Handwriting Experts and Trustee Indemnification

By Justin W. de Vries[1]

Handwriting Experts

Fraud is not restricted to the living. Occasionally, a fraudulent testamentary document makes an appearance and the question of validity becomes paramount. In that context, the issue of whether to retain a "handwriting expert" is raised.

The science of "handwriting analysis" can be divided into two branches: graphology, which examines handwriting to determine the character traits of the writer; and forensic handwriting analysis which is performed by questioned documents examiners who, through document comparison, determine whether the questioned document is a forgery. Graphology has been largely discredited. On the other hand, forensic handwriting analysis has enjoyed greater scientific respect with the result that handwriting experts have been called to give evidence at trial.

Although examples of cases where courts refuse to hear the evidence of handwriting experts are few, more common are cases where the court attaches little weight to the opinions given. Because forensic handwriting analysis is comparatively easy to understand (both the methodology and results), weaknesses in an expert's opinion are relatively easy to spot. The case law demonstrates that courts are usually willing to hear the expert's opinion, but seldom defer to the expert without evaluating the evidence itself.

There are two strategies when dealing with an unfavourable expert opinion: argue that the expert's opinion is inadmissible based on the *Mohan* criteria (relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and properly qualified expert), or attack the reliability of the expert's opinion once admitted.

Probably the most effective way of attacking a handwriting expert is not at the admissibility stage, but during cross-examination, where the weight to be given to the expert's opinion can be

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put into issue. However, the court retains residual discretion over whether or not to admit an expert's opinion.

In *Otis v. Otis*,[2] the validity of the last two wills of the deceased was challenged at trial. Rollin, one of the beneficiaries argued that the signatures on the alleged 1980 and 1994 wills were forged. Rollin produced a handwriting expert (Ms. Kruger) who opined that the signature on both wills was traced using the 1977 will as a template. The drafting solicitor claimed he remembered the testator signing the 1980 will, even though he acknowledged that the event occurred a long time ago and his memory had faded. The Court preferred the evidence of handwriting expert over that of drafting solicitor and admitted the 1977 will to probate.

In *Clifford v. Royal Bank*,[3] the signature on the will was alleged to have been forged. Despite the contradictory testimony of two handwriting experts (or perhaps because of it), the Court explicitly reserved its right to perform its own signature comparison. One of the experts had identified five "points of comparison" on the signatures which the court then used as a basis for its own comparison. Based on its own findings, the court preferred the evidence of one expert over that of the other. The favoured expert was also preferred because she used a microscopic examination technique while the other expert did not.

In *Belser v. Fleury*,[4] the applicant sought a declaration that a document was the final will of the deceased. No family member had seen the deceased write the document in question, and the family was split between those that thought the writing looked like that of the deceased and those that disagreed. No expert was called to give evidence. The court refused to admit the document into probate. "In these circumstances, considerable more evidence was necessary to satisfy the court the handwriting in the document was that of [the deceased]. At the very least, some expert evidence was required."

[2] (2004), 7 E.T.R. (3d) 221, 130 A.C.W.S. (3d) 1072, 2004 CarswellOnt 1643
[3] (1976), 15 N.B.R. (2d) 473
[4] (1999), 139 Man. R. (2d) 149, 27 E.T.R. (2d) 290, [1999] M.J. No. 205, 1999 CarswellMan 221

Trustee Indemnification

It is a fundamental principle that every trustee has the right to be indemnified out of the trust property for all expenses properly incurred in the administration of the trust. The trust instrument itself does not have to guarantee that the trustee will be indemnified; the trustee's right to be reimbursed for expenses is a rule of equity as well as guaranteed by statute.

Right of Indemnification

In Ontario, the right to be indemnified is guaranteed by section 23.1 of the *Trustee Act*,[5] which reads:

> *Expenses of trustees*
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> 23.1 (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
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> (a) pay the expense directly from the trust property; or
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> (b) pay the expense personally and recover a corresponding amount from the trust property.
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> *Later disallowance by court*
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> (2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

The right to indemnification applies equally to estate trustees and executors.

The right to be indemnified is limited to proper expenses. As such, the beneficiaries of the trust can challenge any expense incurred by the trustee on a passing of accounts. If the court agrees with the beneficiaries that the trustee's expenses were not proper expenses of the trust or estate, he/she may be ordered to repay the expenses or be denied reimbursement, whichever the case may be.

