clear and that the estate should be distributed to the deceased’s husband, minus the specific bequests. The deceased’s Will made the following bequests: (1) “should I die before my husband ... I bequeath to him all my worldly possessions, except the following: To my daughter [M.A.W.] I leave to her, my glass table and four chairs, lawn set which includes umbrella, table and two lawn chairs. To my granddaughter [KW] I leave to her my sewing machine, two twin beds, triple dresser, chest of drawers”, (2) “All the rest and residue of my property both real and personal, I devise and bequeath unto my four children [MW, DK, BF, MC] to be divided equally among them.” The Will was prepared by a layperson using a printed form. The only asset remaining was a bank account of approximately $13,000.

Issue: To whom should the executrices distribute the remaining asset in the estate, being the monies in the deceased’s savings/chequing account?

Order: The Will of the deceased exhibited a clear intention to leave all of her worldly possessions to her husband, provided he survived her, as he did, and subject only to the specific bequests in favour of the daughter and granddaughter which were expressly stated. The gift of all her worldly possessions, on a proper construction of the Will, included the monies in the bank account.

Costs of the applicant were ordered to be paid out of the estate. This left the respondent solely responsible for her own costs. The Court found that on the whole of the materials before it, the applicant/executrix had at all times been of the view that the gift to her father included the monies. However, the respondent/co-executrix was not satisfied to join with the applicant in distributing the monies to their father. In the Court’s view, this application was totally devoid of any merit. It was made necessary because of the improper views, concerns, and motives of the co-executrix. To award costs of all parties out of the estate, as suggested by counsel for the respondents, would be tantamount to making the victim of this unfortunate application pay for his victimization.
(a)  *Schimnowski v. Schimnowski (1994), 92 Man. R. (2d) 251 (C.A.)*

Facts: The substantive issue in this appeal was whether the estate of the deceased should honour two cheques allegedly drawn by the deceased in favour of his wife and son. At trial, it was held that the cheques should not be honoured because there was no consideration. However, the trial judge ordered that the costs of the two appellants be borne by the estate. The appellants appealed the substantive finding and the respondent beneficiaries appealed the costs ruling.

Issues: 1. Whether the cheques should be honored; and

2. Whether the appellants’ costs should be borne by the estate.

Order: The Court upheld the trial judge’s decision with respect to the substantive issue. However, the Court allowed the respondents’ appeal. The Court stated that in spite of their relationship to the deceased, the appellants stood in no different position to the estate than any other creditor, and this was not a case where costs should not follow the matter. The Court ordered that the respondent beneficiaries’ costs in the Court of Appeal and in the Court of Queen’s Bench against the appellants on a party-party basis.

(b)  *Hegedus Estate v. Hegedus (1999), 246 A.R. 161 (Q.B.)*

Facts: This was an application made by Wilson, the mother of the deceased, who asked the Court to determine who would benefit from the estate because the sole beneficiary of the Will, her grandson, could not benefit given he killed his mother. Wilson’s application asked the Court not to allow her grandson’s daughter to benefit from the estate, and to order that Wilson was to benefit. Wilson also applied for indemnification for her legal costs from the estate. Wilson’s claim was unsuccessful and Veit J. awarded the murderer’s daughter the estate. This is a wrongly decided case. The Court ordered that each of the parties would be indemnified for their legal costs from the estate. This Order was made without knowledge of the actual legal costs. Wilson’s legal fees were $22,000. The estate was worth $130,000, but disbursements reduced its value to $112,000. The Public Trustee asked the Court to reconsider its costs ruling.

Issue: Whether the Court would reconsider its decision that costs were payable from the estate.

Order: The writer can advise, as she personally argued the costs application, that the Court did not reduce the costs award during its reconsideration. As the Court had not issued a judgment on the question of costs, it was not functus and the Court could reconsider that decision. However, the Court refused to reconsider its decision. The Court noted that although Ms. Wilson was unsuccessful in obtaining her daughter’s estate, this was not ordinary litigation. If this were ordinary civil litigation, not only would Ms. Wilson not receive costs, she would be required to pay the costs of the estate and of the Public Trustee who both had to deal with her claim. However, the Court found that the estate was responsible for Wilson’s legal costs, since it was the deceased’s bequest to her son, who was a murderer, and the fact that the Will did not provide for a gift over, that was
the cause of the litigation. In the Court’s view, the claim for fees was reasonable even though it amounted to 20 percent of the value of the estate.


Facts: An application was made for the interpretation of the Will to determine if the Will permitted distribution of the estate in specie or if a trust to convert was created. An Order was made granting the relief sought in the Petition. The Order was based on a conclusion that certain actions of the respondent constituted a “want of reasonable fidelity”.

Issue: Whether the estate was to bear the costs of the petition.

Order: The estate may be ordered to pay costs where an issue must be litigated to remove doubts with respect to the interpretation or meaning of a Will, upon the basis that the litigation is a cost of administration. In this case, a significant issue was whether or not the terms of the Will permitted distribution of the estate in specie or whether it created a trust to convert. The Court had concluded that while the terms of the Will provided a power to convert the property, it permitted distribution in specie. As the interpretation of the Will was a significant issue which affected the outcome of the Petition, the Court ordered costs payable out of the estate.


Facts: Prior to his death in 1993, the deceased named his wife as beneficiary of his RRSP. The deceased and his wife separated in 1995 and divorced in 1997. They entered into the Minutes of Settlement which provided that neither party would make any application to share or claim any interest in any pension plan or RRSP of the other party. The parties further agreed to execute all documents necessary to give effect to Minutes of Settlement. Subsequently, in 1998, the husband died intestate. He had not yet changed his designated beneficiary on his RRSP to someone other than his ex-wife. The ex-wife subsequently refused to sign a renunciation of interest in the RRSP, so as to enable its payment to the deceased’s estate. The estate successfully brought an application for a declaration that the ex-wife was in breach of the Minutes of Settlement or, alternatively, for a declaration that she held the proceeds of the RRSP in constructive trust for her ex-husband’s estate.

Issue: Is the estate entitled to solicitor-client costs?

Order: The Court observed that a trial judge has a very wide discretion when awarding costs, provided that such discretion is exercised judicially. The general rule is that costs follow the event. This matter was originally scheduled to be heard in regular Chambers. It was adjourned to Special Chambers due to time constraints. In the Court’s view, a departure from the general rule of party-party costs should only occur in rare and exceptional circumstances. Such does not exist in this case.

Counsel for the Estate submitted a draft Bill of Costs calculated on Column 1 of Schedule C and a draft Bill of Costs drafted on the basis of solicitor-client costs, neither of which
was approved by counsel for the wife. The estate has requested that the Court set a sum
certain for the costs payable. The Court, therefore, reviewed the party-party Bill of Costs
and disallowed $500.00 for the adjourned Chambers’ application. By way of final
comment, the Court observed that the inaction on the part of the deceased was not a
ground for ordering that the Estate pay the costs of the action. The ex-wife was the
unsuccessful litigant. There is no reason to depart from the general rule that costs follow
the event.

(e)  **Re Bowlen (Estate), 2001 ABQB 1014 (QL)**

Facts: The applicant was the personal representative of his parents’ Wills. The Wills left the
residue of the estates to him and his sister. If the sister predeceased her parents, her share
was to be divided equally among her children. The sister was convicted of murdering her
parents. In the Court proceedings, she was denied any benefit from her parents’ estates.
The personal representative applied for directions and advice as to who was entitled to
receive the sister’s interest.

Issue: Who was to receive the sister/daughter’s interest under the Wills?

Order: The sister’s interest was to be distributed pursuant to the *Intestate Succession Act* as if it
was an intestacy. Under the terms of the Wills, the sister’s share did not pass to her
brother. The gifts to the son and the sister were gifts of the residue of the estates. A failed
residuary gift could not be distributed to the other residuary beneficiaries. Accordingly,
the daughter’s share did not pass to her children. That could only occur if she
predeceased her parents, which she did not. Accordingly, her one-half share of her
parents’ estates passed on intestacy under the rules contained in Alberta’s *Intestate
Succession Act*.

The Court noted that the usual practice in surrogate cases is for costs to be borne by the
estate on a solicitor-client basis. The rationale for that position is simple. If the Will had
been clear or unambiguous, there would be no reason for the application. However, this
application did not arise because of any problem in the Wills of the testators, but rather
due to their daughter’s actions and her murdering the parents. As a result, the Court
ordered that the costs of all of the parties on a solicitor-client basis be borne by the
daughter’s share of the two estates which was now being passed on intestacy. The Court
also added that as between the two estates, costs should be on a pro-rata basis. The
brother did not have to bear any of the costs of the application as the problem was solely
created by his sister.

(f)  **Coates Estate (Re), [2002] A.J. No. 1508 (Q.B.)**

Facts: This is an application by a beneficiary of the Estate for an Order requiring the executor to
make certain distributions and to produce certain records. The executor was the
applicant’s brother, and the testator’s son. The Will provided that personal, domestic and
household items were to be divided between the testator’s two children if they could
agree to a distribution within three months of his death. Failing such agreement, the
disputed articles were to be sold and added to the residue of the estate, which was to be
divided between the two children. Three months after the testator’s death, the executor applied for a grant of probate, which was rejected because the applicant filed a caveat against the estate. The executor applied to formally pass the accounts of the estate, but the applicant filed a Notice of Objection. The parties appeared in Court several times prior to the applicant bringing the current application.

Issue: Should the executor be required to produce records and make the distributions, and what is the appropriate disposition as to costs?

Order: Application allowed in part. The value of the estate had not warranted the extent of litigation which occurred. There were only a few items of personal property in dispute, which were found not to form part of the estate.

On the issues of costs, many of the legal costs would not have been required had the applicant not taken such a litigious posture from the start. However, it was apparent that she had a measure of success in her various applications and that the personal representative took a somewhat cavalier attitude towards his duties in respect of the household goods and personal effects. Accordingly, it was directed that each was to pay his or her own costs for all of the applications.


Facts: This is an application by Wood for the interpretation of a Will. The deceased, B, had three sons. He executed a Will which divided his estate equally among the sons after taking into account any amounts loaned to the sons. He referred to an attached list of loan amounts. One list was made before the execution of the Will. Two other lists were discovered which were made after the execution of the Will. Wood argued that the pre-Will list entries were to be taken into account for the purpose of distributing the residue of the estate and the post-Will list entries were to be set off against the sons’ share. One of the sons argued that it was inequitable to take the advances into account at all because the deceased had breached his duties as trustee of another estate in which the son was a beneficiary.

