

Burnaby, B.C.

Called to the Bar August 26, 1988

**Discipline hearing panel:** January 21 and October 23, 1997

H.R. Berge, Chair, K.P. Jensen and G.J. Kambeitz, Q.C.

K.E. Neilson, Q.C., for the Law Society

Mr. Barron, on his own behalf

### **Summary**

While representing a party in a matrimonial proceeding, Mr. Barron held in trust proceeds from sale of the matrimonial home. Without first reaching an agreement with opposing counsel on disposition of the sale proceeds, Mr. Barron paid these out to the parties and to his firm for fees, in breach of his undertaking to opposing counsel and in breach of a court order. In another matter, Mr. Barron obtained a divorce order for his client on the basis that the divorce proceedings were undefended when he in fact knew that the respondent was represented by a lawyer.

### **Facts**

#### **H v. H**

In 1994 Mr. Barron represented Mrs. H in a matrimonial proceeding, including a division of family assets. The only substantial family asset was the matrimonial home. In September, 1994 Mr. Barron gave an undertaking to opposing counsel to hold the proceeds from sale of the home (close to \$68,000) in his trust account pending an agreement between the parties or a court order. The court also ordered, by consent and on the usual terms, that Mr. and Mrs. H be restrained from disposing of the family assets.

Mrs. H wanted to resolve disposition of the funds quickly so she could buy a replacement home. On September 29 Mr. Barron wrote to counsel for Mr. H with a proposal for disposition of the funds on a "without prejudice" basis. Having received no reply, Mr. Barron faxed a further letter to Mr. H's counsel on October 14 to say there was some urgency and asking for a reply. On October 21, Mr. Barron sent three faxed letters to Mr. H's counsel. The first letter described the various set-offs under his proposal and asked for approval of the proposal so that cheques could be written that same day. The second letter indicated a further adjustment to the funds to be disbursed. The third letter indicated that, since Mr. H appeared unavailable, the matter would have to be put over to the following week. Although counsel for Mr. H did not reply in writing, he did have telephone discussions with Mr. Barron on these matters.

On October 24 Mr. Barron rendered an account for \$2,795.46 to Mrs. H, and the funds were withdrawn from his trust account in breach of his undertaking and the court order. Mr. Barron said that he did not intend for the funds to be transferred.

On October 26, having received no reply to his letters, Mr. Barron wrote another letter to Mr. H's counsel, enclosing a draft notice of motion. He said he would file the notice, along with affidavit material and would ask the court to order payment of all funds to which his client was entitled. Mr. Barron asked Mr. H's counsel to impress on Mr. H that Mrs. H would seek special costs if the chambers application proved necessary. Mr. Barron also proposed a few more minor changes to the proposed disposition of funds in that letter and in a letter on October 28.

On November 3 Mr. Barron rendered a second account to his client and transferred \$847.71 from trust as payment, again in breach of his undertaking and the court order.

On November 4 Mr. Barron prepared and delivered a cheque for \$30,000 payable to Mrs. H and a cheque to a credit company. He also prepared a cheque payable to opposing counsel for Mr. H for \$30,120.40 and sent a letter to counsel for Mr. H proposing disbursement of the net proceeds: \$30,319.90 to Mr. H and

\$35,033.68 to Mrs. H. In that letter he stated that “[t]here is currently a balance of \$67,923.37 to be divided and an agreement finalized.” This was an untrue statement.

In his November 4 letter, Mr. Barron set a deadline for the agreement in order that he could provide Mrs. H with funds for a home down payment. He did not hear from opposing counsel until November 17 when he received a letter that addressed new issues, but none of the issues in Mr. Barron’s letter. On November 23 Mr. Barron wrote to Mr. H’s counsel addressing the new issues but without referring to the disposition of funds.

Mr. Barron and Mr. H’s counsel met on December 21 when Mr. Barron clarified that he had already paid out the money and he presented the cheque payable to opposing counsel on behalf of Mr. H.

Mr. Barron was frustrated by the failure of counsel for Mr. H to respond in a timely way. At no time, however, had he and counsel reached an agreement on the disposition of the funds held in trust, nor had he obtained any court order for disposition of the funds.

The disposition of the funds was not unfair or unreasonable to Mr. or Mrs. H.

### **W v. W**

In September, 1994, while representing Mrs. W in a divorce proceeding, Mr. Barron sent a petition for divorce to counsel for Mr. W (the same lawyer who had acted for Mr. H). Mr. Barron later sent a letter to counsel to confirm that opposing counsel would accept service on behalf of Mr. W. (In fact, personal service on Mr. W was required for the divorce proceeding, and service on his counsel was not sufficient.)

On October 7 Mr. Barron and opposing counsel appeared in court to deal with interim custody and access and with interim child support. In December, counsel for Mr. W sought to vary access. There was an exchange of correspondence between counsel for both parties, but no order was obtained. In February, 1995 counsel for Mr. W filed an appearance on behalf of his client (although this did not resolve the problem that the petition had not been personally served).

During the early summer, a family court counsellor worked on an access report and was in contact with counsel for both parties in this regard.

On June 10 Mr. Barron had the petition for divorce served on Mr. W personally. On July 14 he filed material to obtain the divorce order. Neither Mr. W nor his lawyer were given any notice of this application. On July 18 Mr. Barron obtained the divorce order on the basis the proceedings were undefended. The order provided that Mrs. W continue to have custody of the child and that Mr. W be granted specified access.

Mr. Barron delivered a copy of the desk order to counsel for Mr. W on July 28. On receiving this order, counsel for Mr. W asked that Mr. Barron immediately have it set aside on the issues of custody, access and maintenance. Mr. Barron refused, saying this would not be responsible or advantageous to his client.

### **Verdict**

Mr. Barron breached his undertaking and a court order by paying out trust funds when he had not reached agreement or obtained a court order for their disposition. This conduct constituted professional misconduct.

In obtaining a divorce for a client on the basis that the proceedings were undefended when he in fact knew the opposing party was represented by a lawyer, Mr. Barron violated Chapter 1, Rule 4(3) (Canons of Legal Ethics) and Chapter 11, Rule 12 of the *Professional Conduct Handbook*:

#### **Chapter 1, Rule 4(3)**

A lawyer should avoid all sharp practice and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests which do not prejudice the rights of the client or the interests of justice.

#### **Chapter 11, Rule 12**

A lawyer who knows that another lawyer has been consulted in a matter shall not proceed by default in the matter without inquiry and warning, unless expressly instructed by the client to the contrary, in which case such instructions should be communicated at the outset of the matter.

The panel found that Mr. Barron had options in giving notice that he failed to pursue prior to taking the divorce as undefended.

### **Penalty**

The hearing panel noted that, although Mr. Barron was under personal financial pressure and pressure from his client to release the funds, although there was no misappropriation of funds and although counsel for the other side may or may not have responded in a timely fashion, these were not mitigating factors and did not justify Mr. Barron's conduct.

Neither did the panel accept as a mitigating factor that the disposition of funds would have been the same had Mr. Barron made a court application. Mr. Barron had no right to make this determination unilaterally, nor was his conduct justified on this basis.

The panel directed that Mr. Barron:

- be suspended for two months commencing January 1, 1998; and
- pay \$5,000 as costs of the discipline proceedings on or before December 31, 1998.

*Discipline Case Digest — 1998: No. 5 April (Barron)*