A "proper" expense has been defined as one that has not been "improperly incurred,"[6] a particularly unhelpful definition. A more useful test is to consider whether the expense was

[5] RSO 1990, c T.23.
[6] *Beddoe, Re,* [1893] 1 Ch. 547 (Eng CA) and *Dingman, Re* (1915), 35 OLR 51 (ON CA).

incurred for the benefit of the beneficiaries, or for preserving/increasing the value of the trust property.

However, even this test is not without its shortcomings. What seemed reasonable and necessary at the time to the trustee may not appear so to the beneficiaries after the fact, especially if the decision leads to an unintended loss. The beneficiary is able to judge the propriety of an expense after the event and in light of the outcome; the trustee has no benefit of hindsight when making his/her decision.[7] The result is that what a "proper" expense is will always be determined by the circumstances and is ripe for conflict. Factors taken into consideration include the nature and extent of the trust, the necessity of the expense to preserve the trust property, whether the trustee was acting within his/her scope of power in incurring the expense, whether the expense was incurred in good faith, and at what point during the course of the trust administration the expense arose.[8]

Hiring an Agent

There are some choices that are clearly wrong even if decided in good faith. Such was the case in *Steven Thompson Family Trust v. Thompson*.[9] The Court found that the trustees' decision to hire an agent to administer the trust was so clearly misguided that the costs of the agent, which otherwise could have been charged to the trust, were to be borne by the trustees personally.

In 2010, Doug and June Thompson were appointed as the trustees of their deceased son's estate following the resignation of Ross Mitchell. Mr. Mitchell had resigned on the advice of his lawyers who warned him of a conflict of interest. Just over a year later, Doug and June were removed as estate trustees by order of the Court. After their removal, they brought an application to pass their accounts as estate trustees. The beneficiaries objected to most of their expenses.

When appointed, Doug and June decided not to be involved in the day to day administration of the trust. Instead, they hired the recently resigned Mr. Mitchell as their agent, knowing full well the reasons behind his resignation. At the passing of accounts, the beneficiaries objected to the

[7] Popovic-Montag, Suzana. "Revisiting a Trustee's Right to Indemnification." 50 ETR (2d) 161.
[8] *Ibid.* See also *Waters' Law of Trusts in Canada*, 4th ed., Donovan Waters, ed. (Toronto: Carswell, 2012),1209. ("*Waters*")
[9] (2012), 2012 ONSC 7138, 2012 CarswellOnt 15843 (ON SCJ). ("*Steven Thompson*")

payments out of the estate to Mr. Mitchell for his work as agent, as well as most of the expenses Mr. Mitchell incurred as result of his administration as agent.

Doug and June argued that the trust instrument allowed them to hire an agent, and that even if hiring Mr. Mitchell was improper, the trust instrument also released them from any liability for their error (via an exculpatory clause). The Court did not accept this argument. Justice McCarthy held:

> The law is clear that a privative or exculpatory clause cannot be a license to a trustee to act in any manner he wants.
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> …
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> In my view, the proper approach is for the court to seek a balance between the protection of the settlor's freedom and his expressed intention to insulate a trustee from liability or judicial intervention, against the principle that no settlor may take away the court's ultimate jurisdiction to protect the beneficiaries and safeguard the intention of the trust. Part of the rationale underlying such an approach is that, in most trust documents, there is no self-help remedy available to the beneficiaries. Judicial intervention is the only remedy.[10]

The Court listed three fundamental (or substratum) duties of a trustee. Those included the requirement that a trustee not delegate his/her responsibilities as trustee to others and the requirement of every trustee to act honestly and prudently at the level of a reasonable business person administering his or her own affairs.[11] Doug and June's decision to hire Mr. Mitchell as agent contravened both of those duties. Although the delegation of tasks to others may be acceptable in certain situations, the complete delegation of trustee work to Mr. Mitchell was not. In addition, the choice of Mr. Mitchell as agent was clearly improper. Justice McCarthy held: "I find that a reasonably prudent business person would not retain an agent to act in the capacity of administrator of a trust when that agent was the very trustee who had just resigned as a result of being in a conflict of interest."[12]

Not only did the Court reduce the amount of compensation payable to Doug and June (based on the principle that the estate should not have to pay for a duplication in services), it also held that Doug and June were personally responsible for the payment of Mr. Mitchell's fees.

