

CITATION: Schickedanz v. Schickedanz, 2026 ONSC 297
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DATE: 20260115

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF THE ESTATE OF ELMA SCHICKEDANZ

RE: CHARLOTTE SCHICKEDANZ, Applicant

AND:

WALDEMAR SCHICKEDANZ, GERHARD H. SCHICKEDANZ, MANFRED SCHICKEDANZ, and ARTHUR SCHICKEDANZ, Respondents

BEFORE: M.D. Faieta J.

COUNSEL: *Alexander Turner & Katie Morris*, for the Applicant

David Lobl & Anna X. Chen, for the Respondents

HEARD: In writing

COSTS ENDORSEMENT

[1] Three applications were the subject of this proceeding which culminated in an eleven-day trial. Waldemar Schickedanz, Gerhard H. Schickedanz, Manfred Schickedanz and Arthur Schickedanz (the “Brothers”) opposed their sister, Charlotte Schickedanz’s (“Charlotte”) application for a declaration that a purported holograph codicil written by their mother, the late Elma Schickedanz (the “Testator”), was a valid testamentary document (“Codicil Application”). This codicil amended the Testator’s Will to leave her home (valued at about \$23 million) to Charlotte. The Brothers’ application for a declaration that certain investment accounts held by the Testator (valued at about \$4 million) were held in trust by Charlotte for the Estate (“Investment Account Application”) was granted. Finally, Charlotte’s application (“Counter Application” or “Management Fee Application”) for compensation for her management of the above accounts was withdrawn with only the issue of costs to be decided: see *Schickedanz v. Schickedanz*, 2025 ONSC 1207.

[2] The Brothers seek costs of \$2,641,389.19 in respect of the Codicil Application and the Investment Account Application as well as costs of \$17,768.99 in respect of the Management Fee Application. Charlotte submits that the Brothers’ costs should be paid from the Estate rather than by her personally. Charlotte further states that the amount of costs sought by the applicants is unreasonable. Charlotte seeks costs of \$906,040.16 payable from the Estate in respect of the Codicil Application as well as her costs thrown away of \$15,800.52 in respect of the Brothers’ motion to adjourn the trial that was never heard due to the unavailability of the court. Charlotte does not seek costs in respect of the investment account application or her Counter Application.

Costs Principles

[3] The principles related to the award of costs in an estates matter were described by the Ontario Court of Appeal in *Westover Estate v. Jolicouer*, 2024 ONCA 81, as follows:

[12] It is now well-established that estate litigation, like all civil litigation, is subject to the general civil litigation costs regime. The historical approach in estate proceedings that all parties' costs are paid out of the estate has been displaced by the modern approach to fixing costs in estate litigation that seeks to ensure estates are not depleted through the costs of unnecessary litigation and the assets of an estate are not treated "as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation".

[13] Exceptions to the general approach may arise in limited cases where public policy considerations apply and mandate a different result. Public policy considerations include the need to give effect to valid wills that reflect the intention of competent testators as well as the proper administration of estates.

[14] Estate trustees are generally "entitled to be indemnified for all reasonably incurred costs in the administration of an estate". Saddling estate trustees personally with legal costs where litigation was caused by the testator might well discourage them from initiating reasonably necessary legal proceedings to ensure the due administration of an estate. However, this is not an absolute rule. A court may order otherwise if an estate trustee has acted unreasonably or in substance for their own benefit, rather than for the benefit of the estate. [Citations omitted.]

[4] The following principles, described by L.B. Roberts, J.A., in *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, govern the award of costs in a civil proceeding:

[59] The relevant principles to be applied in a court's exercise of its discretion to award costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 are well established. They include the myriad factors enumerated in rule 57.01(1) of the *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194] such as: the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, as well as "any other matter relevant to the question of costs". This is not a mechanical exercise or a rubber stamp.

[60] A proper costs assessment requires a court to undertake a critical examination of the relevant factors as applied to the costs claimed and then "step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable" ...

[61] The overarching objective is to fix an amount of costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the

circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant.

[62] While the reasonable expectation of the parties concerning the amount of a costs award is a relevant factor that informs the determination of what is fair and reasonable, it is not the only, determinative factor and cannot be allowed to overwhelm the analysis of what is objectively reasonable in the circumstances of the case. To hold otherwise would result in the means of the parties artificially inflating costs with the concomitant chilling effect on access to justice for less wealthy parties. ...

