SECURITY FOR COSTS MOTIONS

Introduction

Motions for security for costs provide a means for a defendant to ensure, before litigation proceeds too far, that there is a fund of money in place to pay the defendant's costs, should the defendant be entitled to costs. By forcing the plaintiff to pay money into court, a security for costs motion acts as a deterrent to frivolous litigation and reminds the plaintiff that a lawsuit is not to be taken lightly.

Rule 56

Rules 56 and 61.06 govern motions for security for costs. Rule 56 sets out the authority and rules governing motions for security for costs in an action or application. Rule 61.06 provides for the issuance of orders for security for costs in an appeal context, but will not be considered in this paper.

Availability

The test for obtaining security for costs can be divided into two parts:

1. **The defendant must show that the plaintiff's action or application fits in one of the categories specified in subrule 56.01(1).**

2. **If the plaintiff's action or application does fit one of the required categories, the plaintiff has the option of attempting to prove that nevertheless it would be unjust to order security, because the plaintiff is impecunious and the claim has merit.**

The courts have created the "impecuniosity" exemption based on the words "as is just" in rule 56.01(1). [See *Smith Bus Lines Ltd. v. Bank of Montreal* (1987), 25 C.P.C. (2d) 255 (Ont. H.C.)] This exemption allows the courts to avoid applying the provisions in a way that would prevent a plaintiff who has no money to provide security from pursuing a meritorious claim.

When to Bring the Motion

A motion for security for costs should be made without undue delay once the defendant has learned of grounds to bring the motion. Unexplained delay in bringing a motion for security for costs may be fatal to its success. The general test for undue delay is where the plaintiff would be prejudiced by having to provide security at a date that is late in the proceeding. In *423322 Ont. Ltd. v. Bank of Montreal* (1988), 65 O.R. (2d) 136, 27 C.P.C. (2d) 9 (Master); affirmed 66 O.R. (2d) 123 (H.C.), the court refused to order security for costs where delay in bringing the motion for security was unexplained and lulled the plaintiff into a false sense of security.

In cases where a motion for security for costs involves an assessment of an action's merits, it may be appropriate to wait until examinations for discovery have been conducted before bringing a motion for security. It is useful to wait until discovery to find out if the case is meritorious. However, if the defendant waits too long after examinations for discovery, then he or she may be denied relief on a motion for security for costs.

Materials Required for the Motion for Security for Costs

Three documents are required to bring a motion for security for costs: (1) notice of motion; (2) affidavit(s); and (3) draft bill of costs. The draft bill of costs, which is appended to the affidavit, should give a reasonable estimate of the expenses - both legal fees and disbursements - that will be incurred throughout the various stages of the litigation process.

Amount and Form of Security

Under Rule 56.04, the court determines the amount and form of security and the time for paying it into court or otherwise. Where a court finds that the defendant is entitled to security, it will not award only a token amount. [*Michigan National Bank v. Axel Kraft International Ltd.* (1999), 30 C.P.C. (4^{th}) 344 (Gen. Div.)] The courts will generally grant the full amount of the defendant's estimated partial indemnity costs under a system of "pay-as-you-go" security. Under this system, the plaintiff will post security to cover each stage of the litigation. For example, one instalment will be posted to cover the costs up until the action is set down for trial. A second instalment may be ordered after the action has been set down.

Security can be posted in two ways. The plaintiff can pay the amount in cash into court and obtain a receipt or, if the plaintiff wants to avoid paying cash into court, by providing a letter of credit or surety bond pursuant to s. 115 of the *Courts of Justice Act*.

Strategic Considerations

If the defendant successfully brings a motion for security for costs, the plaintiff will be required to pay a substantial amount of money into court. For this reason, motions for security for costs are an effective way for a defendant to force the plaintiff to carefully consider whether the action is worth pursuing, or whether it might be better to settle or abandon the proceeding.

Estate Litigation

The general principle relating to security for costs motions in contentious estate proceedings was formerly set out in *Re Bisyk (1979)*, 23 O.R. (2d), 600 ("*Bisyk*"). The decision of Holland J. was an appeal from the order of a Master ordering security for costs.

The facts of the case concerned issues of due execution, testamentary capacity and undue influence. Holland J. stated that "next of kin, as of right, are entitled to have the will proved in solemn form". [see page 602]. Proof in solemn form requires a will to be formally proved in open court, with notice to all interested parties. Holland J. held that where lack of testamentary capacity is alleged and the executor is therefore called upon to prove a will in solemn form, the executor cannot obtain an order for security for costs. The same seems to hold true where undue influence is advanced to challenge the will.