[10] *Steven Thompson,* ¶ 22-23 and 31.
[11] *Steven Thompson,* ¶ 22.
[12] *Steven Thompson,* ¶ 34.

> [A]s I have found that the retaining of Mitchell in the role of administrator was a breach of a substratum duty, it follows that any cost associated with that breach should not be borne by the trust. This may seem tantamount to an award of damages for breach of trust. On the contrary, it is quite distinct. A passing of accounts requires the court to assess the propriety of an expense and to either allow it or disallow it. Section 21(2) of the *Trustee Act* provides that remedy to the court. The disallowing of an expense *post fact* results in an obligation on the trustee to repay that amount to the trust. This may be an unhappy result, but it is the only available remedy to right the wrong that has been done to the beneficiaries.

What is clear from this case is that an exculpatory clause in the trust instrument is not enough to guarantee a trustee protection from personal liability. The cautious trustee will seek the consent of the beneficiaries before incurring any significant or contentious expense, or have the beneficiaries sign a release (in the absence of an account passing) before making any distribution out of the estate. An application for the advice and direction of the court may also be appropriate. As Justice McCarthy concluded:

> [T]he trustees and their agent [Mitchell] had the opportunity during the trusteeship to either seek the consent of the beneficiaries of the trust to the proposed expenses or to obtain directions and approval from the court on an application under rule 14.05. In my view, a reasonably prudent person of business would have found it appropriate to do so. In electing not to do so, the trustees and the administrator [Mitchell] ran the risk of having these expenses challenged and disallowed on a passing of accounts.[13]

Although obtaining the consent of the beneficiaries prior to acting often avoid problems before they arise, beneficiaries do not always agree amongst themselves or with the trustee. Having the beneficiaries execute a release offers even greater protection to a trustee, but the beneficiaries usually cannot be compelled to sign one. There are exceptions, however, where the Court will order that the beneficiaries release a trustee.

Requiring a Release

In *Dalewood Economy Ltd. v. Black Estate*,[14] the Ontario Court of Appeal upheld the lower court's decision requiring the beneficiaries to execute a release of the trustees. However, the Court of Appeal limited the wording of the release from that proposed by the trustees.

[13] *Steven Thompson,* ¶ 43.
[14] (2010), 2010 ONCA 824, 2010 CarswellOnt 9210 (ON CA). ("*Dalewood*")

The beneficiary of the trust, Dalewood Economy Limited, had requested that the trustees convey the land held in trust to Meadowvale Land Limited. The trustees had refused to do so until Dalewood signed a release protecting them from any tax liability resulting from the transfer. The application judge found that the release and indemnity clause in the trust instrument applied in these circumstances, meaning that the trust instrument required the beneficiaries to release the trustees.

On appeal, Dalewood took issue not with executing the release, but with the wording of the release as proposed by the trustees. The Court of Appeal sided with Dalewood. The release submitted by the trustees would release them from all claims whatsoever, and in any capacity whatsoever.[15] In contrast, the exculpatory clause in the trust instrument only protected the trustees from all claims in connection with the management and use of the land held in trust. The result was that the Court of Appeal ordered that the beneficiaries execute a release of the trustees limited in scope to the terms of the trust deed.[16]

Where the trust document does not offer guidance as to the scope of indemnity, the Court is reluctant to take an active role in settling a dispute about the wording of a release. The exception may be where the estate trustees show a unparalleled inability to resolve issues between themselves. This happened when John Kaptyn named his two sons, Henry and Simon Kaptyn, as co-trustees of his estate and various trusts (settled to the benefit of his children and grandchildren). Their failure of the brothers to get along resulted in a series of disputes, which had to be resolved by application to court.

One such dispute (*Re Kaptyn Estate* (2012))[17] centred on the form of a release. Simon and Henry had been ordered previously (in 2011) to make a distribution of shares gifted in the will, but held in other trusts settled by John Kaptyn. As part of the order, they were told to execute an indemnity in relation to the distribution of the gifted shares. Henry and Simon both agreed to execute the indemnity, but could not agree on either the wording of the indemnity or its scope. For example, a dispute arose as to whether or not the corporations themselves should be indemnified out of the estate for any tax consequences as a result of the shares being transferred.