[63] Although each costs assessment is a fact-driven exercise related to a particular case, consistency with comparable awards in like cases is desirable and the reasonableness of costs that represent an outlier must be objectively and carefully scrutinized, taking into account the chilling effect on litigation that this kind of award could have.

...

[65] Costs that are reasonable, fair, and proportionate for a party to pay in the circumstances of the case should reflect what is reasonably predictable and warranted for the type of activity undertaken in the circumstances of the case, rather than the amount of time that a party's lawyer is willing or permitted to expend. The party required to pay the successful party's costs "must not be faced with an award that does not reasonably reflect the amount of time and effort that was warranted by the proceedings". ...

[66] The party seeking costs bears the burden of proving them to be reasonable, fair, and proportionate. The absence of dockets is not an automatic bar to proving or receiving an award of costs. However, absent dockets, a description of the activities for which fees and disbursements are claimed must be sufficient to permit for the kind of close scrutiny that the court is required to undertake. The material provided for the assessment must allow the court to come to a conclusion as to the amount of time reasonably required by the party seeking costs to deal with all aspects of the proceedings for which costs are claimed, including whether there was over-lawyering or unnecessary duplication of legal work. Bald statements do not assist the court with this task but give rise to the kind of mechanical calculation of hours times rates that this court cautioned against ... [Citations omitted.]

[5] Substantial indemnity costs should only be awarded when an offer to settle is engaged or where the losing party has engaged in reprehensible, scandalous or outrageous conduct. A party's behaviour would have to be especially egregious to justify full indemnity costs: *Net Connect Installation Inc. v. Mobile Zone Inc.*, 2017 ONCA 766, 140 O.R. (3d) 77 at para. 8; *More v. 1362279 Ontario Ltd. (Seiko Homes)*, 2023 ONCA 527, para. 31.

Should Charlotte's Costs be Paid out of the Estate?

[6] Charlotte submits that her legal costs of \$906,040.16 in relation to the Codicil Proceeding ought to be borne by the Estate rather than imposed on her personally for the following reasons:

- (a) Charlotte's commencement of this proceeding was reasonable as the administration the Estate required a judicial determination of the Purported Codicil's validity and thus she was similarly situated to an estate trustee who has a need to ensure that an estate is properly administered.
- (b) The issues giving rise to the Codicil Proceeding were caused by the Testator and as such this is a clear case where the applicant's costs of the Codicil Proceeding should be ordered to be paid from the Estate as:
 - (i) Charlotte's father had indicated that she should receive the Home Farm.
 - (ii) The Testator left a document in her handwriting and signed by her which purported to dispose of the Home Farm.
 - (iii) The Testator acknowledged that document to some of the respondents.
 - (iv) In 2016, the Testator made a contradictory written codicil, which was not probated, that purported to clarify her wishes.
- (c) Charlotte submits that she acted reasonably in asserting the validity of the Purported Codicil given that there was significant factual uncertainty regarding the deceased's state of mind and circumstances at the time that the Purported Codicil was written.

[7] In response, the Brothers note that the Purported Codicil was found invalid based on suspicious circumstances, lack of knowledge and approval and lack of testamentary capacity. The Brothers further note that the following findings were made at trial:

- (a) The Purported Codicil solely benefits Charlotte.
- (b) Charlotte played an instrumental role in procuring the Purported Codicil.
- (c) The Purported Codicil was procured by Charlotte in secrecy without the involvement of anyone other than the Testator, Charlotte and a notary public who witnessed the Testator's signature.
- (d) There were suspicious circumstances that reflected on the Testator's mental capacity to make a testamentary document. Further, Charlotte called a lawyer about one or two years prior to the making of the Purported Codicil to ask that he prepare a codicil for the Testator that would bequeath the Home Farm to her but had no recollection of doing so at trial.

[8] The Brothers submit that Charlotte cannot say that she played no role or bears no responsibility in the events leading to the making of the Purported Codicil, such that it can be said

that the issue arose from the Testator's own doing and such that Charlotte should get her costs fully paid from the Estate.

