

Re: Lawyer 1

Discipline hearing: January 7, 2004

Panel: Ralston S. Alexander, QC, Chair, Michael J. Falkins and Allan D. McEachern

Report issued: March 25, 2004, indexed as 2004 LSBC 04

Counsel: Jessica S. Gossen, for the Law Society and George F. Gregory, for the respondent

Summary

The respondent lawyer represented an estate and eight of the 11 estate beneficiaries in a *Wills Variation Act* proceeding brought by the Public Trustee on behalf of a minor beneficiary. The minor beneficiary was seeking a larger share of the estate and contemplating an application for maintenance under the *Family Relations Act*. The gross value of the estate was \$108,588. A lawyer acting for the Public Trustee wrote to propose a settlement on behalf of the minor beneficiary. In a letter to the executrix, the respondent explained the offer and recommended that it be accepted. He requested that the executrix canvass all the beneficiaries to determine if they were in favour of the settlement. The respondent copied his letter to all the beneficiaries, but did not enclose a copy of the letter from the lawyer for the Public Trustee. While, in hindsight, it might have been better if the respondent had enclosed that letter, his failure to do so was not a conflict between his duty of loyalty to the beneficiaries and the estate.

In the course of the estate matter, the executrix purchased the estate's main asset, the family home. The respondent relied on the executrix's statement that the other beneficiaries were in agreement with this purchase, although this was incorrect as she had not informed all of them. Although the respondent did not advise the individual beneficiaries of the executrix's intention directly or recommend that they obtain independent legal advice, this did not amount to a breach of duty of loyalty. The purchase was in the interests of the estate since the executrix had paid the highest appraised value for the property, the property would have been difficult to sell at that value and no one else had expressed an interest in purchasing it.

The panel concluded that the Law Society had failed to establish that the respondent had acted in a conflict of interest between his duty of loyalty to the estate and his duty of loyalty to the beneficiaries. The panel accordingly dismissed the citation and ordered that the Law Society pay costs.

Facts

In August, 1997 NC retained the respondent lawyer to act on behalf the estate of NC's father (TC) who had passed away in March.

TC had divided his estate equally among his 11 children, including FC who was a minor. FC's 19th birthday was on December 22, 1998.

An order for probate was granted on May 6, 1997. On March 19, 1998 the Public Trustee brought an application under the *Wills Variation Act* (WVA) on behalf of FC as a minor beneficiary of the estate. Both the estate and the estate beneficiaries were named as defendants in this action. As six months had elapsed between the granting of the order for probate and commencement of the WVA action, the beneficiaries had a potential defence to the action. However, because a lawyer for the Public Trustee purported to have filed a caveat in the appropriate registry, it was possible that the grant of probate was made in error and that it may

have been recalled.

At the time of the WVA action, counsel for the Public Trustee was also contemplating a claim against the estate for maintenance for FC.

In April, 1998 the respondent lawyer wrote to the beneficiaries (other than FC) suggesting that it would be economical for him to act for all of them in the WVA action. He invited them to seek independent legal advice. The respondent subsequently began acting for eight of the beneficiaries and filed a statement of defence for them.

On November 23, 1998 the respondent received a letter from the lawyer representing the Public Trustee, proposing settlement of all issues. The respondent wrote to the executrix, NC, enclosing a copy of this letter. In his letter to the executrix, the respondent canvassed the nature of the offer and the financial ramifications.

The respondent raised with NC the potential limitation defence to the WVA action. In his view, the WVA claim was not likely to succeed since FC had no special claim to a larger share of this small estate. He did, however, believe that a claim by FC for maintenance would succeed.

In his letter to NC, the respondent encouraged the beneficiaries to accept the offer. He recommended that, although unanimous agreement was not necessary, if not all beneficiaries agreed to settle, the executrix should seek court approval. He requested that the executrix canvass all the beneficiaries to determine if they were in favour of the settlement. The respondent sent a copy of his letter to NC to all the beneficiaries, but did not enclose a copy of the letter from the lawyer for the Public Trustee. He did not confirm the instructions of each of the beneficiaries himself. It appeared, however, that the beneficiaries did in fact approve the settlement.

In the course of the estate matter, NC purchased the house belonging to her father TC. She paid \$107,000, which was the higher of two appraisals. The house was the main asset of TC's estate, which had a total gross value of \$108,588.53. NC told the respondent that she had informed the other beneficiaries and that they were in agreement with her proposal. This information was not in fact correct; she had not informed all the beneficiaries of her intention. The respondent did not advise the beneficiaries directly of the executrix's intention to purchase the home and did not advise them to obtain legal advice with respect to the transaction.

A citation was issued against the respondent on May 28, 2002 for conflict of interest between his duty of loyalty to the estate and his duty of loyalty to the beneficiaries.

Verdict

Noting that the Law Society has the burden of proving the allegations set out in the citation, the hearing panel observed that the case against a professional person in a disciplinary hearing must be proved by a reasonable preponderance of credible evidence that is sufficiently cogent as to make it safe to uphold the findings with all the consequences for the professional person's career and status in the community.

The hearing panel could not find that the respondent lawyer had a conflict of interest between the duty of loyalty he owed the estate and the duty of loyalty he owed individual beneficiaries.

Although, with the benefit of hindsight, it would have been better if the respondent had provided a copy of the settlement proposal letter from the lawyer for the Public Trustee to all the beneficiaries, he did describe its contents in his own letter which the beneficiaries received. Moreover, none of the beneficiaries asked him for a copy directly. The panel agreed with the view of the respondent that the estate had no independent stake in the outcome save to ensure a maximum return to each of the beneficiaries in accordance with the

terms of the will. There was accordingly no conflict between the interests of the beneficiaries and the interests of the estate in this instance.

There was also no breach of loyalty in the respondent's failure to advise the individual beneficiaries of the fact that the executrix intended to purchase the family home from the estate. It was clear that the purchase was to the advantage of the estate because the home was located in a small rural community and the chances of obtaining the appraised value in any sale were dubious. The executrix paid the highest appraised value and there was no evidence that any other beneficiary or anyone else was interested in purchasing the property. The respondent carried out the transfer in the belief that the beneficiaries had approved it, which is what the executrix had told him. In those circumstances, the panel found that he was justified in acting on the information or, if he were in error in so acting, his actions did not amount to a breach of duty of loyalty.

Finally, the panel noted that the respondent did not breach his duty of loyalty to the beneficiaries by failing to advise them to obtain independent legal advice on the executrix's purchase of the family home as there was no clear obligation on him to do so in these circumstances.

The panel concluded that the Law Society had failed to establish that the respondent was guilty of professional misconduct, conduct unbecoming, incompetence or a breach of the rules. Accordingly, the citation was dismissed.

The Law Society was ordered to pay costs.