[15] *Dalewood,* ¶ 5.
[16] *Dalewood,* ¶ 6.
[17] (2012), 2012 ONSC 2299, 79 ETR (3d) 17, 2012 CarswellOnt 7403 (ON SCJ). ("*Kaptyn 2012*")

In an effort to resolve the impasse, the Court issued several directives. First, it ordered the parties to "immediately confer" with regard to the wording of the indemnity, using the draft indemnity agreement created by counsel for two of John Kaptyn's grandchildren as a framework.[18] Second, the Court laid out what the trustees should consider when drafting the indemnity: (i) the Court's previous conclusions and directions as set out in past endorsements, (ii) the requirements of the *Estates Act* and the *Trustee Act*, and (iii) the principles of law applicable to beneficiaries and trustees (the Court did not elaborate on the principles of law). Finally, the Court held that if an agreement could not be reached within 20 days, although reluctant to do so, it would intervene and make a decision regarding the actual wording to be used.[19] If it came to that stage, the parties were to submit annotated copies of their suggested indemnity forms to the Court.

Delaying Distributions

The decision in *Re Kaptyn Estate* (2012), discussed above, is unusual in its level of court intervention. More common are situations where a court is asked to decide whether it was appropriate for a trustee to delay a distribution while negotiating a release from the beneficiaries. Such was the issue in *Denofrio v. Denofrio*.[20] The beneficiaries of the late Mr. Denofrio's estate took issue with the fact that the trustees imposed a series of conditions on the beneficiaries before they would make any distribution from the estate. The conditions included: (i) that the beneficiaries release any right to make a claim against the estate, (ii) that Mrs. Denofrio drop her matrimonial litigation claim against the estate, and (iii) that no payments would be made until the trustees had passed their accounts.

The Court evaluated the conditions in the context of the issues surrounding the estate. Under the terms of Mr. Denofrio's will, 50% of his estate was to go to his wife, the remainder was to be divided between his children. His children were to receive their entitlement in increments over the course of 10 years. After Mr. Denofrio's death, Mrs. Denofrio brought a claim against his estate pursuant to the *Family Law Act*. During the lengthy defence by the trustees of the

[18] *Kaptyn 2012*, ¶ 39.
[19] *Kaptyn 2012*, ¶ 42.
[20] (2012), 2012 ONSC 3408, 218 ACWS (3d) 234, 2012 CarswellOnt 7448 (ON SCJ). ("*Denofrio*")

matrimonial claim, no distributions whatsoever were made by the trustees. As a result, three of the children threatened to sue the estate.

The Court held that the conditions imposed by the trustees were justified in the circumstances. This was particularly true of the release of the estate from possible litigation. The Court held that the trustees were justified in seeking some finality to the matrimonial dispute with Mrs. Denofrio before paying out her entitlement under the will.[21] Similarly, the trustees were justified in delaying payment to the children until they agreed not to sue the estate. As for the passing of accounts condition, the Court could find no authority justifying an estate trustee's decision to withhold a distribution from the estate before the estate accounts for the period had been passed. Nevertheless, the Court held that the trustees were justified in imposing that condition in this particular case because the children had threatened litigation not only against the estate, but against the estate trustees personally as well.[22]

The Court applied greater scrutiny to the trustees' demand that the beneficiaries sign a release before they began making distributions. The beneficiaries took issue with that condition because the trustees were not entitled to any release under Mr. Denofrio's will. In addition, the beneficiaries pointed out that the trustees' administration was ongoing, as the testamentary trust did not expire until the end of the 10 year period. The beneficiaries argued, and the Court agreed, that this meant that the trustees could not ask for a full and final release from all claims relating to the administration of the estate at this time.

Nevertheless, the Court held that the trustees were justified in asking for releases. Justice Kershman remarked that the trustees may have erred in calling the release "full and final," but the scope of the releases actually sought was proper.[23] The release would not protect the trustees from all potential liability for errors occurring in the future, only from the litigation commenced or threatened up to this point. The Court held that it was reasonable for the trustees to want to have the claims against the estate and themselves settled before they began to make distributions.

The Court may not have found that the trustees' decision to delay distributions was improper, but it did not order that any of the trustees' conditions be met before a distribution was made.

[21] *Denofrio*, ¶ 63.
[22] *Denofrio*, ¶ 70.
[23] *Denofrio*, ¶ 56.

Instead, the Court ordered immediate interim distributions from the estate. The Court was apparently satisfied that the trustees would be adequately protected having passed their accounts as submitted. The Court also required that the trustees continue to pass their accounts every two years.