Order: Application allowed. The pre-Will list was incorporated by reference into the Will. The post-Will lists were taken into account in the distribution of the residue. The evidence established that the post-Will transactions did occur. The doctrine of ademption by advancement was invoked.

With respect to costs, the Court accepted the Administrator’s argument that many of the difficulties arising with respect to the estate and the need for a summary trial, arose out of the manner in which the deceased had left his affairs. To that extent, the Administrator submitted that most of the costs of the application ought to be borne by the estate. However, the Court also agreed that, to some degree, the costs were increased unnecessarily by the son. Further, costs should take into account the son’s untenable position at trial that he should not have to account for the monies he received from his father due to his father’s mishandling of his grandfather’s estate when that action was previously dismissed. Thus, the son will pay costs to the Administrator at the rate of 33
percent of the party-party costs of the Administrator in the trial of this issue and the balance of any costs will be borne by the estate.
2. TESTAMENTARY CAPACITY COSTS

(a) Wild v. Plant, [1926] 139 (C.A.) at P 139

Facts: The plaintiffs were the executors of Mr. Plant’s Will. The defendants had entered a caveat against the probate being granted to the plaintiffs and required proof in solemn form of the Will, and an undated codicil. The defendants alleged that the Will had not been duly executed and that the Codicil had been executed at a time when the testator was of unsound mind. The defendants also alleged undue influence in regards to the execution of the Codicil. At trial, the Will was held to be valid. On the issues raised as to the Codicil, it was held that it was not valid due to lack of capacity. However, the defendants ultimately withdrew their plea of undue influence. The trial judge ordered that the plaintiffs were to have their costs, on a solicitor-client basis, from the defendants and that the defendants were to have their general costs from the plaintiffs. However, in the event of a default, the defendants were entitled to have their costs from the estate. The plaintiffs appealed the trial judge’s cost ruling insofar as it related to the cost award granted at trial.

Issues: 1. Whether the plaintiffs’ costs should be paid out of the estate;

2. Whether the defendants should be punished, through an Order for costs, for their unsuccessful allegation of undue influence; and

3. Whether the defendants were entitled to have their costs from the plaintiffs, or if in default, from the estate.

Order: The Court held that it was a well established rule that where an executor successfully establishes a Will, he is prima facie entitled to have his costs on a solicitor-client basis out of the estate. This right can only be lost or curtailed by inequitable conduct on the part of the executor. As this was not the case here, the Court ordered that the plaintiffs’ costs of establishing the Will were to be paid by the estate. With respect to the second issue, the Court ordered that the defendants were to pay the plaintiffs’ costs on a party-party basis for costs incurred on the issue of undue influence. The Court held that this was justified since the defendants had plead undue influence without reasonable grounds upon which to support it. As to the third issue, the Court noted that the original Order, which granted the defendants their costs against the plaintiffs in respect of the Codicil, appeared to be based on the basis that the plaintiffs ought not to have propounded the Codicil. However, it took no account of the fact the defendants had raised one issue as to the Codicil unsuccessfully. As such, the Court held that the defendants were to have their general costs, in respect to the invalidity of the Codicil, payable from the estate on a party-party basis. The Court stated in this case that the Court has a wide discretion in relation to awarding costs, and much depends on the exact facts of the case. The specific rules are not deductible, and cannot be laid down.

Note: This case is discussed on page 3 of the paper. Since it is concerned with testamentary capacity, it has been referenced here as well.


Facts: These were appeals by the children of the deceased from a judgment which affirmed the validity of the mother’s Will. The mother was blind and infirm when she made her Will. Two of her five children challenged its validity. The action was heard by a judge who gave extensive reasons and found the Will valid. The Justice specifically found that there was testamentary capacity and no undue influence. Although the mother was infirm, her mind and her opinions, memory and resolve were all firm. She also had competent professional help. The appellants sought a mistrial on the grounds that the trial judge misdirected herself on the burden of proof, that she missed issues, and that their request for payment of their costs out of the estate were wrongly denied. The second appeal was brought by one of the deceased’s children (Daniel) and was concerning the costs Order made at trial. He had been ordered to pay a portion of the respondent/plaintiff’s costs at trial. He argued that he was not really a party to the lawsuit even though he was a named defendant and was represented by counsel.

Issues: 1. Whether an Order for a mistrial should be granted;

2. Whether the appellants in the first appeal should have been granted their costs out of the estate;

3. Whether the appellant in the second appeal should be responsible for a portion of the plaintiff’s costs at trial.

Order: The appeals were dismissed. The Court held that the issue of burden of proof was moot since the facts and inferences to be drawn were clear and everyone had led all the evidence they wanted to. However, even if the onus had been put on the respondents at every stage, the result would have been identical. Further, the Court found that the evidence overwhelmingly established that the testatrix knew and approved the contents of the Will. With respect to the second issue, the Court held that an Order that costs be payable out of the estate would be the same as ordering costs payable by the residual beneficiaries (the respondents). However, those beneficiaries won and were found to have done nothing wrong. The Court held that the trial judge was right not to give the appellants costs out of the estate for this fact and a number of other reasons, including the appellants’ unsubstantiated plea of undue influence. With respect to the second appeal, the Court held that there was no question that Daniel was anything but a full party to the suit, since he had examined other parties and also actively participated in the trial. The Court held that partial award of the respondent’s costs at trial against Daniel was substantiated by the trial judge’s finding that Daniel had a motive to support the other appellants, since they owned the “swing” voting shares in the family company and had voted those shares to give Daniel control to the exclusion of the respondents.

Note: This case is discussed in the Appendix under the heading Undue Influence/Suspicious Circumstances Costs, but is also concerned with testamentary capacity, and this is why it has been referenced here as well.


Facts: Margaret and Werner Stevens were married in 1963 when she was 51 years old and he was 54. When they married Werner was a widower with three children, Ernie, Jay and Bob. Jay died in 1967. Werner died in 1997, and Margaret died in 1998. Margaret executed her last Will on August 2, 1991. The defendants (who were some of Margaret’s siblings) challenged the Will on the basis of a lack of capacity and undue influence. Initially, the Stevens met with their lawyer, Mr. Tod, at their home to discuss the Will. After meeting with the Stevens initially to discuss the Will, Mr. Tod returned with a draft, together with his articling student, Nash, and showed the Will to the Stevens. At that time the Stevens asked Mr. Tod to make some changes. Nash and Seibel, a Wills paralegal, returned to the Stevens home with the final draft and the Stevens signed it. The medical evidence, and Margaret’s doctor, Dr. Flook, clearly established that Margaret suffered from Alzheimer’s disease but that she was not at such an advanced stage of the disease at the time of signing the Will. Mr. Tod had testified that, based on his encounters with Margaret, he had no doubt she had testamentary capacity.

Issue: Whether Margaret Stevens had testamentary capacity at the time she executed the Will and whether there was any undue influence.

Order: The Court held that Margaret had testamentary capacity and her Will was admitted to probate. Mr. Tod and Dr. Flook were credible and reliable witnesses and their evidence established that Margaret had testamentary capacity. Further, it was significant that Margaret herself had requested changes to be made to her Will. Testamentary capacity did not mean that the testator had to be of entirely sound mind, but instead had to understand and appreciate the nature of the testamentary act. There was a suspicious circumstance by virtue of Margaret suffering from Alzheimer’s disease, but the Court found that there was no undue influence exerted with respect to the Will.

The plaintiffs were awarded party-party costs against the defendants. However, they were not awarded full indemnity costs, since there was a justiciable issue at trial regarding the testamentary capacity of Margaret Stevens. The defendants were not entitled to recover any of their costs from the estate. At trial, it was found that Alzheimer’s disease was a suspicious circumstance and thus the investigation of the mental status of Margaret Stevens at the time she made her Will was not unreasonable under the circumstances. Had the defendants been content to simply litigate the issue of testamentary capacity, then the plaintiffs’ costs would have been payable out of the estate. However, since they went further to allege undue influence as well, which is a
species of fraud, the Court found this to be grounds for denying them their costs from the estate.


**Facts:** This was an application by the deceased’s grandchildren for costs from the estate on a solicitor-client basis. Riva died in 1999. Her last Will, made in 1996, left each grandchild $5,000 and the residue of her estate to the Canmore Hospital. The grandchildren had brought a Court challenge of the Will, stating that Riva lacked testamentary capacity and was unduly influenced. The matter was contentious. The grandchildren brought the matter to the attention of politicians and the media. The manner in which the grandchildren proceeded resulted in significant legal costs for them and for the Hospital. The grandchildren eventually abandoned the challenge to the Will. The grandchildren stated that there were grounds to inquire into the validity of the Will and that they should recover their costs from the estate.

**Issue:** Whether costs should be awarded from the estate on a solicitor-client basis.

**Order:** The application was dismissed. The manner in which the application was initiated and pursued as well as the tactics of the applicants clearly disentitled them from any costs from the estate. The costs of this application, in the case of the applicants, were to be borne by the applicants/grandchildren. The costs incurred by the respondent were ordered to be paid from the estate on a solicitor-client basis. The Court noted that the legal costs incurred by the respondents will significantly diminish the value of the residue of the estate that is to pass to the Canmore Hospital. The Court was not prepared to compound that result by an award of costs from the estate in favour of the applicants/grandchildren.

**Note:** Surrogate Court Rule 90(h) which allows the Court to penalize a litigant for their conduct.

(g) **Weidenberger Estate (Re), [2002] A.J. No. 1157 (Q.B.)**

**Facts:** This is an application by a class of beneficiaries for formal proof of a Will. The deceased prepared a handwritten one-page testamentary document in December of 1987 disposing of his estate to his sister and next of kin. With the exception of six months during 1987, the deceased had been hospitalized from 1981 until his death in July 1995 because of a mental illness. During the time he was hospitalized, a certificate of incapacity under the *Mental Health Act* had been issued with respect to the deceased and his estate and affairs were administered by the Public Trustee. There was conflicting expert opinion as to whether the deceased had an understanding of the nature and extent of his estate and whether he understood the natural objects of his bounty.

**Issue:** Is the Will valid, and what is the appropriate disposition as to costs?

**Order:** Application allowed. The act of creating the Will was evidence of the deceased’s intent to control his estate and that he possessed a rational mind. Any delusions he suffered from did not affect the dispositions he actually made. There was no evidence that the
deceased unreasonably excluded or included beneficiaries. There was evidence that he knew the value of his estate, but even if he did not, this would not have been unreasonable considering he had been out of touch with the market place for a prolonged period.