[9] Charlotte assisted the Testator in making the Purported Codicil, whose terms solely benefited the Applicant, while being aware of the Testator's mental decline are not circumstances that justify Charlotte's costs in litigating the validity of Purported Codicil be paid out of the Estate. Even an estate trustee is not entitled to recover their legal costs from an estate if they act unreasonably or in their own self-interest: See *Brown v. Rigsby*, 2016 ONCA 521, 350 O.A.C. 236 at para. 14.

[10] I agree with the Brothers' view that Charlotte's position is contrary to public policy as it would mean that all parties in a will challenge case would recover their costs from the estate even if a party procured the will through pressure, in suspicious circumstances and with knowledge of the testator's capacity issues. Those litigants would have nothing to lose. If the will was upheld, they would get the gift under the will. If the will was declared invalid, they would get their costs paid out of the estate. In my view, public policy does not support the conclusion that Charlotte's costs in respect of advancing the case that the Purported Codicil was valid should be paid out of the Estate.

[11] Accordingly, I find that it just that Charlotte shall bear her own costs of the Codicil Proceeding. Similarly, having been unsuccessful in the Investment Account Application, Charlotte shall bear her own costs of that application as well.

The Brothers' Claim for Costs

[12] This was a complex proceeding. No stone was left unturned by either party. Extensive documentary discovery was undertaken. Expert reports were delivered. More than 20 pre-trial examinations were conducted. Numerous motions, pre-trial conferences and trial management conferences were held.

[13] The Brothers seek costs of \$2,641,389.19 in respect of the Codicil Application and the Investment Account Application calculated as follows:

- (a) Costs on a partial indemnity basis up to January 5, 2022 in the amount of \$490,466.26; and
- (b) Costs on a substantial indemnity basis from January 5, 2022 onward in the amount of \$2,150,922.93

[14] Alternatively, the Brothers seek costs of \$2,308,289.61 in respect of the Codicil Application and the Investment Account Application calculated as follows:

- (a) Costs on a partial indemnity basis up to January 18, 2024 in the amount of \$1,290,056.41; and

(b) Costs on a substantial indemnity basis from January 18, 2024 onward in the amount of \$1,039,233.20.

[15] In the further alternative, the Brothers seek partial indemnity costs of \$1,985,447.65 in respect of the Codicil Application and the Investment Account Application.

[16] Charlotte submits the Brothers' costs claim for costs of \$2,641,389.19 in respect of the Codicil Application and the Investment Account Application is unreasonable and that the court should award partial indemnity costs to the Brothers in the amount of \$1,985,447.65 and that those costs should be paid out of the Estate.

Should the Brothers Costs be Paid out of the Estate?

[17] As I have found above, neither of the public policy grounds for ordering that costs be paid out of the Estate are engaged in this case. Accordingly, there is no reason to depart from the "loser pays" principle in this case.

Unreasonableness of the Amount of the Brothers' Costs

[18] Charlotte states that the Brothers' draft Bill of Costs delivered a few months before trial estimated fees for the period up to December 31, 2023 at about \$1.1 million. However, their total fees across the three final Bill of Costs for the period up to January 18, 2024 amount to about \$2 million. She states that their total fees actually amounted to about \$3.2 million. The Brothers did not provide an explanation in their reply submissions for this significant variation.

[19] Charlotte submits that the Brothers' costs with respect to the costs of the trial adjournments in 2021 and 2022 were \$154,665.24. She submits that this is unreasonable in light of their draft Bill of Costs which estimated a total of about \$63,000.00. Charlotte did not indicate what amount of costs she incurred for these adjournments nor was it readily apparent from a review of the Bill of Costs that she provided. In addition, she submits that the Brothers should bear the costs of these adjournments as they requested these adjournments. The Endorsements that were issued in respect of these adjournments do not suggest that the court found that the Brothers bear responsibility for the adjournments nor were costs orders made that reflect that view.

[20] Charlotte further submits that excessive time was spent reviewing and editing the affidavits of Anna Permaul and Marilyn Klug. I agree that it appears excessive for counsel to have spent 97.5 hours on these two affidavits.

[21] More significantly, Charlotte submits that the Brothers' costs are well beyond her reasonable expectations given that her actual costs were \$1,350,958.28, and the Brothers' actual costs were \$3,209,269.30. The Brothers submit that it should have been within Charlotte's reasonable expectation that their costs would be significantly higher than her costs as they had 19 witness while she had nine witnesses, delivered two expert reports while she delivered none and assembled the joint document books for the court. Regardless, the amount spent by the Brothers is beyond Charlotte's reasonable expectations.

