

Vancouver, B.C.

Called to the bar: May 14, 1963

Discipline hearing panel: November 3, 1997

G.J. Lecovin, Chair, G.R. Toews and G.J. Kambeitz, Q.C.

H.C.R. Clark, for the Law Society

C.E. Hinkson, Q.C., for Mr. Small

Summary

While serving as executor of two estates, Mr. Small paid himself fees in excess of the maximum allowable for executors and trustees when he did not have approval of the court or the consent of the beneficiaries. On one of the estates he also paid himself legal fees when he was not entitled to do so and delayed unreasonably in finalizing accounts. The panel found that, given the size of that estate and the nature of the assets, the fees Mr. Small charged were excessive and reflected adversely on the integrity of the legal profession.

Facts

Mr. Small served as executor and trustee of the estates of two brothers for whom he had drafted wills. One of the brothers (JC) died in 1972 and the other brother (DC) died in 1987.

The JC estate

Prior to his death, JC had financially supported DC who suffered from mental illness and was at times incapable of managing his affairs. JC bought DC an annuity in exchange for which DC signed a \$60,000 promissory note.

JC's will provided that, after payment of a few small legacies, the estate would be held in trust for DC for his lifetime and then paid to the residual beneficiaries. The gross value of the estate was declared to be \$123,935 for probate purposes. The promissory note from DC was disclosed as an estate asset, but stated as having no value.

In 1975 Mr. Small passed his accounts as executor for the period 1972 to 1975, and the court approved a \$9,498 executor's fee. In 1977 Mr. Small received court approval to pay income out of the JC estate for DC's benefit.

Mr. Small prepared executor's accounts on the JC estate for the period 1975 and 1990, but did not provide these to the beneficiaries. By 1991, following a diminution of assets necessary for the life interest of DC, the JC estate was worth \$5,916. Of this amount, \$786 was paid out for accounting and legal fees and the balance of \$5,130 was paid to Mr. Small. This payment was in excess of his entitlement to an annual care and management fee of .4% of the estate value and 5% of the income. Mr. Small did not receive approval from either the court or the beneficiaries for this excess payment.

The DC estate

When DC died in 1987 the gross value of his estate was declared at \$117,091 for probate purposes. The \$60,000 promissory note and a \$1,715 bill for funeral services were disclosed as debts. Mr. Small liquidated the estate between 1987 and 1989. The bulk of the estate was comprised of speculative stocks that declined in value significantly over that period of time, due in part to the market crash of 1987. By the end of 1989, the gross value of the DC estate had dropped to \$46,501.

After resigning as a member of the Law Society in 1989, Mr. Small retained a law firm to wind up the DC and JC estates. By 1990 the new law firm concluded that there would be little if anything to be paid out to the beneficiaries after debts and expenses.

Mr. Small prepared executor's accounts on the DC estate. The accounts show that Mr. Small paid himself a total of \$26,014 as legal fees between 1988 and 1989, even though DC's will did not contain a clause to permit Mr. Small to charge legal fees (as opposed to executor's fees). As of 1991, the DC estate was worth \$21,186. Of this amount, \$4,153 was paid out as accounting and legal fees and the balance of \$17,033 was paid to Mr. Small as executor's fees.

In total, Mr. Small received \$43,047 as fees from the DC estate when his maximum entitlement under the *Trustee Act* was \$8,000. He did not receive approval of the court or the beneficiaries to receive these payments.

Mr. Small sought advice from an experienced estate practitioner at the time of these events.

Decision

Mr. Small's conduct in taking fees in excess of the maximum allowable for executors and trustees on two estate files, when he did not have the approval of the court or the consent of the beneficiaries, constituted conduct unbecoming a member of the Law Society.

On one of the estates he also paid himself legal fees when he was not entitled to do so and delayed unreasonably in finalizing accounts. The panel found that, given the size of that estate and the nature of the assets, the fees Mr. Small charged were excessive and reflected adversely on the integrity of the legal profession. His conduct constituted professional misconduct.

Penalty

The hearing panel ordered that Mr. Small:

1. be reprimanded;
2. wind up and pass final accounts in the two estates; and
3. pay costs of the discipline hearing.

Discipline Case Digest — 1998: No. 19 October (Small)