As to costs, the solicitor-client costs of the application including all disbursements were ordered to be paid out of the estate with no reasons provided.

**Bahry v. Zytaruk, 2002 ABQB 858**

Facts: This case had involved an action by Bahry, one of 32 nieces and nephews of the deceased, for formal proof of her Will dated June 18, 1997, and for a Grant of Probate. The defendant, Zytaruk, was the deceased’s only child. Prior to the June 18, 1997 Will, Zytaruk and her three children were the deceased’s principal beneficiaries. The 1997 Will made Bahry executor and residual beneficiary.

The sole issue was whether the deceased had testamentary capacity in June 1997. In May of 1997 the deceased had called her usual law firm to make an appointment to change her Will. When the lawyer questioned some of the changes, the deceased told her lawyer that she changed her mind and she did not want to make any changes. The deceased then made another appointment three days later with a lawyer at a different firm which resulted in the June 1997 Will. In November 1998 the deceased was admitted to hospital with a serious illness. She was diagnosed with dementia. Many friends and acquaintances testified that she was nonetheless very lucid. The lawyer who prepared the 1997 Will said the same and he also felt that she had mental capacity when he visited her in February 1999. The medical evidence indicated that it was common for dementia not to be diagnosed for several years after its onset.

The action for formal proof was ultimately dismissed. A declaration was issued that the transfer of land executed at the time of the 1997 Will was not valid, and a Grant of Probate was issued for the deceased’s earlier Will of July 20, 1993. In 1997 when the deceased executed the Will and land transfer, she did not have testamentary capacity because she did not appreciate the consequences of the change that she was making in the disposition of her estate.

Issue: Is the defendant/successful party entitled to party-party or solicitor-client costs from the plaintiff? Are they entitled to double costs, due to service of a formal offer?

Order: The estate presently has a value of approximately $700,000. The plaintiff’s solicitor-client costs are in the order of $170,000. The defendant’s solicitor-client costs are approximately $220,000 plus some travel expenses. The defendant’s party-party costs, if they are doubled after the Rule 174 offer and a second counsel fee is allowed, are approximately $130,000 plus $30,000 of disbursements.

The traditional approach seems to have been that in the absence of any wrongdoing on the part of the named executor, a Court will recognize his duty to propound the Will and will rarely deny him solicitor-client costs for so doing even if he is unsuccessful.
However, the general rule appears to be changing. If reasonable overtures of settlement are rebuffed by the opposite party in a Will contestation, the Court will likely consider such conduct unreasonable and penalize the party with liability for costs.

Therefore, where the solicitor for parties propounding or challenging a Will is of the view that the position of the opposite party has little merit, as in this case, the solicitor advises the opposite party of that assessment in that he will be seeking an Order from the Court directing the costs of the proceedings to be paid by that party if they persist with the proceedings. Furthermore, a Formal Offer to Settle will further enhance the position of the parties offering the settlement and place the opposite party in greater peril as regards to disposition of costs.

The Court of Appeal has also made it clear that it is important to give full effect to Rule 174. It provides an incentive to encourage settlement and to discourage parties from pursuing uneconomical litigation.

At least by the time of the service of the Offer of Judgment, the plaintiff knew the expert opinions. The defendant’s experts’ opinions were clearly stronger and sounder than the plaintiff’s expert opinions. The plaintiff must have been aware of the real risk that the Court might well accept the defendant’s experts’ reports in preference to those of the plaintiff. Furthermore, the plaintiff was on notice that the defendant, if successful, would not only be seeking to prevent the plaintiff from having his costs out of the estate but would also be seeking her costs from the plaintiff.

In appropriate circumstances effect should be given to Rule 174, even in estate litigation. Therefore, from the date of the Offer forward, the plaintiff should be required to pay double the defendant’s party-party costs, including provision for two counsel. Prior to that date, however, it was reasonable for the plaintiff to resist the attack on the 1997 Will. Thus, the plaintiff should receive his solicitor-client costs from the estate up to that date. Those costs should be set off against the award of party-party costs to the defendant. The defendant should also have party-party costs for the application to replace the plaintiff as executor with the Royal Trust Corporation.

Note: In brief subsequent reasons the Court ordered that the party-party costs be set at Column 4 due to the complexity of the issue, the importance of the case between the parties, the length of the trial, and the size of the estate.

(i)  **Stiles Estate v. Stiles** [2003] A.J. No. 603

Facts: This is an application by the executor to prove the Will in solemn form. The deceased, a farmer, left one of the four quarter sections of his farm to his wife, and the other three quarter sections to his nephews, with a life interest to his wife. His wife argued that the deceased lacked testamentary capacity and that the Will was the result of undue influence. The deceased had received two of the quarter sections from his family and he was registered as sole owner at the time of his death. His wife was not registered as sole owner of any of the quarter sections at the time of his death. The other two quarter sections were in joint ownership with his wife. For some time prior to his death, the deceased had been trying to arrange a land swap whereby his wife would retain sole title to one
of the quarter sections and he would have sole title to the other. If the Will were found to be valid, the deceased’s nephews would obtain ownership of two quarter sections of the farm, subject to the wife’s life interest.

The deceased had had an accident in 1996 that left him in a coma for a month. He consulted a lawyer during his recovery period about receiving compensation for his injuries. The deceased met with this lawyer on two later occasions in 1997 and 1998 to discuss estate matters and the land swap. On April 20, 1999, while in the hospital undergoing lung cancer treatment, the deceased again met with the lawyer and gave detailed instructions for the preparation of his Will. The lawyer prepared the papers and returned to the hospital on April 27th, at which time the deceased executed all of the documents.

The lawyer testified that no question of the deceased’s mental capacity was ever raised by anyone, and that he had no doubt about the deceased’s testamentary capacity. The deceased’s brother denied exercising any influence on the deceased and confirmed that his mental capacity was fine. Doctors and friends who had been in contact with the deceased between 1996 and his death all testified that his mental capacity did not change during this period. The wife testified that the deceased exhibited confusion and anger between April 20th and 27th and that the deceased’s brother had discussed the Will with him on a few occasions prior to 1999. A friend testified that the deceased seemed confused on April 27, and another friend indicated that in 1998 the deceased had implied that he was under pressure from his brother to complete a Will. Hospital records indicated that the deceased had a low sodium level on April 27th and that he had exhibited some signs of confusion the night before. Expert evidence indicated the low sodium level on April 27th may have caused some disorientation and confusion.

The wife argued that there were suspicious circumstances surrounding the preparation and execution of the Will sufficient to establish on a balance of probabilities that the deceased lacked testamentary capacity or executed the Will as a result of undue influence from his brother.

**Issue:** Is the Will valid, and what is the appropriate disposition as to costs?

**Order:** Action allowed. There was no evidence that the actual beneficiaries, the nephews, were in any position to influence the deceased. Most of the telephone calls between the deceased and his brother took place after the Will was executed. The brother was not in a position of authority over the deceased nor was the deceased in any type of disadvantaged position toward him. The members of the deceased’s family were concerned that he put his affairs in order with a Will, but that reasonable concern did not impute undue influence on their part.

Suspicious circumstances did exist on April 20th when the deceased gave instructions to the lawyer and on April 27th when he signed the Will because of the gravity of the illness, the medical treatments, and the fluctuations of the deceased’s sodium levels, shifting the burden of proving capacity onto the executor as propounder of the Will. The deceased was able to give a detailed and complicated set of instructions to
the lawyer on April 20th that confirmed his previous instructions. On that date, he was clearly of sound mind. The April 27th medical records were inconclusive and did not establish that the deceased was confused, delusional or incoherent. Even if his mental state had deteriorated since April 20th, he was still competent to understand that the document he was signing on April 27th was a testamentary instrument prepared pursuant to his previous instructions.

The Will was valid. In the circumstances of this case, costs were to follow the event. That meant that the plaintiff’s costs are to be paid by the defendant wife, taxed on the appropriate Column of Schedule C. The Court declined to give any reasons for this cost award.

Appeal: Appeal dismissed, with virtually no reasons.

(j) **Serdahely Estate (Re), [2005] A.J. No. 1620**

Facts: The action involved validity of a Will, with an 8-day trial. The respondents alleged suspicious circumstances, lack of testamentary capacity and undue influence. The Court made a finding of suspicious circumstances and directed that the Will be formally proved. However, the respondents were unsuccessful in the litigation.

Issue: Should the successful parties (the applicants) receive solicitor-client costs? Are the unsuccessful parties (the respondents) entitled to an Order of all costs out of the estate?

Order: The respondents are liable for their own costs. The applicants are entitled to solicitor-client costs against the respondents from October 2003 onwards. The respondents impeded the process of formally proving the Will with repeated motions and appeals that lacked foundation. There was no substantive basis for the respondents’ position throughout the litigation. Once the respondents had disclosure of all facts (by October 2003) they should have ceased their opposition. The respondents’ conduct unreasonably lengthened proceedings. The Court also has reason to believe that a false affidavit was filed in support of the respondents’ position. This must be denounced in costs.
3. **UNDUE INFLUENCE/SUSPICIOUS CIRCUMSTANCES COSTS**

   (a) *Mitchell v. Gard (1863), 164 E.R. 1280*

   Facts: This case concerned an unsuccessful challenge to the testator’s Will by his next of kin. The next of kin had plead that the Will was invalid due to undue influence upon the testator by a residue legatee. Despite being unsuccessful, the next of kin was successful in obtaining costs payable from the estate, since he had a reasonable ground for litigation based on the conduct of a residue legatee.

   Issue: In estate litigation, in what circumstances should a Court deviate from the normal rule that the unsuccessful party is responsible for costs?

   Order: Generally, costs are to be borne by an unsuccessful litigant. However, the Court noted that Costs are always in its discretion. As such, in estate litigation, two rules could be laid down with respect to costs:

   1. If the cause of litigation takes its origin in the fault of the testator or those interested in the residue, the costs may be properly paid out of the estate; and

   2. If there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the Will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may be properly relieved from the costs of his successful opponent.

   (b) *Re Bisyk (No. 2) (1980), 32 O.R. (2d) 281*

   Facts: The deceased had appointed his priest as the executor of his Will and had left his entire estate to the Church. The deceased was very dedicated to the church and had no close friends or relatives living in Canada. Three of the deceased’s nieces from Russia, who had never met or communicated with the deceased, challenged the validity of his Will. The solicitor for the nieces had made unfounded allegations of undue influence against the executor.

   Issue: Whether the Solicitor was responsible for the executor’s costs.

