

**“Ontario Court Rules on Paying Legal Fees from Estate Funds”  
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Two recent Ontario decisions addressed the propriety of legal fees being paid from estate funds, prior to the passing of accounts or agreement of beneficiaries to same. In both cases, the Ontario Superior Court of Justice held that estate funds should not be so applied. In one case, the estate trustee was ordered to repay the amount plus interest to the estate pending the passing of accounts.

In *DeLorenzo v. Beresh* 2010 ONSC 5655, the applicants were the residual beneficiaries of an estate which had been in administration for over a decade. The Will of the deceased provided for testamentary trusts with the balance of the capital to be paid upon a beneficiary attaining age 30. The estate trustee brought application to pass accounts for the 1999-2004 period and the residual beneficiaries brought application to remove the estate trustee and related relief, including in the case of one residual beneficiary who had attained age 30, a request for transfer to her of the capital of her trust. During the course of these multiple proceedings, the estate trustee applied estate funds to pay legal fees incurred by him.

The Court noted that a solicitor retained by an estate trustee is at first instance, the solicitor for the estate trustee as opposed to the estate. Therefore, the estate trustee is personally liable to the solicitor for his/her fees.

Generally, an estate trustee receives full indemnity of his/her “proper costs” in administering the estate, but such costs are awarded at the time of the audit or passing of accounts.

In contrast, the Court noted that in contentious or adversarial legal proceedings, the general rule is that the successful party is awarded its costs, to be paid by the unsuccessful party. Where there is litigation between the estate trustee and beneficiaries related to the question of whether the estate trustee has properly discharged his duties, including timely passing of accounts, the Court held that the outcome of the litigation could well determine whether the estate trustee would be entitled to charge the estate with the legal fees which he had incurred.

Accordingly, in the interim, the Court stated that it was preferable that each party bear its own costs until the completion of the litigation. The Court found it inequitable that the estate trustee should pay his legal fees from the estate funds and ordered same repaid with interest. Further no additional legal accounts were to be paid from the estate funds absent consent of the beneficiaries or order of the Court.

*Craven v. Osidacz* 2010 ONSC 6637 involved an estranged spouse who brought an application for removal of the estate trustee, the brother of the deceased. The deceased had stabbed his young son to death during an access visit, forcibly entered the home of his estranged spouse and threatened her before being shot to death by police officers.

The estranged spouse successfully brought an action for wrongful death against the estate although the quantum of damages was to be determined at a trial of an issue, together with her claim for dependant's relief under the Succession Law Reform Act. The Will of the deceased did not provide for either his estranged spouse or his deceased child. Rather, the residual beneficiaries under the Will were the brother of the deceased also being the estate trustee, and his mother.

The applicant expressed the view that given the finding of liability from the wrongful death and assault claims, she would ultimately be entitled to the entire estate and that the respondent was improperly expending estate funds on legal fees resisting these claims without court approval.

The Court also noted that an executor has a duty to defend claims against the estate but suggested that when the executor and family were the sole residual beneficiaries, this duty may be seen in a different light.

The Court also noted that counsel retained by the executor was at first instance, counsel for such executor. Where the executor has a personal interest in the outcome of the litigation, the Court referred to the oft-cited words from *Bilek v. Salter Estate* 2009 CanLII 28403 and held that it would be "inequitable to use the assets of an estate as a kind of ATM machine from which withdrawals automatically flow to fund the litigation ..."

With respect to fees already paid from estate funds, the Court stated that whether they were reasonably expended should be determined upon the passing of accounts. The Court did not order the estate trustee to repay such legal fees immediately as requested by the applicant, but adjourned same to the passing of accounts.

As in *DeLorenzo v. Beresh*, the Court ordered that the estate trustee was restrained from using estate funds to pay any further legal accounts without consent of beneficiaries or approval of the Court.

*DeLorenzo* and *Craven* serve as reminders that counsel are retained by the estate trustee and not the estate. Pending the passing of accounts, or in litigious circumstances, the resolution of legal proceedings, the resultant legal fees are the liability of the estate trustee and not the estate.

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