The courts are not always as sympathetic to trustees who demand releases from beneficiaries as it was in *Denofrio*. The general rule is that trustees cannot force beneficiaries to sign a release by refusing to make a final distribution unless they do.[24] Once a beneficiary becomes absolutely entitled to the trust property, the Court has little tolerance for an extended delay in the distribution, whatever the reason.

In *DeLorenzo v. Beresh*,[25] Justice Lofchik chastised the estate trustee for doing just that. Vincent DeLorenzo died in 1999. Nearly 10 years later, his daughter, Tina DeLorenzo, became indefeasibly entitled to her interest in the trust property by turning 30. The trustee, Calvin Beresh, refused to distribute the estate to Tina prior to obtaining a tax clearance certificate (pursuant to s. 159 (3) of the *Income Tax Act*) and prior to a passing of accounts. He claimed both were necessary in order to protect himself from any personal liability. The Court was unsympathetic to Mr. Beresh. It held:

> The respondent has failed to obtain the necessary tax clearance certificate or certificates over the past 10 years when he knew that the Tina Marie DeLorenzo trust payout date was approaching. Under these circumstances, he cannot rely on his failure to carry out his duties as a basis for withholding the payout of her legacy.[26]

The Court did compromise somewhat: it allowed Mr. Beresh to withhold 20% of Tina's share until the passing of accounts was completed.

[24] See for example *Brighter v. Brighter Estate* (1998), 81 ACWS (3d) 743, 74 OTC 329, 1998 CarswellOnt 3113 (ON Ct Jt), where the court held (at ¶ 9): "The executor has no right to hold any portion of the distributable assets hostage in order to extort from a beneficiary an approval or release of the executor's performance of duties as trustee."
[25] (2010), 2010 ONSC 5655, 62 ETR (3d) 65, 2010 CarswellOnt 7756 (ON SCJ). ("*DeLorenzo*")
[26] *DeLorenzo*, ¶ 28.

Trustees' Legal Fees

In addition to his refusal to pay out Tina's share, Mr. Beresh had also been using estate funds to pay for his legal fees incurred from the ongoing proceedings with Tina. The Court was asked to determine whether it was appropriate for Mr. Beresh to have done so in the absence of prior court approval or the consent of the beneficiaries.[27]

In deciding the issue, the Court reviewed the general right of trustees to be indemnified by the estate, in particular of a trustee's right to be indemnified for legal expenses. Justice Lofchik held:

> A solicitor retained by an estate trustee is in the first instance the solicitor for such trustee, not the estate. The estate trustee is personally liable to the solicitor for his or her fees. Whether a right to indemnity or reimbursement exists is a matter between the estate trustee and the beneficiaries of the estate and is to be determined either by agreement with them or on a passing of accounts.[28]
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> …
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> It is the well settled principle that full indemnity of the trustee's proper costs, charges and expenses in administering an estate is the price to be paid by the *cestuis que trust* for the services of the trustee and that the trustee must not be required to pay them personally.[29]
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> …
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> When there is litigation between the estate trustee and the beneficiaries related to the question of whether or not the trustee has properly discharged his duties, including timely steps to pass his accounts, different consideration apply in my view. Ultimately the issue of whether the trustee is entitled [to] charge the estate with his legal fees may turn on the outcome and it should be determined on a passing of accounts or court application, if not agreed to by the beneficiaries.[30]

The Court held that there were two appropriate times to decide whether the trustee's legal costs could be paid out of estate funds: either at the passing of accounts or at the end of the litigation. In this case, neither had occurred (several questions had been adjourned to a later date, meaning Mr. Beresh was not free from Tina yet). Citing both the principle of fairness and *Coppel v.*

[27] *DeLorenzo*, ¶ 12.
[28] *DeLorenzo*, ¶ 15.
[29] *DeLorenzo*, ¶ 20.
[30] *DeLorenzo*, ¶ 23.