   Order: The costs of the executor were to be paid out of the estate on a solicitor-client basis. The Court held that the estate was entitled to costs of the proceedings, including the interlocutory proceedings, against the solicitor personally. This was due to the fact that the solicitor had been in control of the proceedings and had even joined himself to the proceedings as attorney and in that capacity had participated in the proceedings. Accordingly, the solicitor was obligated to assume responsibility for allegations advanced and to bare the risk of costs where these allegations were made irresponsibly and without foundation.

Facts: In a probate action, the defendants attacked the validity of the Will on the basis that the testator lacked testamentary capacity and that one of the executors, who was also the sole beneficiary under the Will, had exercised undue influence upon the testator to her sole benefit. The defendants’ positions were rejected at the trial of the action.

Issue: How are costs to be awarded in this action?

Order: Costs were awarded to the plaintiff against the defendants on a solicitor-client basis. This was based on the defendants’ unwarranted allegations of undue influence and their conduct in the litigation, namely their unreasonable refusal to compromise and consider a settlement offer, which had caused the estate to be depleted.


Facts: This was a trial on the validity of a residuary bequest in a Will. The Will was signed while the testator was dying of AIDS. The challenger alleged suspicious circumstances. The brother of the deceased and executor dispelled all allegations of suspicious circumstances and the Will was not proven and probate was granted.

Issue: Who will pay the costs of the litigants?

Order: The Court ordered that the unsuccessful plaintiff (the deceased’s mother) was not entitled to any costs out of the estate. Neither the testator nor the residuary beneficiary had caused the litigation. The circumstances did not lead reasonably to the need to investigate into the propounded Will. The defendant was entitled to her costs on a party-party scale, which costs were to be paid by the plaintiff.


Facts: This was an application by the defendant for an Order for costs. The propounder/defendant of a Will successfully defended the validity of the Will in an action brought by the caveators/applicant. During stage one of the trial, the caveators satisfied the Court that suspicious circumstances existed for challenging the validity of the Will. However, the propounder then satisfied the onus which reverted to him. Ultimately, the Court held that the propounder fully answered and dispelled the suspicious circumstances with substantially stronger evidence than that which had indicated suspicion. Actual costs, relating to the dispute and the litigation, were in the neighbourhood of $70,000 for each of the propounder and the caveators. Both parties’ costs exceeded the value of the estate. The propounder sought an Order for costs against the caveators on a solicitor-client basis, particularly from the time of oral discoveries and onward through trial. The caveators also sought payment of their costs out of the estate on a solicitor-client basis.

Issue: Whether the defendant’s application for costs should be allowed.
Order: The application by the defendant was allowed. He had proven the Will and as such was entitled to an award of his costs from the estate on a solicitor-client basis. Also, an Order for partial payment of his costs was made against the caveator on a party-party basis. The Court noted that the caveators had a right to challenge the Will, and to have it judicially investigated and determined that the Will was valid. However, it is was apparent to the Court that the propounder had fully informed the caveators of the salient facts very early and that it should have been obvious to them that the Will was valid. Since they had not acted responsibly, the Court felt it justifiable to compel them to pay a portion of the propounder’s costs. Furthermore, this also disentitled them to an award of costs from the estate or from the propounder.


Note: This case is discussed on page 3 of the paper. Since it is concerned with undue influence, it has been referenced here as well.


Facts: This was an application by Stannard for leave to appeal an award of costs. Originally Scramstad brought an action against Stannard. She alleged that a Will, appointing Stannard as executrix of the estate, was void due to undue influence. Stannard was also a beneficiary. The action was dismissed and the Will was upheld. However, the trial judge ordered that costs for both Stannard and Scramstad were paid out of the estate. Stannard applied for leave to appeal the award of costs.

Issue: Whether costs should follow the event.

Order: The application was dismissed. The trial judge had jurisdiction to determine costs. The trial judge was aware that payment of costs by the estate reduced Stannard’s share of the estate as a beneficiary. However, the Court held that since there were reasonable and sufficient grounds for Scramstad to litigate the validity of the Will, it was appropriate for the Court to exercise its discretion not to have costs follow the event.


Facts: An action was brought by a caveator, who challenged the validity of the deceased’s Will. The caveator alleged lack of capacity, and undue influence and fraud on the part of the executrix. The allegations of fraud were dropped on the first day of trial, but had caused the testatrix embarrassment for some 3 and ½ years. The executrix won at trial. The Court held that while there was some evidence which may have initially given rise to suspicions about capacity, they ought to have been allayed before trial by evidence which had emerged at discoveries. Counsel for the executrix warned counsel for the caveator that if these allegations persisted, he would seek costs from him.

Issue: Whether costs should be awarded against the counsel for the caveator.
Order: The Court concluded that although the record shows errors in judgment, and perhaps negligence, on the part of counsel for the caveator, something more than a mistake, error in judgment or mere negligence must be shown for liability of the solicitor or counsel to result, and that in this case, that threshold had not been crossed. Accordingly, there was no judgment for costs against the solicitor. Furthermore, the Court suggested that when fraud and undue influence is alleged, which allegations are more serious than allegations of testamentary capacity or undue execution, the former must be treated more seriously than the latter.


Facts: An action was brought to have the testator’s Will set aside on the basis if lack of testamentary capacity and undue influence.

Order: The Court held that the testator had testamentary capacity and that there was no undue influence.

On the issue of costs, the defendants submitted that the plaintiff, challenger should be charged with the costs of the action because no sufficient grounds were established for challenging the validity of the Will, a fact which should have been evident to the challenger prior to the commencement of the trial.

Cavarzan J. held that the costs of the challenger were not to be fully paid from the estate, and further that there was no reason to charge the challenger with the defendant’s costs. In so holding Cavarzan J. stated (at pgs. 11-12 of Q.L. case):

I am not persuaded that the plaintiff could have determined prior to trial that her concerns about testamentary capacity were in fact groundless. She had sufficient and reasonable grounds to question the testamentary capacity of the testator. The allegation of undue influence, on the other hand was groundless. It was within the means of knowledge of the plaintiff to determine this. This basis for attacking the validity if the will ought not to have been pursued.

In my view the plaintiff’s persisted in pursuing the allegation of undue influence introduced unnecessary complexity and additional trial time. It would not be just, in the circumstances to compensate the plaintiff fully for her costs out of the estate.

On the other hand, I see no reason to charge the plaintiff with any of the defendant’s costs. An allegation of undue influence is not different in nature from an allegation of lack of testamentary capacity. Both classes of allegation involve the same question, what was the will of the testator. Inevitably there was considerable overlap in the evidence addressing these allegations.

Note: What Justice Cavarzan fails to take into account in this case is that allegations of fraud and should not be made unless the allegations can be substantiated. Other Courts have not been as tolerant of these types of unsubstantiated allegations.

Facts: This was an action by Johnson to prove a holograph Will in solemn form. The action was contested on the ground that the holograph Will was revoked by a subsequent instrument and that there was undue influence in the creation and signing of the document. Johnson also sought costs on a solicitor-client basis from the estate, and an Order disallowing costs to the respondents.

Issues: 1. Whether the Will was valid;
2. Whether the applicant should have his costs borne by the estate on a solicitor-client basis; and
3. Whether the respondent was entitled to her costs.

Order: Johnson was successful and the Will was admitted to probate. Since Johnson was successful, he was entitled to have his costs paid out of the estate on a solicitor-client basis. However, the Court disallowed any costs to the respondents on the basis that her allegation of undue influence was unfounded and that there were no suspicious circumstances surrounding the preparation of the Will. Further, since Johnson was the sole beneficiary of the estate, any such cost award in favour of the respondent would erode his position. This case is an example of the negative consequences which can follow if a party alleges undue influence and suspicious circumstances without having strong proof that the undue influence and suspicious circumstances exists.


Facts: This was a reconsideration of the issue of costs arising out of an application by Holzel for the removal of a caveat filed by Mjeda. Holzel was the executor and sole beneficiary of the estate of the deceased, Sinigoj. Mjeda was the executor and sole beneficiary of the estate under a prior Will of the deceased. Mjeda argued that there were suspicious circumstances in the execution of the subsequent Will. Holzel was employed by the deceased to provide housekeeping services and the deceased had expressed to Mjeda that he believed that Holzel wanted his money. Holzel had refused to explain the matter to Mjeda made many requests for the information. The Court had ordered the caveat removed for lack of suspicious circumstances and ordered Mjeda to pay solicitor-client costs to Holzel.

Issues: 1. Whether costs should be paid out of the estate; and
2. Whether costs should be awarded on a solicitor-client or party-party basis.

Order: The Court held that there was no real issue of suspicious circumstances as there was no evidence of lack of capacity. As such, it could not be said that the deceased had caused the litigation through his conduct. Accordingly, it was not justifiable to order that costs be paid out of the estate. There was also no mala fides on the part of Mjeda, which meant that solicitor-client costs were not appropriate. Furthermore, full indemnification of
Holzel was not appropriate since it was Holzel’s actions which incited Mjeda’s suspicion. Accordingly, Mjeda was ordered to pay costs on a party-party basis only. When awarding costs the Court has a wide discretion to take into consideration factors such as that the allegation caused anguish to the other party (see - Marshall Estate infra), that offers to settle had been made but ignored (see - Kerner v. Fioreli infra) and the size of the estate (see - Morrissey Estate infra).

(l)  


Facts: This was an application by the defendants, Vallee and Helene Lapointe, against Dansereau respecting his actions with regard to his mother while she was alive and after her passing. They sought an Order firstly to remove him as a co-executor of the Will. Their grounds were that he overpowered her and over-rode her wishes while she was alive, and whittled away her estate to the point that all that was left was four quarters of land. They also suggested that it would be very difficult, after the personal animosity between Dansereau and the co-executor Bernard Lapointe, and the proceedings, for the two to work together. Dansereau responded that he had worked hard and long to get the land in question annexed to the Town and that this work will benefit all of the beneficiaries. Vallee and Helene sought double costs against Dansereau, or costs on a solicitor-client basis to be paid out of his share of the estate. They made an offer of judgment to Dansereau, but he did not have the whole 45 days required by the Rules of Court to accept the offer. The value of the estate was about $6 million dollars.

Issues: 1. Whether Dansereau should be removed as executor?  
2. Whether the applicants should be awarded costs against Dansereau?  
3. If so, on what scale?  
4. Whether Dansereau should have any of his costs?