[22] Charlotte submits that the hourly rates paid by the Brothers for their lawyers was unreasonable given that they were significantly higher than those charged by Charlotte's lawyers. I agree. In any event, an award of costs is not based on the actual costs incurred by a successful but rather by what is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances: *Apotex*, at para. 61.

[23] Each party alleges that the other party engaged in conduct that unnecessarily lengthened the duration of the proceeding. Having presided over the trial, it was my view that counsel did a relatively good job of being very well prepared and addressing the evidence of the witnesses.

Costs of the Brothers' Motion to Adjourn the Trial

[24] The Respondents brought a motion to adjourn the trial of this matter that had been scheduled to begin on January 17, 2022, on the grounds that the Applicant had tampered with a witness. The adjournment motion was never heard because there was no judge available to try this matter commencing January 17, 2022. In rescheduling the trial to begin on September 12, 2022, Justice B. Dietrich deferred the issue of the costs of the trial judge. Charlotte seeks her costs on a partial indemnity basis in the amount of \$15,800.22, inclusive of HST on the basis that she is entitled to costs pursuant to Rule 37.09(3) because the motion was abandoned. There is no basis to award costs to Charlotte in respect of this motion. The motion was not abandoned. Further, the Brothers obtained the rescheduling of the trial which they sought on the motion without the motion being heard on its merits. The Brothers submit that costs should follow the event, in other words, that such costs should be awarded to the successful party at trial. I agree.

Offers to Settle

[25] Charlotte made no offers to settle. The Brothers made two offers to settle which are summarized as follows:

	Offer – January 5, 2022	Offer – January 18, 2024
Codicil Application	<p>The Purported Codicil is declared invalid and the Home Farm shall be administered by the ETDL for the Estate in accordance with the terms of the Will.</p> <p>In the alternative, Charlotte may purchase the Home Farm whereby she will pay to the Brothers the sum of \$20 million for their share of the Home Farm.</p> <p>If the offer is accepted within 7 days of service of the offer, the parties shall</p>	<p>The Purported Codicil is declared invalid and the Home Farm shall be administered by the ETDL for the Estate in accordance with the terms of the Will.</p> <p>Charlotte shall pay to the Brothers 50% of their costs of the Codicil Proceeding</p>

	<p>bear their own costs for the Codicil Proceeding.</p> <p>If the offer is accepted after 7 days of service of the offer, Charlotte shall pay to the Brother their costs on a partial indemnity scale.</p>	<p>on a partial indemnity scale incurred to the date of the acceptance of the offer.</p>
<p>Investment Account Application</p>	<p>Assets held in the Margin Accounts shall be declared to be held in trust for the Estate. Charlotte shall take all steps to transfer the assets to the ETDL.</p> <p>Charlotte shall provide or direct BDO Canada LLP to provide an accounting of the National Bank Accounts from February 8, 2019 to the date of acceptance of this offer.</p> <p>Charlotte shall take all steps necessary to transfer the assets in the National Bank Accounts to the Bank of Nova Scotia Trust Company as Estate Trustee During Litigation forthwith.</p> <p>If the Offer is accepted within 7 days of service of the offer, Charlotte shall pay the Brothers' costs of the</p>	<p>Assets held in the Margin Accounts shall be declared to be held in trust for the Estate. Charlotte shall take all steps to transfer the assets to the ETDL.</p> <p>Charlotte shall pay to the Estate a lump sum of \$910,000 CDN being the funds that Charlotte withdrew from the Margin Accounts for her own use.</p> <p>The beneficiary designations on the National Bank Registered Accounts shall be declared as invalid.</p> <p>Charlotte shall pay \$272,735 CDN, being the total assets in the Registered Accounts as of December 16, 2019, to the Estate.</p> <p>Charlotte shall deliver an affidavit confirming that she has no knowledge of any bank accounts in Elma's name for the period from June 24, 2011 to December 12, 2019, other than the Margin Accounts and the Registered Accounts.</p> <p>Charlotte shall pay 50% of the partial indemnity costs of the Investment Account Application and the Management Fee Application incurred to the date of acceptance as agreed or assessed.</p>