Holland J. stated as follows:

> As I have indicated earlier, the order [for security for costs] is a discretionary one. The discretion is narrow. However, the claim of the heirs-at-law is clearly not vexatious and it appears to me that in all probability, in these circumstances, no order would be made requiring the heirs-at-law to pay costs. In this case, there appears to be sufficient and probably ground to question the capacity of the testator and also to put forward the charge of undue influence and as such, as a general rule, the next of kin may properly be relieved from the costs should they fail [at page 603]

Holland J. therefore allowed the appeal and set aside the order for security for costs granted at first instance.

Moses

In *Moses Estate, Re (2001)*, 38 E.T.R. (2d) 231 (Manitoba Master) ("*Moses*"), the deceased, Angeline Moses, died in 1998 and the deceased's sole surviving sister, the heir-at-law, brought an application challenging the deceased's will. The sister lived in California. An order was granted for a trial for proof in solemn form of the disputed will and identifying the issues to be tried. In *Moses*, the sister was described as the respondent.

The estate trustee submitted that an order for security of costs was necessary because the heir-at-law resided in California, there was no evidence she had assets in Manitoba or that she was impecunious, and the action initiated by the sister was not, on the evidence presented to date, meritorious. For her part, the sister claimed that she had a well established right to have a will proved in solemn form and was merely exercising that right.

In his decision, the learned Master relied on *Bisyk* and stated as follows:

> The executrix has a responsibility to propound and defend the will in question. It would be inappropriate in these circumstances to insist that the heir-at-law post security… It would appear, therefore, that although the court has a discretion to award security of costs, there has been a general practice not to exercise this discretion, for obvious practical reasons and out of considerations of public policy, in situations involving the proving of a will in solemn form. [see page 2 at para. 5 and page 4 at para. 12]

The court considered the fact that the estate was modest (approximately $200,000) and noted that costs might not be automatically awarded to the challenger at the end of the trial. In other words, the court seemed to "hedge its bets" by recognizing that even an heir-at-law requiring proof in solemn form may eventually be required to pay costs at the end of the day. As such, the court was not prepared, in the circumstances, to require the sister to post security. However, the court's reasoning that the sister may be required to pay costs at the end of the day seems to take away from the policy underlying security for costs - that a non-resident defendant or respondent may "skip town" making it impossible or financially difficult for a successful plaintiff or applicant to collect on costs awarded at trial.

The court also faulted the executrix for her year-long delay in not seeking an order for security for costs. As the court noted, "… the heir-at-law's residency outside this province has been a

fact for some forty years and would certainly have been known to the executrix prior to the initiation of the proceedings". [see page 4 at para. 14]

Finally, the court was not prepared to accept the executrix' submission that the heir-at-law's action lacked merit. The executrix based this on the examination for discovery of the lawyer who prepared the impugned will, "as well as on reference to other potential evidence which was not placed before the court". [see page 4 at para. 16] The court held that the examination, the only real evidence the court could consider, was not conclusive on the issue of merit.

Boutzios

Boutzios Estate, Re (2004), 5 E.T.R. (3d) 51 (Ont. S.C.J.) ("*Boutzios*"), is a decision of Greer J., and effectively departs from the principals articulated in *Bisyk*. In the author's view, *Boutzios* reflects, in large measure, the changed or changing landscape in estate litigation. Estate litigation, while retaining many of its unique features, has moved closer, in terms of many of its governing principles and sensibilities, to civil actions.

By way of background, the deceased, Dimitrios Boutzios (a.k.a. James Boutzios), died in January 2000; he was not married and had no children. The deceased's brother, Evangelos, who lived in Greece and had no assets in Canada, challenged the validity of his brother's will on the grounds of lack of knowledge and approval and capacity as well as undue influence. The estate trustee/residue beneficiary was the deceased's nephew, Louis. It was clear from all of the evidence that Louis had a close relationship with his uncle.

For his part, Evangelos claimed he was a major beneficiary of his brother's 1982 will and that there was a 1995 Greek will that left the his brother's entire estate in both Greece and Canada to him. Greer J. noted that "Jimmy died four years ago and the challenge has still not come to Trial." [see page 53 at para. 10] Louis' counsel estimated that the cost of bringing the matter to trial to be $106,000; Louis had already spent $45,000.

Examinations for discovery had been completed though answers to undertakings were still outstanding. No evidence of undue influence was presented. Evangelos seemed to be relying on the medical evidence of his son, a doctor in Greece, who, the evidence revealed, likely never examined the deceased. Moreover, Evangelos had yet to advise what witnesses he would call, whether his son would fly to Canada to give evidence, and what evidence he had regarding what

he alleged was the false signature of his brother affixed to the will.