Order: The application was allowed in part. Dansereau was removed as executor, and costs were awarded on party-party scale for this part of the application. Dansereau was removed as executor since the animosity between the co-executors was so serious that it was unrealistic to require them to continue to work together. With respect to the second issue, the Court held that there was no rule of law that established that in estate litigation, everyone’s costs (including the losing parties) costs were to always be paid by the estate, unless the litigation was the fault of the testator and an application to the Court is necessary to seek the guidance of the Court to interpret the Will. This was confirmed by Veit J. in this case. Since Dansereau’s conduct was wrongful in the sense that he overpowered his mother’s wishes, the Court held that the applicants’ costs were to be paid by Dansereau rather than by the estate. With respect to the third issue, the Court held that double costs would not be awarded since the offer of judgment was not available for the mandatory 45 days prior to trial. The Court awarded costs against Dansereau on a party-party basis, since this was an ordinary contest among litigants. As to the fourth issue, Dansereau’s costs of having the four quarters annexed to the town was to be borne by the estate since all of the beneficiaries would benefit from these expenditures.

Facts: This was an application to determine costs following the dismissal of the action commenced by J and H alleging undue influence. They claimed that the defendant W exercised undue influence over the deceased such that her Will and the survivorship provision in their joint bank accounts should be set aside. The estate, which consisted almost entirely of the joint bank accounts at the defendant bank, was valued at $89,000. Three years before trial, J and H had been provided with the notes of the solicitor who prepared the deceased’s Will, as well as the deceased’s instructions to the solicitor. In the deceased’s view, ascertained from her instructions to the solicitor, she had not had contact with her children, J and H, and viewed them as money hungry. The deceased had not used her usual lawyer who had prepared earlier Wills. There were five days of trial, three days of discoveries of W and an injunction application. J and H were unsuccessful in their claim. W now claims costs on a solicitor-client basis.

Issue: Is W entitled to solicitor-client costs?

Order: Solicitor-client costs were awarded to W. The allegation of undue influence was an extremely serious allegation and is a species of fraud. The issues raised by J and H as causing them to have legitimate suspicions had almost nothing to do with the allegation of undue influence.


Facts: The defendant McLean challenged the validity of a Will made by the deceased. The Court held that there were suspicious circumstances surrounding the execution of the Will, but subsequently admitted the Will to probate following a determination that the testator did have testamentary capacity. McLean had also argued that the testator was acting under undue influence exerted by the plaintiff, Stewart, but abandoned that argument near the end of the trial.

Issue: What is the appropriate disposition as to costs?

Order: The plaintiff Stewart was entitled to solicitor-client costs from the estate. The defendant McLean was not entitled to recover any costs from the estate. He was ordered to reimburse the estate for 10 percent of the solicitor-client costs allocated for the undue influence issue. There were serious costs consequences from the unproven allegation of undue influence. The allegation should have been abandoned earlier. The trial was necessary as a result of the finding of suspicious circumstances and it was appropriate that the plaintiff receive her costs from the estate.


Facts: After the deceased’s husband died she transferred the joint bank account she held with her husband to her son, R, 10 years later, and while visiting R she revoked her Will and made the son, R, one of two beneficiaries, but disinherited her two daughters. The two
daughters made an application to declare the Will and the transfer of the bank account invalid by alleging undue influence. The daughters were not successful.

Issue: Is the son entitled to solicitor-client costs against the two daughters whose application was unsuccessful?

Order: There was a reasonable explanation for the timing and location of preparation of the new Will, and no evidence existed to prove that the son played any part in preparing the second Will except to the extent that he helped his mother find a lawyer and drove her to the lawyer’s office. The son was entitled to solicitor-client costs which are to include the costs of the lawyer who prepared the Will as she was an essential witness and she attended at the trial, even though she was not compellable because she resided out of the province of Alberta.

(p)  *Quaintance Estate (Re)*, [2004] A.J. No. 1588

Facts: A Notice of Motion was filed requesting an Order requiring formal proof of the testator’s Will and an Order setting for trial the issue of whether the testator lacked testamentary capacity or was unduly influenced when executing the Will.

Order: The Will should be accepted for probate and not made subject to trial. The testator’s daughter applied for a stay of portions of this Order pending appeal. The application for a stay was also denied.

With respect to costs, in an estate action of this kind, where there is a challenge which falls short even of the prima facie level, there should be some consideration given to a ‘disapproval’ form of costs. It is accepted that there was an emotional element for the daughter, in that there was disappointment in the way the Will was drafted by her father, and she was shocked by it and genuinely felt that it could only have been the result of ‘bad things’. However, where people make allegations akin to fraud and fall completely short of making out any basis at all, the Court has a responsibility to regulate such behaviour with costs, and voice its disapproval. Solicitor-client costs have to be awarded in the circumstances, with some reluctance.


Facts: AG died on October 13, 1999. At that time, he was 95 years old and a lifelong bachelor. AG’s brother, Ken, applied to the Court for a grant of probate of a Will dated October 15, 1996 (the “1996 Will”). The 1996 Will named Ken as the executor and made him the sole beneficiary. AG’s nephew, John, opposed the grant of probate and argued that the 1996 Will was obtained through the exercise of undue influence and that AG did not have testamentary capacity at the time the 1996 Will was executed. It should be noted that AG had executed previous Wills in 1985 and 1990, in both cases dividing his estate equally among his nieces and nephews.

Order: The Court was satisfied that AG had testamentary capacity and knew and approved of the contents of the 1996 Will. Further, the Court was not satisfied that the 1996 Will was the
product of undue influence. There was a failure to discharge the burden of proof. Therefore, the claim of undue influence was dismissed.

With respect to Costs, a pre-trial Order had been issued, providing that all parties are to have their costs out of the estate. Nevertheless, the Court was concerned about the extent to which the estate would be depleted by these costs. In particular, John is to have his costs in respect of his unsuccessful allegation of undue influence. There is case law that provides that since undue influence is a species of fraud, a party making such an allegation may be punished in costs if that allegation is unfounded. In light of the prior Order, this cannot be considered further.

However, the Court will review the lawyers’ accounts before approving payment of those accounts out of the estate. Therefore, counsel was directed to provide their final accounts within 30 days of the date of judgment, at which time the Court would provide direction with respect to payment of the accounts within 60 days of receipt thereof.

Note: See also *Stiles Estate v. Stiles* [2003] A.J. No. 603 and *Serdahely Estate (Re)*, [2005] A.J. No. 1620 as set out in this Appendix under the heading “Testamentary Capacity Costs”. These two cases also have components of undue influence/suspicious circumstances alleged by the unsuccessful party.
4. FAMILY RELIEF/DEPENDENT RELIEF COSTS

(a) McGowan Estate v. McGowan Estate, 2000 ABQB 681 (QL)

Facts: This case concerned a dispute over the disposition of assets pursuant to a Will. The deceased parties were Mary and Charles McGowan. The Toronto Dominion Trust Company was appointed to administer the assets of both of the estates. The parties to the dispute are Norman Hill and Elaine Megley, trustees of the Estate of Catherine McGowan, who is the daughter of the two deceased persons. Catherine suffers from some mental incapacity which requires the assistance of trustees. Charles and Mary had another child, Robert McGowan, who is the other major party in the dispute. Without detailing all of the transactions that occurred between 1993 and the death of both Charles and Mary, the Court held that Mary McGowan had been ambivalent about how she wanted to treat her daughter, which resulted in a series of dealings with the property that caused confusion which the Courts then had to untangle. The Toronto Dominion Bank and Robert McGowan applied for costs payable from the estate.

Issue: Whether the Toronto Dominion Bank’s and Mr. McGowan’s costs were to be borne by the estate.

Order: The law is clear that if litigation was required because of difficulties caused by the testator, then all parties are entitled to have their costs paid on a solicitor-client basis out of the Estate. Accordingly, the parties’ application for costs was allowed. However, Robert McGowan was not awarded the full amount of his costs. While his fees were in excess of $25,000.00, the Court set his solicitor-client fees at $25,000.00. The only reason for limiting the costs was to recognize that Catherine is disabled and the Court had to balance the costs award. TD was granted the full amount of their costs.

(b) Boje v. Boje Estate, 2005 ABCA 73

Facts: The respondents executors are appealing from a decision of a chambers judge, which had awarded KB, a daughter of the deceased, maintenance and support for life. The deceased, JB, was a farmer who was divorced and had five adult children. He left money to the church, land and property to two sons, but made no provision for his three other children. The balance of his $2,750,000 estate was transferred to a company and 96 percent of its shares were left to three friends with the intent that they maintain the operation of the farm. These three beneficiaries were also the executors of the estate.

The daughter was 35 when JB died. She suffered from various mental and physical ailments, some of which were contributed to by JB’s abuse of her. At trial, the executors conceded the daughter was entitled to maintenance and support. The judge awarded her $4,000 per month for life, claimed against the residue of the estate.

The judge awarded the daughter solicitor-and-own-client costs. The amount of the judgment was greater than the daughter’s settlement offer and the judge ordered double costs.
Order: Appeal allowed in part. In respect of costs in applications under the *Family Relief Act*, the Courts commonly order solicitor-client costs paid from the estate. In fact, it is conceded that the respondent is entitled to solicitor-client costs. However, the decision to award solicitor-and-own-client costs is disputed. Such costs provide full indemnity for all legal costs contracted for between solicitor-client which are necessary for the proper presentation of the case.

In this case, the chambers judge noted numerous factors which militate in favour of solicitor-and-own-client costs. The Appeal Court saw no basis to disturb the award of solicitor-and-own-client costs.

With respect to the doubling of costs, the award exceeded the pre-chambers offer of judgment. Rule 174 has been amended since the decision of the trial judge, by the addition of subsection (2.1), which provides a judge with the discretion to decline doubling of solicitor-client costs. There is no doubt that had it been in force at the time, the chambers judge would have exercised that discretion to decline the award of double solicitor-and-own-client costs. Even without resort to that amendment, although the doubling of costs may be applicable to solicitor-and-own-client costs, the intrinsic punitive nature of such costs, and the full indemnity they already provide, may constitute special reason to refuse doubling. The unique nature of such costs affords sufficient reason to decline the usual order to double. Appeal allowed on this point.

(c)  *Vinojurova v. Seneker, 2005 ABQB 590*

Facts: This was an application by V for an Order for maintenance and support from the Estate of LB. V claims that she was an adult interdependent partner of the late LB, now deceased. The respondent is Dan Seneker, the Deceased’s nephew, in his capacity as the Personal Representative of the Estate.

Issue: Is V entitled to maintenance and support? Who should bear the costs of this application?

