

Victoria, B.C.

Called to the Bar: May 10, 1977

**Discipline hearing panel:** March 24 and April 16, 1993

W.T. Wilson, Chair, J.M. MacIntyre, Q.C. and W.M. Trotter, Q.C.

C. Wiseman, for the Law Society

The member did not appear in person or by counsel

### Summary

The member, while acting as co-trustee of a trust for an infant in 1991, removed the trust funds from B.C. and invested them in investments not authorized under the *Trustee Act*. He failed to comply with a B.C. Supreme Court order of March, 1992 to deliver the trust assets to the Public Trustee and he misappropriated to his own use \$124.91 U.S. from the trust. The hearing panel ordered that he be disbarred.

### Facts

In 1983 the member acted for an estate administrator in opposing claims made by T and her infant daughter D for a share of the estate. A settlement was reached, and the Public Trustee gave approval in June, 1984. The terms of the settlement included a provision for "the infant daughter to receive 40% of the net estate (the 'Trust') to be held on trusts contained in the Declaration of Trust."

The administrator was appointed trustee of the \$28,597 trust for D. There was subsequently contention between T, who wanted to release money from the trust for D's current needs, and the administrator, who resisted encroaching on the trust assets. The member offered to take over as trustee without fee and as a personal favour to the administrator. He expressed concern that the remainder of the estate might be depleted by legal costs if T continued legal proceedings. The member and S, who was then the lawyer for T, took over as co-trustees on December 22, 1985. The member took exclusive possession of the trust assets and held them in guaranteed investment certificates at a bank in Sidney, B.C.

In February, 1991 the member moved to Utah, saying he expected to stay a year or two. He did not notify T of his relocation. On April 26, 1991 T complained to the Law Society. The member then contacted T to tell her to call him at his office or residence if she had any enquiries or requests.

On June 2, 1991, following a letter from the Law Society, the member wrote a lengthy, detailed, sophisticated and apparently cooperative letter responding to the complainant's concerns and offering to transfer the trust funds to the Public Trustee. Through correspondence with the member, the Law Society was generally satisfied with the member's assurances that the trust would be transferred to the Public Trustee. But by November, 1991 the member called off efforts to transfer the trust; he instead moved it out of British Columbia.

The member first transmitted \$12,500 of the trust funds from the bank in Sidney to a bank in Vancouver with instructions to purchase \$10,800 U.S. and transfer those American funds to an account of A.L. at a bank in Manilla, the Philippines. The account at the Vancouver bank was the member's personal account with no indication of trust implications. His letter of instruction to that bank included the statement:

If the above draft in Canadian is insufficient, please make up the difference from my personal U.S. dollar account. Conversely, if there is an excess, please deposit this into my account.

After the bank purchased the U.S. dollars, there remained \$124.91 excess in the member's personal account.

On November 5 the member withdrew \$30,622.06, the balance of the trust, from the bank in Sidney in the form of a U.S. bank draft. Two days later he opened an account in the name of "Flemming J. Hansen DBA Hansen & Associates Lawyers Trust" at a bank in Provo, Utah and deposited the draft.

On five occasions in late November and early December, 1991 the member withdrew funds from the Utah account, the withdrawals totalling \$29,600. These funds were sent to A.L. or I Ltd. in the Philippines, bringing the total trust fund transfer to the Philippines to \$40,400. A \$47.58 balance was left in the Utah account.

The member told the Law Society that he could not agree to transfer the trusteeship to the Public Trustee because the administrator would not consent and he was bound to respect her wishes. When T asked for a \$200 advance of funds to purchase medical equipment for D, the member forwarded to her \$1,000 U.S. He urged her to trust him and not to call her lawyer. He said he could find international business investments that would yield high returns and would make the trust fund grow in "unprecedented ways." He also took an irregular approach to his duties as trustee by saying he was sending more money than requested, for T to use at her own discretion, and that he would not expect an accounting.

The Law Society learned in November, 1991 about the transfer of the trust funds to Utah, though not the transfer overseas. A complaints staff lawyer wrote to the member about his apparent breach of the *Trustee Act* and asked for his explanation. His response was first to reject the jurisdiction of the Law Society and then to say that a transfer to B.C. was not possible as the funds "are locked in until the end of March."

The Law Society insisted that the funds be brought back to British Columbia. When the member did not cooperate, the Discipline Committee ordered a citation.

On March 21, 1992 the B.C. Supreme Court made an ex parte court order that the Public Trustee become judicial trustee of the D trust fund in the place of the administrator, lawyer S and the member. The court ordered that the former co-trustees "forthwith return all assets, both real and personal, of the trust for the petitioner to the Province of British Columbia and deliver such assets to the Public Trustee as judicial trustee of the trust."

The member was properly served with that order, but he never complied with it. He has never returned any of the trust funds from Utah or the Philippines to British Columbia.

The Law Society amended its discipline citation in November, 1992 to include misappropriation of trust funds. In January, 1993 the member sent to the Law Society fax copies of documents which, if accepted as genuine, could tend to show that the Philippines investment was in the nature of a trust. A delay ensued while the Law Society insisted upon receiving, and ultimately did receive, the original documents. The originals were then examined by a forensic document expert. The discipline hearing panel found, based on the expert evidence, that many documents were signed on a date other than the date the documents bore. Among the documents is an affidavit of A.L., sworn January 14, 1993 in Manila. She deposed that the member had stipulated that he was investing in I Ltd. solely as trustee for D.

The hearing panel summarized its conclusions of fact:

- The member received \$28,579.60 as trust funds, together with accumulated income, as trustee for the infant beneficiary D and that the funds fall within the definition of trust funds under Law Society Rule 880(j).
- From November 5, 1991 on, the member failed to maintain the trust funds on deposit in accordance with Law Society Rules 803 and 805.
- The member as trustee invested the trust funds in investments not authorized by section 15 of the *Trustee Act* by paying various amounts to I Ltd. or his personal bank account between November 5, 1991 and December 30, 1991.
- The B.C. Supreme Court on March 31, 1992 ordered that the member deliver the trust assets to the Public Trustee. The member received notice of the order, but failed to comply with it in any way.
- The member misappropriated to his own use \$124.91 U.S. left in his account after the \$12,500 trust withdrawal in November, 1991.

All members of the panel recognized there was strong evidence of the member misappropriating all of the trust funds, and of the investment with I Ltd. being intended for his benefit directly. The documents he produced in January, 1993 could be seen as an attempt to invent a defence to the misappropriation

allegation after the fact. One member of the panel was prepared to find misappropriation of the whole trust amount on that basis; however, the majority could not find misappropriation of the whole amount had been established according to the high standard of proof required in Law Society discipline proceedings.

The member ceased membership in the Society at the end of 1992 for failure to pay fees.

**Decision**

The member's conduct constitutes professional misconduct.

**Penalty**

The hearing panel ordered that the member:

1. be disbarred immediately; and
2. pay costs of the discipline proceedings totalling \$7,800 by April 30, 1993.

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In early 1993 the Law Society liability insurance program, in settlement of an insurance claim against lawyer S who was co-trustee for the infant trust, paid the trust an amount equal to the full principal and accumulated interest.

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