

No. 04/03

Alan Marsden

Royston, BC

Called to the Bar: January 13, 1981

Discipline hearing: December 15, 2003

Panel: Robert W. Gourlay, QC, as a one-Bencher panel by consent

Report issued: December 30, 2003, indexed as [2003] LSBC 47

Counsel: Jean P. Whittow, QC, for the Law Society and Michael P. Ragona, QC, for Mr. Marsden

## Summary

In 2002 Mr. Marsden represented the respondent spouse in a family law proceeding in which the plaintiff sought sole custody of the couple's child, financial relief and court approval to relocate the child to Ontario. In the course of representing the respondent on the application in BC Supreme Court, Mr. Marsden failed to inform his client of proposals for settlement, failed to obtain the client's instructions on matters at issue in the application, entered court orders as "by consent" when he did not have instructions to so consent, failed to properly inform or advise the client on terms of the orders and advised the court that he had no specific instructions respecting relocation of his client's child when he had either failed to obtain such instructions or knew or ought to have known that his client opposed the child's relocation. He also advised a Supreme Court master that he had sent an affidavit of the plaintiff to his client and had received no response when in fact the affidavit had not yet been sent by his firm and he had failed to verify the accuracy of the information he provided to the court.

Mr. Marsden admitted that he had failed to serve his client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that expected of a competent lawyer, contrary to Chapter 3 of the *Professional Conduct Handbook*, and that his conduct constituted professional misconduct. The Discipline Committee and discipline hearing panel accepted Mr. Marsden's admission and his proposed disciplinary action and accordingly ordered that he be suspended for 30 days, effective December 15, 2003, pay costs and be referred to the Practice Standards Committee for a practice review.

## Facts

In April, 2002 Mr. Marsden began acting for Mr. T, the respondent in a family law action brought by Mrs. T who sought sole custody of the couple's son, financial relief and court approval to relocate the child to Ontario. At an initial meeting with Mr. Marsden on April 6, Mr. T said that he wanted joint custody of the child, did not want Mrs. T and their son to move away to Ontario and was concerned about the high level of financial support that Mrs. T was seeking. As Mr. T was a long-distance truck driver and frequently away, arrangements were made for various means of communications. Mr. T did not attend any of the court proceedings.

### The April 30 interim order

On April 16 Mr. Marsden appeared in BC Supreme Court Chambers on behalf of Mr. T. Noting that he had only recently been retained and required instructions, Mr. Marsden asked the court for an adjournment. The court adjourned the application to April 30 and made several interim orders, granting Mrs. T sole custody of the child and Mr. T reasonable access, restraining the parties from dispersing assets and restraining removal of the child from Vancouver Island, all without prejudice. Mr. Marsden advised his client of this order and sought further financial information from him.

On April 30 Mr. Marsden again appeared in Chambers on behalf of Mr. T. Mr. Marsden and the lawyer for Mrs. T entered an order by consent, in part revising the court's order of April 16. Under the revised terms, Mrs. T retained interim sole custody and joint guardianship with Mr. T. Access arrangements were changed to allow Mr. T a four-day period of access at a home he had in the Lower Mainland and other access as agreed. He was to be responsible for transportation and provide one week's notice of visits. Interim child

support under the child support guidelines was to be based on an income of \$30,400.

By consent, all outstanding matters in the application, including interim spousal maintenance, lump-sum maintenance and relocation of the child, were to be adjourned to June 18, 2002. Mrs. T's lawyer said that he intended to argue the amount of Mr. T's imputed income. At no time prior to the April 30 proceeding did Mr. Marsden provide advice or obtain instructions from Mr. T as to a proposed settlement of the application and he did not obtain his client's instructions to enter an order "by consent" on April 30.

Mr. Marsden sent a copy of the April 30 order to his client who was pleased about the provision for expanded access to his son. The order, as drafted, failed to reflect the fact of joint guardianship, which had been a term ordered "by consent." After April 30 and prior to the continuation of the application on June 18, Mr. Marsden did not properly inform Mr. T about the application or obtain instructions. In particular, he did not inform Mr. T that the April 30 order had proceeded "by consent" or explain the implication of that. He did not tell Mr. T that the court had ordered joint guardianship, nor that the order as drafted omitted this term. He did not tell his client that certain terms of the order would be subject to further argument on June 18 and he did not seek instructions from him on the outstanding issues to be considered at that time, including relocation of the child.