Order: Weighty evidence was led which rebutted V’s assertion that she was living in an interdependent relationship with the deceased at the time of his death. Even if she were, she could not rely on the *DRA* for relief. The applicable legislation is the predecessor *Family Relief Act*, given that the deceased died prior to the *DRA* being amended to include adult interdependent partners as dependants. V is not a dependant under the *FRA*, and, as such, is not entitled to maintenance and support from the estate. Lastly, the facts do not support a claim for relief on the basis of a constructive trust.

As to costs, the respondent was the successful party, and “is entitled to his costs”. No further reasoning was provided.

**Facts:** This was an application by the spouse for support out of the testator’s estate. Despite a marriage of over 20 years, nothing was left to the spouse in the testator’s Will. Although two properties were transferred from the estate to the spouse through the course of litigation, she still claimed a need for support. Although the spouse was employed and thus capable of meeting her current needs, she was 69 years old and wanted to retire. An item in her proposed budget was $280 per month for car lease payments. Although the lease would expire in 2007, the applicant argued that she would then need to replace the car and arrange a new loan. While the respondent estate representative conceded that costs should come out of the estate, he urged the Court to order taxable costs only instead of costs on a solicitor-client scale.

**Issue:** What scale of costs should be paid and should the estate pay the costs?

**Order:** Application allowed. The spouse was not required to continue working well after the usual retirement age to reduce her claim for support against the estate. The spouse’s budget was to be reduced by $140 per month after the expiration of the car loan, to take into account increased maintenance costs only. The full amount of the loan would no longer be an appropriate budget item at that time because its inclusion would essentially have required the estate to purchase an asset for her. The *Dependants Relief Act* could not be used to facilitate the spouse accumulating an estate for the benefit of her beneficiaries at the expense of the testator’s designated beneficiaries. As the need for the litigation arose from the actions of the testator and the spouse was successful, she was to have her costs on a solicitor-client basis payable out of the estate. The applicant had established a need for support in the context of the application. If she were not granted costs on a solicitor-client basis and were left with a debt to her solicitor this would simply have increased her need for support and her claim for that support from the estate.
5. **APPEAL COSTS**

(a) *Re Lotzkar (No. 2) (1965), 50 D.L.R. (2d) 357 (B.C.C.A.)*

**Facts:** This was an application for the interpretation of a Will. The judgment was appealed by the widow of the deceased who also opposed the appeal of the residuary beneficiaries. The disposition of costs was the main issue in this judgment.

**Issue:** Who should bear the costs?

**Order:** The costs of the executor, the widow and the residuary beneficiaries were ordered paid out of the estate. Both at trial and on appeal, costs follow the event unless the Court “shall, for good cause, otherwise order”. In a proceeding to construe a Will, good cause to order costs out of the estate on a solicitor-client basis exists where the parties are led into the litigation by the conduct of the testator, i.e. the state in which he left his papers, so that the executor cannot rely simply on his solicitor’s advice but must come into Court for construction or other advice to enable him to administer the estate. Further, this rule may be followed if a beneficiary makes such an application, and it is adopted by the executor. However, “good cause” will exclude instances where the executor should proceed on the advice of his solicitor rather than incur the costs of an application, and will also exclude those cases where the application is in form for the construction of a Will but in substance is to determine a right asserted by one of the parties without reasonable grounds. While there may be other instances when such costs may be allowed out of the estate, it is apparent that such an order does not follow as a matter of course, and the general rule is that the costs are to follow the event. This is also true with respect to appeals, except that costs may be allowed out of the estate in the matter of the construction of a Will where it is proper that a second opinion be taken. However, where persons who participate in an appeal by merely supporting a position taken by another party, when there appears no reason why they could not have been represented by the same counsel, should bear their own costs.


**Facts:** This was an application by the executors to propound a Will of the deceased by proof in solemn form. The trial judge found that there were many suspicious circumstances relating to the preparation of the Will which raised well grounded concerns that the Will did not express the intention of the testator. The trial judge did not believe that the evidence adduced removed the suspicions and, therefore, the Will failed and was not admitted to probate.

**Order:** At trial, the judge ordered that costs of all parties, including the executors who were granted their costs on a solicitor-client basis, be paid out of the estate of the testator.

**Appeal:** The executors appealed the case to the Ontario Court of Appeal. The appeal was dismissed as the Appellate Court agreed with the trial judge that in view of the suspicious circumstances the Will should be set aside. On the question of costs, Arnup
J.A. focused upon the duties incumbent upon the executors and ordered costs against the appellant executors personally, denying them access to the estate assets for the payment of costs. Arnup J.A. stated:

The Trial Judge allowed the costs of all parties out of the estate of the testator. This was, I think, a perfectly proper order, because the executors had a duty to bring forward what purported to be the last Will of the testator. I do not think their duty extended to appealing from the adverse finding against the Will, particularly when one of the appellants was a son of the principal beneficiary, and had himself been a participant in the circumstances leading up to the execution of the Will in respect of which probate had been refused.

(c) *Re Beck (1976), 70 D.L.R. (3d) 760 (Man. C.A.)*

Facts: The insured had named his wife as beneficiary under two separate policies. One policy was a policy of life insurance while the other policy was a contract providing for annuity payments to the insured or to his beneficiary.

Issue: Whether the words in the insured’s Will “In case of my death I want all my money totalled and divided evenly between my brothers and sisters, except half of my insurance and all the bonds go to my wife Mary” were a declaration revoking the prior designation of beneficiary in the two group policies on the insured’s life.

Order: The appeal was dismissed. The Court of Appeal agreed with the trial judge’s finding that the annuity policy could not be considered as a policy of life insurance and that the insured was entitled to change his beneficiary from his wife to his brothers and sisters. However, as far as the life insurance policy was concerned, the declaration in the Will revoking the prior designation of beneficiary was not effective.

With respect to costs, the Court noted that the trial judge awarded costs to counsel for the executors on a solicitor-client basis, payable out of the estate. In the Appeal Court’s view, that was a permissible and proper disposition, since the executors were justified in seeking a ruling of the Trial Court. However, the question was whether they were also justified in bringing an appeal. The answer was yes, if they were prepared to risk payment of the costs of an unsuccessful appeal. The answer was no if they proceeded on the assumption that the costs of an unsuccessful appeal would automatically come out of the estate. In the Court’s view, an appeal here was not warranted. Accordingly, party-party costs were ordered payable out of the estate to the widow and counsel for the Insurer.

Note: It appears that if a party appeals a decision of the lower Court and they lose the appeal, the costs follow the event. The party appealing the original decision in essence takes the further proceedings with the risk of having to pay the costs of the appeal.
(d) *Atchison v. Inkster et al. (1983), 47 B.C.L.R. 222 (B.C.C.A.)*

Facts: Atchison was not successful on appeal relating to a probate matter. He now brings this application seeking an Order for costs on a solicitor-client basis to be paid from the deceased’s estate. Atchison originally commenced an action to force an executor to prove a Will in solemn form. The executor, who is a solicitor practising in the city of Winnipeg, refused to propound the Will in solemn form. Atchison’s proceedings were not frivolous or without merit. In fact, the trial judge held against the validity of the Will, so Atchison won at first instance. When the executor appealed that decision, the Court allowed the appeal and made an Order pronouncing for the validity of the deceased’s Will.

Issue: Whether the plaintiff should have her costs from the deceased’s estate, despite losing the appeal.

Order: The application was allowed. It was ordered that the plaintiff have costs of the trial and the appeal on a solicitor-client basis payable from the estate. The Court stated that costs should not be paid from the funds of an estate to unsuccessful parties without good reason. In the Court’s view, the plaintiff’s efforts to uphold the decision of the trial judge constituted good reason.


Facts: These were supplementary reasons on an appeal from a decision whereby a Will was admitted to probate, except for the residuary clause. The appellants (the executors), sought as residuary beneficiaries, to have the clause admitted and so brought the appeal which was ultimately successful.

Issue: How the costs of this appeal were to be awarded?

Order: The Court ordered costs on a solicitor-client basis, payable out of the estate, to the appellants and to the respondents. Without elaboration, the Court applied the rule from *Atchison v. Inkster*, which states that costs should be awarded to an unsuccessful appellant where there is a good reason for doing so. The respondent’s had sought costs from the appellant’s/executors arguing that the appellant’s had breached their duty as executors by bringing an appeal. The Court noted that while the executors had a duty to propound the Will in its solemn form, this duty did not extend to taking an appeal for their personal benefit as residuary beneficiaries. Accordingly, it would not be proper to award costs against the appellants.

Note: It appears that if a party makes an appeal and the appeal is successful, the Court will look to see how the Court in the original proceeding ordered costs. If the original Court ordered the costs to be paid out of the estate for all parties, it appears as though the higher Court will also grant all of the parties costs to be paid out of the estate, based on the reasoning that the issue was one that was properly before the Courts and the original judicial decision needed to be varied.

Facts: The Court upheld the finding of the trial judge that the Will was valid and that the unsuccessful party challenging the Will should pay the costs of the party defending the integrity of the Will. The Court also held the solicitor for the challenging party personally responsible for costs.

Appeal: The Court of Appeal upheld the reasoning as to the costs liability of the challenging party and his solicitor on the following basis:

1. One aspect of the challenge to the Will was an allegation of fraud and that allegation was not supported by any evidence whatsoever.

2. Costs were ordered to be paid personally by the plaintiff’s solicitor, in part because the solicitor had drafted the affidavit which contained the unfounded allegation of fraud, which allegation, the Court concluded, the solicitor knew was unfounded.

3. The solicitor and the party challenging the Will were responsible for unjustified litigation and, therefore, it was appropriate to make both of them responsible for costs.

The Court fixed the costs on a solicitor-client basis and directed that an account representing approximately 80 percent of the costs be paid by the plaintiff’s solicitor and the other 20 percent by the plaintiff himself.


Facts: The issue of costs arose as a result of two interlocutory appeals which had to do with the dispute over the validity of the Will of the deceased. The trial judge found that the executors, who were also the sole beneficiaries named in the Will, the Rufenacks, held the estate in secret trust for a number of unspecified charities. A number of charities who had not involved themselves in the trial, now wish to be added as parties to the Appeal, but were denied party status at the Q.B. level. The group of charities appealed from this denial of status. A second appeal was brought by another group of charities, also claiming to be beneficiaries of the trust, from the denial of their application to remove the Rufenacks as executors on the basis of conflict of interest. Both appeals were allowed and the charities sought costs on a solicitor-client basis at both the Q.B. level and at the Court of Appeal level. The Rufenacks sought their costs payable from the estate.

Issue: What is the appropriate disposition as to costs?

