Some Further Thoughts on Costs in Estate Litigation

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In the October 2009 edition of *Deadbeat*, Elizabeth Seo provided a helpful survey of recent costs decisions in estates litigation. A decision released by Justice Pitt in late October 2009 throws additional light on the issue of costs. The decision in *Estate of Elizabeth Gyetvan*1 is consistent with the message in *McDougald Estate v. Gooderham*2 and *Salter v. Salter*3 that costs will not be routinely ordered out of the Estate and thatparties "cannot treat the assets of the estate as a kind of ATM bank machine…".

In *Gyetvan*, Justice Pitt awarded full indemnity costs against the unsuccessful respondent, to be paidfrom his interest in the proceeds of sales of real estate devised to him under the will. Elizabeth Gyetvan had left three parcels of real estate to her two sons who were the co-executors and sole beneficiaries of her estate. The properties had still not been transferred to the sons more than four years after Elizabeth's death because of bitterness between them. One brother applied for a declaration that the properties had vested by virtue of s. 9 of the *Estates Administration Act*, for an order requiring the Land Registry office to register the brothers' ownership, and for an order for the sale of all three properties under the *Partition Act*. The conduct of the respondent brother during the litigation lent credence to the applicant's affidavit evidence of the respondent's failure or refusal to cooperate since the death of their mother. Justice Archibald on the first attendance ordered the vesting declaration and registration of the real estate in the names of the brothers, on consent. He adjourned the balance of the application, urging the respondent to retain counsel, and recorded in his endorsement that the respondent was going to retain counsel. The respondent brother did not approve the draft order, or retain counsel. On the second attendance, the court ordered a settlement conference. This was held a month later, but no settlement resulted. The respondent brother did not attend court on the ensuing motion to fix a peremptory return date for the application. When the application came on for hearing before Justice Pitt, his Honour noted in his endorsement that the respondent had filed no evidence and "had seen fit not to retain counsel". He also noted that applicant brother had done "everything within his power" to have the real estate sold and the proceeds divided. He granted the application and gave the applicant brother carriage of the sales, stipulating that the signature of the respondent brother was not required in respect of the listing of the properties or the acceptance of offers. He also ordered the proceeds of the three sales to be paid to the applicant brother's solicitors in trust. As to costs, Justice Pitt ordered "costs of and incidental to the application on a full indemnity basis" in an amount to be approved by the Court on notice to the respondent, to be charged against the interest of the respondent brother in the sale proceeds. In addition, His Honour removed the respondent brother as an estate trustee. It was clear that the respondent brother's conduct (outlined above) factored heavily in the making of the costs award. The message in the *McDougald Estate* and *Salter* cases echoes throughout Justice Pitt's decision in Gyetvan. _____ 1 Unreported decision of Justice Pitt of the Ontario Superior Court. 2 *McDougald Estate v. Gooderham* (2005), 17 E.T.R. (3d) 36, 2005 CarswellOnt 2407, 999 O.A.C. 203, 255 D.L.R. (4th) 139 (Ont.S.C.J.).

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