Coppel Estate,[31] the Court ordered that Mr. Beresh repay his legal expenses into the estate, with interest. This would mean that the parties bore their own costs of the proceeding until its conclusion, at which time Mr. Beresh's right to be reimbursed from the estate would be decided.[32]

This case seems to show that section 23.1 of the *Trustee Act* does not give trustees an absolute entitlement to pay ongoing expenses directly from trust property, at least when it comes to legal fees. A plain reading of s. 23.1 suggests that Mr. Beresh should have been allowed to fund the litigation out of the trust property, with the possibility that he would be ordered to pay it back on the passing of accounts. However, this decision shows that the Court has the ability to restrict a trustee's ability to pay for his/her legal expenses out of the trust fund where appropriate. In this case, it was done so that neither party would have a financial advantage over the other during the dispute.

Since a solicitor is employed by the trustee, not the trust or estate, solicitor bills are usually presented to the beneficiaries at the passing of accounts as part of the trustee's costs.[33] The general rule is that where the legal expense was incurred from an application for the interpretation of a trust instrument or testamentary document, or where the estate trustees has hired a lawyer to defend the estate against a third party claim, then the trustee will be indemnified for the legal costs. On the other hand, where the dispute is between a beneficiary and the estate trustee, or where the trustee has initiated or continued litigation against a third party, the propriety of the legal costs will be determined by the circumstances. In these latter cases, just like awards of costs, legal expenses usually follow the outcome of the event.

In *Denofrio*, discussed above, the beneficiaries objected to the trustees' legal costs of defending the estate against Mrs. Denofrio's matrimonial claim. The beneficiaries objected on the grounds that the fees were both unreasonably incurred and excessive. The Court disagreed on both counts. The Court described the trustees' duties to defend the estate as follows:

> Mrs. Denofrio initiated the legal proceedings. In turn, the Estate Trustees were under an obligation to:

[31] [2001] OJ No. 5246 (ON SCJ).
[32] *DeLorenzo*, ¶ 24.
[33] *Waters*, page 1214.

> (1) defend against the litigation;
>
> (2) preserve Mr. Denofrio's Estate; and
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> (3) administer the Estate in accordance with the terms of the Will and as prudent Estate trustees.[34]

The Court held that the trustees had satisfied all three obligations by defending the estate against Mrs. Denofrio's claim.

Generally, legal expenses follow the same rule as any other trustee expense: if properly incurred by the trustee, the trustee is entitled to be indemnified for the expense out of the trust property. In *Denofrio*, the trustees were found to have acted properly and their accounts were approved. As a result, not only were they reimbursed out of the estate for their legal fees, they were also awarded their costs of the passing of accounts application. However, had the accounts been falsified or prepared negligently, the trustees would likely have been denied the costs of passing their accounts.[35]

Other proper legal expenses include litigation into which the trustee is drawn; for example, litigation between beneficiaries where the trustee adopts a neutral position.[36] The same is true for applications for the advice and direction of the court. The reasoning is that the trustee, who is under a duty to carry out the terms of the trust, cannot fulfill that duty if the terms are unclear. Usually, the settlor is held responsible for the ambiguity in the trust deed, so it is considered proper that the trust bear the cost of the application for interpretation. However, where the court's assistance in interpreting the will or trust instrument is held to be unnecessary because the document is unambiguous, the result of the application obvious, or the position of one of the parties unreasonable, the court may order that the costs of the application be borne by the parties personally.

The beneficiaries in *Primo Poloniato Grandchildren's Trust (Trustee of) v. Browne*[37] used this argument to object to the trustee's legal expenses of an application for advice and direction. The trustee had applied to court regarding the proper interpretation of the trust document, in

[34] *Denofrio*, ¶ 35.
[35] Suzana Popovic-Montag, *ibid.*
[36] Suzana Popovic-Montag, *ibid*.
[37] (2011), 2011 ONSC 4400, 206 ACWS (3d) 477, 71 ETR (3d) 185, 2011 CarswellOnt 8826. ("*Primo*")

particular as to the source of payments to the beneficiaries (from the income or capital of the trust). The beneficiaries opposed the trustee's request for costs of the application on the grounds that the application was unnecessary because the terms of the trust were clear. The Court found in favour of the trustee. Justice Pattillo noted that a conflict had arisen between beneficiaries regarding the source of their payments out of the trust. Because the trustee was unable to resolve the issue by agreement of the beneficiaries, the trustee was justified in bringing the issue to court.[38]

Although common sense would suggest that where the terms of a trust are clear, the results should be obvious, the Court held that this is not always the case.