Order: The successful charities were awarded costs as requested. The Rufenacks were unsuccessful and so were not entitled to any costs. The costs of the charities were payable by the estate, and taxed, on a solicitor-client basis.
Note: This case is the writer’s, and as such, the writer can advise that this case is interesting for several reasons. Firstly, the Rufenacks were removed as executors because they appealed the Trial Decision that they were not beneficiaries of the estate, rather they held the estate in a secret trust for charity. Secondly, because they put themselves in this position of conflict they were not allowed their costs to defend their removal as co-executors. It is very odd for an executor not to receive their costs when acting in such capacity. But, in this case the co-executors could not be litigants and “neutral” executors at the same time.


Facts: Appeal by DB from a finding that his deceased father’s estate owned the trophy for the world’s record ‘non-typical mule deer’. DB also appealed from a contempt finding against him and the sentence imposed, a fine of over $50,000.00. The father, Ed, died in 1968. Ed’s seven children did not apply for letters of administration, opting to appoint George and DB to informally coordinate the division of the deceased’s estate. The trophy was left on display in the family home and no decision was made about its ownership. DB took the trophy to his home in 1973, and claimed ownership of it in a newspaper article in 1997. The other siblings brought a civil action to have the trophy returned to the family home in 1997. Two other family members were appointed personal representatives of the estate. The judge ruled that the siblings had assumed that DB held the trophy in joint possession with them until 1997, when they saw the article. DB was found liable in conversion and detinue for refusing to return the trophy. The judge ordered that the trophy be returned to the personal representatives for sale and distribution of proceeds, and allowed DB’s counterclaim for expenses of $21,995. Following judgment, DB did not return the trophy. He was ordered to deliver the trophy to the offices of a law firm but delivered a fake trophy. When DB appeared in Court at a show cause hearing, he did not disclose that the trophy had been sold. He was found in contempt. DB later admitted the trophy had been sold and paid the funds he received for it to purge his contempt. A fine was imposed rather than a costs order.

Issue: What is the appropriate disposition as to costs?

Order: Appeal from the decision regarding ownership of the trophy is dismissed. DB’s appeals from the contempt finding and sentence are allowed. Because DB did not have the trophy, it was impossible for him to comply with the Court Order. Therefore, the contempt finding and penalty could not be upheld on appeal. DB’s conduct warranted the imposition of a costs award against him in the amount of $28,500, representing the costs of the appeal and the fees incurred in the contempt action. Although he succeeded in having his contempt conviction and sentence overturned, his deceptive conduct was the cause of the appeal.
6. **DEPENDENT ADULT/POWER OF ATTORNEY COSTS**

(a) *Nemeth (Re) (1989) 99 A.R. 351 (Q.B.)*

Facts: This was an application for the appointment of the guardian and trustee of a 88-year-old woman, Mrs. Nemeth. Mrs. Nemeth lived in a senior citizens’ home awaiting transfer to a nursing home facility. She suffered from advanced stages of senility. Her son and daughter-in-law sought to become her joint trustees and guardians. The bank had refused to allow them to deal with her bank account without such an Order. By the time the application had been heard the woman had died.

Issues: 1. Whether a trustee or guardian was required; and
2. If so, whether the Crown was to pay costs of the applications.

Order: The Court found that since Mrs. Nemeth was medically assessed as having behavioural patterns which warranted a less independent form of extended care, and she refused to leave the senior’s home at which she resided. Therefore, an application for a Guardianship Order was justified in this case. As to the appointment of a trustee, the evidence showed that the Royal Bank refused to allow Mrs. Nemeth’s family members to deal with her bank account, in the absence of a Court Order. As such, the trusteeship application was justified, notwithstanding her minimal estate. As to the second issue, the Court stated that to be successful in having the Crown pay the costs of the application, the applicant had to demonstrate that:

- The dependent adult’s entire estate, liquid and non-liquid, is under $5,000.00; and
- Independent evidence that a guardian or trustee is necessary, in addition to the medical or psychological report. Independent evidence, meaning evidence from the dependent adult’s banker, broker, etc., that such institution will not allow access to the dependent adult’s assets without such Order, or in the case of guardianship, evidence from the dependent adult’s doctor or nursing home, etc., that care will not continue until a guardian is appointed.

Given that these two requirements were met, the Court ordered that the Crown pay costs of $750.00 plus reasonable disbursements. The Court considered its discretion to award the costs against the applicants. On this point, it was noted that the applicants had minimal income and a family to support. Accordingly, the Court felt that it would have been a hardship for them to have to bear the costs. However, the Court also observed that it would be very unlikely for the Court to make the trustee applicant pay the costs, even if it was not a hardship for the applicant. In the Court’s view, a trustee, once appointed, has many onerous responsibilities in looking after the dependent adult’s estate. To require that person to be responsible for the costs in having him appointed seems unreasonable, unless it can be shown that the application was unnecessary, in which case the Court has the discretion to award costs against the applicant under section 48(b) of the *Dependent Adults Act*. 
(b)  *Addley (Guardian of) (Re) (1991), 126 A.R. 63 (Q.B.)*

Facts: This was an application for an Order directing the Crown to pay the costs of an application for a Guardianship and Trusteeship Order in respect of a dependent adult. The dependent adult was a 23-year-old man who had suffered from cerebral palsy from birth. The applicants, who were his parents, had agreed to become his joint guardians and trustees. The dependant adult’s only income was from a government program. The applicants supplemented that income to improve his quality of life. The Public Guardian resisted the payment of the costs of the application on the ground that it was contrary to a policy it had adopted and argued that the applicants should contribute to the costs. There was evidence that the adult had no more than $3,000 in his estate.

Issues: 1. What costs should the government pay on a trusteeship and guardianship application where the dependent adult is impecunious?
2. Should the government pay costs where the applicants could afford to indemnify their lawyer? and
3. If the government pays, should it pay according to the tariff or on a solicitor-client basis?

Order: The application was allowed. The Crown was directed to pay $500 in costs on the application. Forcing the dependant adult to bear the costs of the application would constitute a hardship. While the applicants may have been able to bear the costs in this case, it was still appropriate for the Crown to bear the costs. The Court cited three reasons for this position. Firstly, the need for a Guardianship and Trusteeship Order arose from a serious medical condition. Accordingly, the Order was as much a medical necessity as a legal one. Secondly, the Court noted the applicant’s active contribution to the dependant adult’s ongoing welfare. This degree of involvement and support should surely be encouraged as being not only in the interests of the dependent adult himself but in the interests of a civilized society. One practical way of showing that support was to pay the Court costs of those individuals who remain actively involved in the care of dependent adults with whom they have a familial, social, moral or legal link. Thirdly, sub-section 67(c) *Dependent Adults Act* supports the position that applicants are not normally responsible for costs, save for situations where the application was frivolous. As to the third issue, the Court awarded costs on a solicitor-client basis. The Court reasoned that party-party costs were not appropriate, since the proceedings were neither adversarial nor elective.

(c)  *Hodgins (Re), (1999) A.J. No. 669 (Q.B.)*

Facts: This was an application by the trustee and guardian, Walker, for an Order terminating her trusteeship of the estate of the dependent adult, Hodgins. Hodgins was 41 years old, and had Down’s Syndrome, and she lived in an adult residence. Walker, Hodgins’ sister, was appointed as trustee of Hodgins’ estate in 1992. The accounts were last passed in 1996, when Hodgins had savings of over $8,000, which had been put into an account by Walker. Hodgins received $810 a month in disability payments. Her room and board was
$425 a month, $200 of which was spent on vacations and miscellaneous items and $100 was for personal expenses. Walker sought to be discharged from the responsibility of having to pass the accounts, although she would continue to oversee her sister’s care. The Public Trustee expressed reservations about leaving the bank account funds unadministered.

Issue: Whether Walker could be relieved of her position as trustee of Hodgins’ estate.

Order: Application allowed. Hodgins’ funds had accumulated due to Walker’s efforts who ensured that Hodgins was reasonably frugal with her income. Hodgins’ income was only slightly higher than her expenses, and there was no real opportunity for her to increase her estate in the future. As such, Walker was not to be penalized by having to continue in a trusteeship role which required regular accounting to the Court.

Costs in the sum of $375.00, plus all reasonable disbursements were ordered against the Crown, and the remaining legal fees were ordered to be paid out of Hodgins’ estate. The Public Guardian’s Office had opposed the request for payment of costs on the basis that the Hodgins’ liquid assets, namely the amounts in her bank accounts of approximately $8,287.00, exceeded the hardship guidelines of $7,000.00 as set by the Public Guardian’s Office. Despite Hodgins’ bank account balance being in excess of the hardship guidelines, the Court felt that it was appropriate for a portion of the applicant’s costs to be borne by the Crown. Citing Veit, J. in Re: Addley, [1991] A.J. 1002, the Court stated that notwithstanding that the guidelines were surpassed, it was still appropriate to require the Public Guardian’s Office to provide payment for the costs of the application on the basis that the guardians were continuing to actively contribute to the on-going welfare of the dependent adult, and allowing them to receive the benefit of such costs encouraged their continued active participation in the dependent adult’s life.


Facts: The petitioners sought costs of their failed application to have their mother, Lillian Grace Bush, declared incapable of managing herself and her affairs, and to have themselves appointed committees of her person and estate. The petitioners sought the orders as their mother was suffering from paranoid schizophrenia. A Court-ordered examination by an independent psychiatrist confirmed the diagnosis of schizophrenia but concluded that the mother was capable of managing her own affairs. It was the consensus of all parties that the petition should be dismissed, but the matter of costs remained in issue.

Issue: Who should bear the costs of the application?

Order: The Court exercised its discretion and ordered special costs to the petitioners, to be paid out by Lillian Grace Bush. The general rule with respect to costs provides that costs shall follow the event unless the Court otherwise orders. However, it is also clear that an Order for costs at variance with the normal rule may be appropriately made where adherence to the rule would work an injustice. Further, there is no absolute right to costs and the Court enjoys an absolute and unfettered discretion to award or withhold costs. However, this discretion is a judicial one and must be exercised according to the
circumstances and particulars of each case. In this case, the Court felt that the test was whether the petitioners had been forced into taking the actions they did in bringing the petition before the Court due to the actions of their mother. The Court found that there had been valid concerns on the part of the petitioners during the time when they brought their application. The petitioners had acted out of a sense of duty and obligation, and their petition was commenced not to advance their own interests, but rather to protect the interests of the mother. Accordingly, it was appropriate for the dependant adult’s estate to bear the cost of settling this dispute on a solicitor-client basis.