In her decision, Greer J. considered *Bisyk* and commented as follows:

> There is some case law, *Bisyk, Re* [citation omitted], to the effect that a non-resident who challenges a Will, need not be required to post security for Costs. That case, however, is 25 years old, and did not look at whether the claim was frivolous or not. There, the claim was brought on by next-of-kin. In the case before me, only one of the deceased's four surviving siblings [Evangelos] challenged the Will. The main beneficiary is Louis, a son of the deceased's brother, Steve, who predeceased him. Louis is not a stranger to the family. The evidence shows that Louis and his Uncle Jimmy were very close and Jimmy spent many years in Toronto with Steve and his family. [see page 56 at paragraph 22]

The statement by Greer J. that *Bisyk* did not look at "whether the claim was frivolous or not" does not seem merited considering Holland J. described the claim before him as "clearly not vexatious". Greer J. also considered the issue of costs and the practice of the estate automatically paying the costs of will challenges by next of kin (one of the deciding factors in *Bisyk*) and noted as follows:

> There is a substantial body of law in Estates and Will matters in Ontario, that has developed over the past ten years or so, which shows that the courts are not as inclined as they had been in the past to award all Costs automatically out of the Estate… In the case before me, Evangelos, supported by Vulla [a niece of the deceased acting on behalf of Evangelos as his attorney under a power of attorney], has alleged that the deceased was unduly influenced in making his 1998 Will, for which no evidence has been put forward. Secondly, Evangelos has alleged that the deceased lacked testamentary capacity, and has put no Canadian medical expert's report forward to support his position. Mr. Naumovich [the lawyer who drafted the challenged will] has identified his signature, which he signed in the present of Mr. Naumovich and one of his employees… Given the uncontraverted evidence that is before the Court, in my view it would be frivolous and vexatious of Evangelos to push the case to Trial without properly assessing his position. The overall costs of completing the case and including the costs of the Trial, will be hugely expensive, in addition to what has already been paid to Louis. [see page 57 at para. 28]

Greer J. relied on Rule 56.01(1) which states that the court, on a motion by the defendant or respondent in a proceeding, may make such order for security for costs as is just, where it appears that the plaintiff or applicant is ordinarily resident outside Ontario, and there is good

reason to believe that the action or application is frivolous and vexatious, and the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent. Greer J. also relied on section 131 of the *Courts of Justice Act*, which states that the costs of and incidental to a proceeding or a step in a proceeding is in the discretion of the court and the court may determine by whom and to what extent the costs shall be paid.

Greer J. then concluded as follows:

> In the matter before me, it is clear that Evangelos is ordinarily resident out of Ontario, having always resided in Greece. In addition, Evangelos has no assets in Ontario from which to pay the Costs of the Trial, if ordered to do so. The only remaining question to consider is whether the Application is frivolous and vexatious. The question to be asked, therefore, is this Will challenge reasonable and meritorious. Will either or both Evangelos and Vulla be ordered by the Court to pay Costs, if their challenge is unsuccessful? The litigation, to date, has costs Louis almost $50,000, as the Pre-Trial and Trial approaches. Should he have to continue to defend a case that he sees is without merit and is both frivolous and vexatious, without security being posted in Court to cover costs, if awarded against Evangelos? The Court must look at all the evidence before it, to determine how the Motion should be decided. [see page 55 at paras. 20 and 21]

Greer J. acknowledged that there were some estate cases that hold that where a will is to be proved in solemn form, for practical reasons and out of consideration of public policy, the court should not exercise its discretion to award security for costs. Greer J. recognized that one such underlying public policy was "where those who might reasonably be expected to benefit from a will have been excluded or those who might not anticipate being beneficiaries, receive a windfall under the will, a challenge may be appropriate…" and an automatic cost awarded could be reasonable in the circumstances. [see page 56 at para. 26] However, according to Greer J., that consideration did not apply to the case before her as Louis was next of kin and therefore could reasonably expect to be favoured under his uncle's will. Moreover, Evangelos was the only sibling who challenged the will.

The result was that Greer J. exercised her discretion under section 131 of the *Courts of Justice Act* requiring Evangelos to post $75,000 within 20 days of the date of her reasons, failing which Vulla was given ten days to pay into court the same amount. If no security was posted, Louis could move to have the will challenged dismissed.