> While I found that the terms of the Trust, as varied, to be clear and unequivocal, the issue involved was complex and not straight forward. Further, and notwithstanding that the result obtained was consistent with the way in which the Trustee and its predecessor had historically interpreted and administered [the] Trust, the record supports the position that, once the conflict arose, the Trustee was uncertain as to the proper interpretation of the Trust.[39]

The Court further held that, once the conflict arose between the beneficiaries, the trustee would have been in breach of his duties *not* to bring the application to court.[40] As a result, the trustee was allowed his legal expenses payable from the estate.

Trustee Expenses as a First Charge

Where a court finds that an expense is proper, the trustee's right to be indemnified is usually a first charge against the trust property. However, a 2011 decision in the series of *Re Kaptyn Estate*[41] decisions suggested that this is not a fixed rule. The Court acknowledged that the trustees' costs of an application for the advice and direction of the court regarding a question of construction of a testamentary instrument is normally a proper estate expense.[42] However, in this case, the behaviour of the trustees and the untenable positions they adopted in argument led the Court to conclude that most of the application brought by the trustees was unreasonable and therefore an improper expense. The Court was only willing to allow the trustees' legal fees in

[38] *Primo*, ¶ *17.*
[39] *Primo*, ¶ 19.
[40] *Primo*, ¶ 20.
[41] [2011] WDFL 1622, 64 ETR (3d) 269, 2011 CarswellOnt 302. ("*Kaptyn 2011*")
[42] *Kaptyn 2011*, ¶ 22.

the amount of $350,000.00. The Court then imposed the following condition on the payment out of the estate of those costs:

> [T]he costs awarded to the estate trustees DO NOT constitute a first charge against the assets of the Primary and/or Secondary Estate ... [T]he costs I have awarded to them fall to the bottom of the pile of the liabilities of the Estates, and the Estates cannot pay those cost awards until all other liabilities of the Estates have been paid. I recognize that this is an extraordinary condition to impose upon an award of costs to estate trustees, but the conduct of the two estate trustees in these proceedings justifies the imposition of such a condition.[43]

By making the legal expenses a last charge against the estate assets, there was the possibility that the estate assets would be depleted before the trustees were repaid. By manipulating the order of payments from the estate, the Court was able to follow the law with regards to the right of a trustee to be indemnified while at the same time censuring the trustees for their behaviour over the course of the administration of the estate. *Re Kaptyn Estate* (2011) is unique in this regard.

Cost Awards

More often than not, the Court expresses its displeasure with a trustee's behavior by making an adverse cost award against the trustee. An interesting example of how cost awards are used to denounce a trustee's actions is found in the case of *Re Thompson Family Trust* (not connected to *Steven Thompson Family Trust* discussed above).

The beneficiaries and the trustees of the Sandra Thompson Family Trust had not been getting along. The trustees' application to pass accounts was contested by the beneficiaries. In addition to the estate proceedings, Sandi Thompson, one of the beneficiaries of the trust, made a complaint against William Martin to the Law Society of Upper Canada (William Martin was both trustee and a lawyer). Before trial on the passing of accounts, the trustees and the beneficiaries entered into a settlement agreement. One of the terms of the settlement was that Ms. Thompson withdraw her complaint against Mr. Martin. When Ms. Thompson failed to withdraw her complaint, Mr. Martin brought a motion to compel Ms. Thompson to comply with the settlement. At the motion hearing,[44] the Court refused to enforce that provision of the

[43] *Kaptyn 2011*, ¶ 52.
[44] *Thompson Family Trust, Re* (2011), 108 OR (3d) 180, 2011 CarswellOnt 13261 (ON SCJ).

settlement that Ms. Thompson withdraw her complaint against Mr. Martin from the Law Society on grounds of public policy.

Despite having lost the motion, Mr. Martin sought the costs of the motion payable from the trust (the second trustee did not participate).[45] The Court refused. It held that it would be inappropriate to protect Mr. Martin by having his costs paid out of the trust. The Court found that Mr. Martin's actions in entering into any settlement which provided that Ms. Thompson withdraw her complaint against him was improper, that his motion to compel Ms. Thompson to comply with the terms of the settlement was misguided, and that his request for costs was unsupportable. As a result, the Court ordered that Mr. Martin alone bear the costs payable to Ms. Thompson personally.

[45] *Thompson Family Trust*, *Re* (2012), 2012 ONSC 1318, 214 ACWS (3d) 649, 2012 CarswellOnt 2524 (ON SCJ).