The Court made an analogy between costs awarded in dependant adult matters and those awarded in interpretation of a Will. The Court stated that in cases where the applicant is attempting to protect the dependant adult’s interests without any personal gain flowing to the applicant, then the costs should be paid by the dependant adult’s estate. The idea being that the dependant adult will be viewed as having caused the litigation by his or her conduct.


Facts: These were applications by David and Paul Greenhalgh for an Order that they each be appointed committee of their mother. The mother suffered from Alzheimer’s disease. She and her late husband had made Wills, wherein they named each other primary beneficiary and named Paul, to the exclusion of the other children, as alternate beneficiary in the event the spouse predeceased the testator. The mother also executed an enduring power of attorney in favour of Paul. When the father was diagnosed with lung cancer, he requested that Paul and his wife, Colleen, move in with them. This was to enable Paul to care for them. The father and mother sold their home and purchased another larger home. The title to the new home was registered in the names of the father, the mother, Paul and Colleen. A portion of the sale proceeds from the first home was used by Paul and Colleen for their benefit. David claimed that this transaction was suspicious and that Paul and misused his mother’s funds, and that he was the best person to be appointed committee.

Issue: Whether Paul’s application as committee of his mother should be allowed.

Order: Paul’s application was allowed. He was appointed Joyce’s committee. Paul had a close relationship with his parents. They trusted him with the management of their affairs, as evidenced by the power of attorney, the Wills and the joint ownership of the residence. It did not matter that Paul and Colleen benefited from the sale of the home. The reality was that Paul and Colleen would ultimately benefit from the parents’ funds. Paul’s appointment as committee was consistent with his parents’ intentions.

The Court ruled that both Paul and David Greenhalgh were to have the costs of their applications paid as special costs from the estate. The costs were to be as agreed between Paul and David Greenhalgh and the Public Trustee or as assessed by a registrar of the Court.
(f) **Mottishaw (Re) (1998), 23 E.T.R. (2d) 62 (Alta.Q.B.)**

Facts: Sloan made an application to be appointed guardian and trustee to her aunt, Mottishaw. Mottishaw’s niece (by marriage), Simmonds, had previously acted as attorney of Mottishaw’s estate under a power of attorney. Sloan wanted to move Mottishaw from a lodge in British Columbia to live with her in Edmonton. While Mottishaw was visiting Sloan in Edmonton, she signed a revocation of the power of attorney previously given to Simmonds, and appointed Sloan in her place. Mottishaw also signed a holograph Will, changing her executor from Simmonds to Sloan. When Mottishaw returned to British Columbia, Sloan attempted to make arrangements to have Mottishaw moved. Simmonds objected. Sloan was successful in having Mottishaw moved to Alberta, and she obtained a Guardianship Order in May 1997. Various physicians testified that Mottishaw suffered from dementia, but retained her ability to express her wishes as to her living arrangements. Mottishaw had stated that she was happy with her living arrangements in Edmonton.

Issues: 1. Who should be appointed as guardian of Mottishaw?; and
2. Who should be appointed as trustee of Mottishaw’s estate?

Order: Application allowed. Guardianship was to remain with Sloan. Sloan provided a loving home for Mottishaw, and had given Mottishaw a high level of personal care and attention. The expert evidence indicated that Mottishaw had suffered from dementia, which had seriously affected her cognitive abilities for some time. As a result, the power of attorney granted to Simmonds was void, as Mottishaw lacked the capacity to grant it or to execute its revocation. As to the second issue, the Court noted that since Simmonds was a resident of British Columbia, she could not be appointed as trustee in Alberta. The Court also found that Sloan had shown poor judgment in handling Mottishaw’s money. Accordingly, and in addition to the animosity between the two women, the Court held that it was appropriate for the public trustee to be appointed.

Solicitor-client costs were awarded to each of Ms. Sloan and Ms. Simmonds from Mottishaw’s estate. The Court noted that if full solicitor-client costs are not awarded to Ms. Simmonds she will be personally responsible to the solicitor employed by her and, similarly, if full solicitor-client costs are not paid out of the estate to counsel for Ms. Sloan, they will remain her personal liability. The Court’s award of solicitor-client costs to both parties remained subject to the Court’s ruling that their costs were reasonable and subject to the Court’s reviewing them from the point of view of deciding whether some portion of those costs should be borne personally by either or both of the litigants.


Facts: This was an application by Richard for an Order appointing the Registrar of the Supreme Court of Newfoundland as guardian of Hammond, who was 92 years old. Richard was Hammond’s nephew, and Hammond did not have a spouse or any children. Richard’s brother, Benedict, opposed the application alleging suspicious circumstances. Benedict claimed that Hammond appointed him as donee and directed him to manage his estate.
Issues: 1. Whether there was a valid and subsisting power of attorney within the meaning of the *Enduring Powers of Attorney Act*, and

2. If the answer was yes, whether Benedict’s behaviour has not been in Hammond’s best interest and thus warrants the termination of his enduring power of attorney.

Order: The application was dismissed. The Court found that Benedict was duly appointed by Hammond, whilst he still had capacity. With respect to the second issue, there must be strong and compelling evidence of misconduct or neglect on the part of Benedict before a Court should ignore the clear wishes of Hammond and terminate the power of attorney. There was a lack of such evidence in this case.

Costs were awarded against Richard. In the petition dated December 16, 1998, which initiated this hearing, Richard alleged that Benedict held an enduring power of attorney on behalf of Hammond and further made allegations concerning the performance of Benedict in the discharge of his duties under such enduring power of attorney. In the Court’s view, such allegations justified Benedict to oppose Richard’s petition. For these reasons, Benedict was entitled to recover his costs, which were to be taxed, as against Richard.


Facts: This was an application by Davies to compel Byer to pass his accounts under an Enduring Power of Attorney over the affairs of her husband, Davies. The Enduring Power of Attorney also authorized Ms. Byer to use Mr. Davies’ property to benefit his spouse and dependent children. Davies suffered from Alzheimer’s disease and resided in a permanent care facility. The Power of Attorney was granted in 1994 with no work being required until 1996. The accounts were prepared by an accounting firm, and included reimbursement for one-half the costs of the installation of five blinds in Davies’ home which was paid for by Byer. The application was opposed by Myra and Campbell Davies, who cross-applied for reimbursement of amounts paid for Davies’ share of house repairs and maintenance, notwithstanding that the house would eventually fall to them under Davies’ Will.

Issues: 1. Whether to allow the application for the passing of accounts;

2. Whether to compensate Byer for the costs of the blinds; and

3. Whether to allow Myra and Campbell’s cross-application.

Order: The application was allowed and the cross-application was dismissed. The accounts as prepared by the accounting firm of KPMG were acceptable to the Court. Ms. Byer was also granted compensation for the blinds. Mr. Davies and Ms. Byer had entered into a pre-nuptial matrimonial property agreement which contemplated Mr. Davies’ predeceasing Ms. Byer. Pursuant to that agreement, all household expenses in connection with maintaining the home were to be borne in equal shares by Ms. Byer and Mr. Davies. The Court found this clause to be applicable in this case, despite the fact that
Mr. Davies had not yet predeceased Ms. Byer. Accordingly, the cross-application for repayment by Ms. Byer of the funds paid to her by Mr. Davies for his share of renovation expenses, house repairs and maintenance, had no foundation in law under the Enduring Power of Attorney which authorized those expenditures, and, moreover, the applicants were going to receive the benefit of these expenditures in due course.

Since Ms. Byer has succeeded in her application, the costs of this application were to be borne by the cross-applicants Myra and Campbell Davies and included all properly taxable costs and disbursements.


Facts: The siblings of a dependant adult had brought an application to remove the children of the dependent as guardians and appoint themselves. On the basis of expert medical evidence by a doctor, the siblings’ action was dismissed. In 2002, prior to trial, the Court made a pre-trial Order that the successful parties’ solicitor-client costs of the litigation were to be borne by the estate, unless one of the parties acted in a manner which was frivolous or vexatious. By May 2003, the siblings were aware that the doctor’s expert opinion was that the dependant should remain in the guardianship of the children, and the dependent should remain where he was residing. However, the dependant requested that his siblings continue the litigation, because he said that he did not want to remain where he was, but wanted to return to live in his home.

Issue: What is the appropriate disposition as to costs?

Order: There was no evidence to support a claim that the siblings’ action was vexatious, in that it did not constitute a misuse of the Court for improper purposes. However, once the doctor’s opinion was received in May 2003, the siblings should have been aware that their action had little or no reasonable chance of success, and was in fact untenable. Thus, to continue the claim as they had was frivolous and costs would be payable by them on a solicitor-client basis from that date. All other costs were to be borne by the dependant adult’s estate.

(b) **Silver v. Silver, Dependant Adult [2005] Q.B. No. 286**

Facts: The dependant adult’s daughter made an application for trustee and guardianship of her mother. The dependant adult’s son opposed the application. After several Special Chambers Court applications, numerous capacity assessments and extensive affidavits and legal briefs, the Court appointed the daughter as guardian and trustee of her mother.

Issue: Who should pay for the costs? The costs totaled approximately $90,000.00 and were incurred by the dependant adult who had legal counsel and the various family members either advancing or opposing the litigation.

Order: The Court ordered that all of the dependant adult’s solicitor-client costs (approximately $20,000.00) would be paid by her estate. The unsuccessful son had to bear all of his own costs. The costs of the successful daughter were to be paid on a solicitor-client basis as
follows: partially by the dependant adult’s estate in the amount of $3,000.00 plus disbursements relating to the dependant adult application, as this was a legitimate expense of the dependant adult. The cost of the medical assessment was also to be paid by the dependant adult’s estate. The balance, approximately $45,000.00, was to be paid personally by the unsuccessful son to his mother’s estate. The son was given 3½ months to pay the costs, failing which the costs would offset against any beneficial interest the son might have to his mother’s estate at the time her estate is administered.

(c) Dependant Adults Act, R.S.A. 2000, c. D-11

Note: Section 67 of this Act sets out provisions dealing directly with costs.

Note: The cases appear to encourage people to get involved in looking after the welfare of dependant adults. Therefore, when a proper issue is brought before the Court, the parties will likely be indemnified from the dependant adult’s estate. However, if the litigation was unnecessary, the Courts will award the costs against the unsuccessful party, most likely on a party-party basis.

The case of Nemeth (Re), supra is even further evidence that the Courts prefer to have individuals take part in a dependant adult’s welfare, and the Court in this case ordered the Crown to pay part of the challenger’s costs because the dependant adult’s estate was not able to pay the costs, rather than place the burden on the party making the worthwhile application.