	<p>Investment Account Proceeding at 50% of the partial indemnity scale.</p> <p>If the Offer is accepted after 7 days of service, Charlotte shall pay the Brothers their costs on a partial indemnity scale for both the Investment Account Application</p>	
<p>Management Fee Application</p>	<p>Charlotte shall deliver a judgment to the Counter Application to dismiss the Counter Application with costs with costs as described below.</p> <p>If this offer is accepted within 7 days of service of the offer, Charlotte shall pay the Brothers their fixed costs of \$10,000.00.</p> <p>If the offer is not accepted within 7 days, then Charlotte shall pay the Brothers their costs on a partial indemnity basis until written acceptance of this offer.</p>	<p>Note: This Application was “withdrawn” in December 2021. As a result there is no proposal related to its dismissal.</p>

[26] The Brothers submit that they are entitled to substantial indemnity costs from the date of service of the 2022 Offer and partial indemnity costs up to that date or alternatively, from date of service of the 2024 Offer and partial indemnity costs up to that date.

[27] Charlotte made no submissions in respect of these offers and the application of Rule 49.

[28] Rule 49.01.1 states that Rule 49 applies to applications as well as actions. Rule 49.01 states that under Rule 49 a reference to a “defendant” includes a respondent and to a “plaintiff” includes an applicant.

[29] There were three applications in this proceeding. Charlotte was the applicant in respect of the Codicil Application and the Management Fee Application. The Brothers were the applicants in respect of the Investment Account Application.

[30] The January 2024 offer did not expressly revoke the January 2022 offer. Further, the January 2024 offer did not implicitly revoke the earlier offer as common law principles of contract law relating to offer and acceptance do not apply to Rule 49. A Rule 49 offer to settle may only be

withdrawn in writing in accordance with Rule 49.04(1): *Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc.*, 2018 ONCA 839, 41 C.P.C. (8th) 246 at para. 25.

[31] In respect of the Codicil Application, it is unclear whether Charlotte obtained judgment that was less favourable than the January 2022 Offer. Although the judgment did not provide Charlotte with an option to purchase the Home Farm, it is unclear whether the \$20 million price tag for that option would have been favourable to Charlotte given the property's estimated \$23 million value. The judgment was as favourable or more favourable than the January 2024 Offer.

[32] In respect of the Investment Account Application, the Brothers obtained a judgment that was not as favourable as the January 2022 Offer as Charlotte was not ordered to direct BDO Canada LLP to provide an accounting of the National Bank Accounts from February 8, 2019 to the date of judgment. However, the Brothers obtained a judgment that was as favourable as or more favourable than the terms of the January 2024 offer.

[33] Accordingly, the Brothers are presumptively entitled to their costs on a partial indemnity basis to January 24, 2024 in respect of both the Codicil Application and the Investment Account Application, and on a substantial indemnity basis thereafter.

[34] Prior to both offers being made, Charlotte states that she withdrew her Management Fee Application on December 17, 2021.

Costs for the Management Fee Application

[35] Charlotte's application for compensation for her management of the Investment Accounts was withdrawn in December 2021 with only the issue of costs to be decided. The Brothers seek costs from Charlotte on a partial indemnity basis in the amount of \$17,768.69 inclusive of disbursements and taxes. Charlotte states that she abandoned this application at an early stage in the proceedings. She does not dispute the amount claimed.

[36] Rule 38.03(3) states that "[w]here an application is abandoned or is deemed to have been abandoned, a respondent on whom the notice of application was served is entitled to the costs of the application, unless the court orders otherwise." The Applicant has not advanced any good reason to not award costs of the abandoned application.

[37] The issues raised by this application do not fit within any public policy exception and thus there is no basis for these costs to be paid out of the Estate.

Conclusion

[38] Order to go as follows.

[39] Given the considerations described above, I find that it is reasonable, fair and proportionate to order that Charlotte shall pay the following amounts to the Brothers:

(a) The sum of \$2,200,000.00 in respect of costs of the Codicil Application and the Investment Account Application, including the motions to adjourn the trial and

(b) The sum of \$17,768.69 in respect of costs of the Management Fee Application.

[40] Charlotte shall pay the above amounts within 90 days failing which the costs payable to the Brothers shall be paid from Charlotte's share of the Estate as soon as practicable.

Mr. Justice M.D. Faieta

Date: January 15, 2026