#### The June 18 interim order

The application was continued on June 18. Mrs. T's lawyer sought lump sum spousal support and argued that Mr. T's income should be assessed at \$45,000 for the purpose of child support, which Mr. Marsden opposed. The court ordered that Mr. T pay Mrs. T \$5,000 as an advance on either maintenance or a division of assets. Mr. Marsden requested an adjournment, stating that he had sent his client an affidavit of Mrs. T but had received no response and had not been able to contact his client. In fact, Mr. Marsden's office did not send out the affidavit to his client until June 22, after completion of the June 18 proceeding, and Mr. Marsden acknowledged that he ought to have verified delivery before making this statement to the court. The court ordered that Mr. T produce financial statements and tax returns and further adjourned the application to July 3. Mr. Marsden also told the court that he had no submissions to make on relocation of the child. The court ordered that Mrs. T be allowed to relocate to Ontario with the child.

Following the June 18 hearing, Mr. Marsden wrote to his client, informing him generally of the June 18 order, including the requirement to provide further financial information, but omitting any reference to the order for joint guardianship or relocation of the child. He subsequently sent the client a draft of the order, which also omitted reference to these terms. In a subsequent meeting, Mr. T swore an affidavit expressly opposing relocation of the child.

#### The July 29 order

Mr. Marsden and the lawyer for Mrs. T agreed to a further adjournment of the matter to July 29. Mr. Marsden sent his client another affidavit from Mrs. T and served further materials on Mrs. T's lawyer. During this time, Mr. Marsden did not provide any advice to Mr. T or obtain his instructions respecting the matters at issue on July 29 and did not inform Mr. T of any proposals of settlement.

On July 29 Mr. Marsden tried to call Mr. T on his cell phone but without success. He subsequently appeared on the application and told the court that the matter would proceed "by consent." The terms of the agreement were that Mr. T's income would be set at \$40,000 for the support guidelines and that the lump sum payment to Mrs. T would be reduced from \$5,000 to \$2,500. Mrs. T's lawyer also sought an order for relocation of the child. Mr. Marsden said that he had no specific instructions in this regard and the court ordered that Mrs. T be allowed to relocate to Ontario with the child.

Mr. Marsden did not have Mr. T's instructions to consent to these terms. Mr. T expressed dissatisfaction with the outcome and, in November, 2002, made a complaint to the Law Society. In response to the complaint, Mr. Marsden said that his instructions were to obtain the best possible outcome in all the circumstances, whether by consent or not. He later acknowledged that he was obliged to obtain specific instructions prior to consenting to the substantive terms of the court orders.

#### Admission and penalty

In the course of representing Mr. T on the family law application in BC Supreme Court, Mr. Marsden failed to inform his client of proposals for settlement, failed to obtain the client's instructions on matters at issue in the application, entered terms of court orders as "by consent" when he did not have instructions to so consent, failed to properly inform or advise the client on the terms of orders and advised the court that he

had no specific instructions respecting relocation of his client's child. He had in fact failed to obtain such instructions or alternatively knew or ought to have known that his client opposed the child's relocation. He also advised a Supreme Court master that he had sent an affidavit to his client and had received no response when in fact the affidavit had not yet been sent by his firm. He failed to verify the accuracy of his information before making this representation to the court.

Mr. Marsden admitted that he had failed to serve his client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to that expected of a competent lawyer, contrary to Chapter 3 of the *Professional Conduct Handbook*, and that his conduct constituted professional misconduct. Pursuant to Law Society Rule 4-22, the Discipline Committee and the discipline hearing panel accepted Mr. Marsden's admission and his proposed disciplinary action. The panel accordingly ordered that Mr. Marsden:

1. be suspended for 30 days, from December 15, 2003 through January 15, 2004;
2. pay \$7,500 as costs of the discipline proceedings within two years; and
3. be referred to the Practice Standards Committee for a practice review, at his own expense.