Burden of Proof

A discussion of which party in a contentious estate proceeding is the plaintiff/applicant and which party is the defendant/respondent is worthwhile in the context of a motion for security for costs. Pursuant to Rule 56, it is the defendant/respondent who brings a motion for security for costs. However, in the estate litigation context the propounder of a will initially bears the burden of proving due execution and testamentary capacity and is often earmarked as the plaintiff. How is it that the propounder - the plaintiff - can bring a motion for security for costs against the challenger - a defendant? The answer lies in the shifting burdens of proof and the notion of rebuttable presumptions in the estate litigation context, as well as in Rule 56 and section 131 of the *Courts of Justice Act*.

As Sopinka J. noted in *Vout v. Hay*, [1995] 2 S.C.R. 876 at 889:

> Although the propounder of the will has the legal burden with respect to due execution, knowledge and approval and testamentary capacity, the propounder is aided by a rebuttable presumption. Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.
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> Where suspicious circumstances are present the presumption is spent and the propounder of the will reassumes the legal burden of proving knowledge and approval. In addition, if the suspicious circumstances relate to mental capacity, the propounder of the will reassumes the legal burden of establishing testamentary capacity. Both of these issues must be proved in accordance with the civil standards. There is nothing mysterious about the role of suspicious circumstances in this respect. The presumption casts an evidenciary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or testamentary capacity. In this event, the legal burden reverts to the propounder.

It is this casting of the "evidentiary burden on those attacking the will", which, in the author's opinion, allows the court on a motion for security for costs to cast the challenger as the real plaintiff such that the propounder can move for security for costs. In the circumstances, the propounder can be regarded as merely a titular plaintiff.

Another way of approaching the issue is to ask who holds the cause of action. It is the challenger who is the one advancing the cause of action – lack of due execution or testamentary

capacity – so it is the challenger who should be properly considered the plaintiff and required to post security in the right circumstances.

It is also worthwhile to consider an allegation of undue influence in this context where the burden of proof always rests with the challenger. As such, a challenger alleging undue influence, cast as plaintiff, could always be required to post security. However, in a capacity challenge because the propounder, presumably the estate trustee, initially bears the burden of proving testamentary capacity, and can be regarded as the plaintiff, the estate trustee would be thwarted from moving for security for costs against the challenger (the defendant). This seems to result in uneven treatment of parties based on the allegations made.

However, in *Boutzios*, it is important to note that Greer J. simply exercised her discretion under section 131of the *Courts of Justice Act* to order for security for costs and did not concern herself with which party was saddled with the burden of proof and rebuttable presumptions. Section 131 allows the court to award the costs of and incidental to a proceeding or a step in a proceeding against any party at any time.

Finally, Rule 56.09 seems to confer on the court jurisdiction to award security for costs against any party (Greer J. did not rely on Rule 56.09 in *Boutzios*). Rule 56.09 states that despite rules 56.01 and 56.02, any party to a proceeding may be ordered to post security for costs were, under rule 1.05 or otherwise, the court has a discretion to impose terms as a condition of granting relief. For its part, Rule 1.05 states that the court may impose such terms and give such directions as are just.

Tips and Pitfalls

- The court has discretion to order security for costs, but that discretion is narrow.
- Rule 56 and section 131 of the *Courts of Justice Act* govern security for costs.
- By forcing a party to pay money into court, a security for costs motion acts as a deterrent to frivolous litigation.
- The court will likely look at “the facts on the ground” to determine who is the true defendant.
- Delay in bringing a security for costs motion may be fatal.
- Where the evidence has revealed that a security for costs motion may be appropriate, the

defendant or respondent must act immediately.

- Where next of kin have been excluded from a will, a will challenge will rarely be regarded as frivolous. The estate trustee has a responsibility to propound the will (an automatic cost award at trial is still a possibility albeit not certain). As such, a security for costs motion would prove to be an uphill battle.

- Where the next of kin acts alone without the support of his/her family or against his/her family, an automatic costs award at trial is unlikely and a will challenge can be regarded as frivolous.

- Even where a next of kin enjoys the support of family members, or is the sole next-of-kin, he/she may be required to post security in the right set of circumstances.

- A security for costs motion is likely most appropriate once examinations for discovery have been completed. A party applying for security for costs can then address the merits of the action.

- There has to be clear evidence that a will challenge lacks merit for security to be ordered.

- Vague reference to other evidence regarding the merits of a challenge or impecuniosity will not carry any weight with the court. The plaintiff or respondent will have to marshal the evidence and put their best foot forward.

- A party is required to provide a draft bill of costs, appended to a supporting affidavit, which gives a reasonable estimate of expenses.

- If a party challenging a will fails to push a challenge to trial, i.e. undue delay the making of which can be visited on the challenger, the court may be more willing to order security for costs.

- A party who applies for summary judgment should consider, as alternative relief, applying for security for costs assuming, of course, that the party fits into one of the categories enumerated in Rule 56.01.