

THE LAW SOCIETY OF BRITISH COLUMBIA

IN THE MATTER OF THE *LEGAL PROFESSION ACT*, SBC 1998, C. 9

AND

LYON THOMAS FINKELSTEIN

(a member of the Law Society of British Columbia)

RULE 3-7.1 CONSENT AGREEMENT SUMMARY

1. On June 28, 2023, the Chair of the Discipline Committee approved a consent agreement proposal submitted by Lyon Thomas Finkelstein (the “Lawyer”) under Rule 3-7.1 of the Law Society Rules (the “Rules”).
2. Under the proposal, the Lawyer admitted to the following conduct, and that it constitutes professional misconduct, conduct unbecoming the profession, or both, pursuant to s. 38(4) of the *Legal Profession Act*:
 - 1) In or about May and June 2019, in the course of representing and acting as executor for the estate of OW, the Lawyer did one or both of the following, contrary to one or both of rules 3.1-2 and 3.4-1 of the *Code of Professional Conduct for British Columbia* (the “Code”) and his fiduciary duties:
 - a) failed to notify the alternate executor under the will of his priority of executorship of the estate under s. 131 of the *Wills, Estates, and Succession Act* (“WESA”); and
 - b) failed to obtain an explicit renunciation of executorship from the alternate executor under s. 104 of the *WESA* before proceeding with an application for grant of probate.
 - 2) In or about June and July 2019, in the course of representing the estate of OW, and in an application for a grant of probate in respect of the will of OW in the Supreme Court of British Columbia, the Lawyer drafted materials, swore an affidavit, and filed materials that inadvertently omitted material information, contrary to rule 5.1-1 of the *Code*.

- 3) In or about September 2019, in the course of representing and acting as executor for the estate of OW, the Lawyer improperly withdrew from trust the sum of \$22,503.61 in executor fees, disbursements, and taxes from the estate, prior to receiving a signed release from a beneficiary of the estate waiving the passing of the Lawyer's accounts or obtaining a court order authorizing the payments, contrary to one or more of Rule 3-64 of the Rules, rule 3.6-1 of the *Code*, and the Lawyer's fiduciary duties.
- 4) In or about September 2019, in the course of representing and acting as executor for the estate of OW, the Lawyer improperly transferred the sum of \$143,625.94 from the client trust ledger for the estate of OW to the client trust ledger for the estate of JW, prior to obtaining the written consent of a beneficiary of the estate or a court order authorizing the estate distribution, in breach of one or both of Rule 3-64 of the Rules and the Lawyer's fiduciary duties.
- 5) Between August 2019 and March 2021, in the course of representing and acting as executor for the estate of OW, the Lawyer improperly withdrew from trust an additional sum of \$2,767.77 in legal fees, disbursements, and taxes from the estate, when he was not entitled to those funds, contrary to one or more of Rule 3-64 of the Rules, rule 3.6-1 of the *Code*, and the Lawyer's fiduciary duties.
- 6) In or about October 2019, in the course of representing and acting as executor the estate of JW, the Lawyer improperly withdrew from trust the sum of \$8,107.13 in executor fees, disbursements, and taxes from the estate, prior to receiving signed releases from the beneficiaries of the estate waiving the passing of the Lawyer's accounts or obtaining a court order authorizing the payments, contrary to one or more of Rule 3-64 of the Rules, rule 3.6-1 of the *Code*, and the Lawyer's fiduciary duties.
- 7) Between September 2019 and October 2020, in the course of representing and acting as executor for the estate of JW, the Lawyer improperly withdrew from trust an additional sum of \$8,754.58 in legal fees, disbursements, and taxes from the estate, when he was not entitled to those funds, contrary to one or more of Rule 3-64 of the Rules, rule 3.6-1 of the *Code*, and the Lawyer's fiduciary duties.
- 8) In or about 2019-2021, in the course of representing and acting as executor for the estate of OW and the estate of JW, the Lawyer failed to provide the expected quality of service and fulfill the Lawyer's obligations to the beneficiaries of the estates, contrary to one or more of Rule 3-55 of the Rules, rules 3.1-2, 3.2-1, and 3.2-2 of the *Code*, and the Lawyer's fiduciary duties, by failing to do one or more of the following:

- a) maintain contact and communicate with the beneficiaries of the estates in a timely, diligent, and efficient manner;
 - b) produce the records necessary to provide a full, timely accounting of the receipt or disbursement of the fiduciary property; and
 - c) consider all beneficiaries in administering the estates in their best interests.
3. Under the proposal, the Lawyer agreed to cease practising law as a sole practitioner by the end of 2023. The Lawyer anticipates retiring from the practice of law altogether by the end of 2023 but agrees that, should he wish to continue practising in 2024 or later, he will only do so in a firm setting that is approved by the Law Society, and where he has practice support from other lawyers.
4. The Lawyer has also agreed to pay back the total sum of \$9,013.55 to the beneficiaries of the estates. The Lawyer has previously paid back a portion of the improperly withdrawn fees for professional legal services to the beneficiaries, as described below. The sum of \$9,013.55 represents the balance that has not yet been repaid.
5. In making its decision, the Chair of the Discipline Committee considered an Agreed Statement of Facts dated June 23, 2023, and a letter to the Chair of the Discipline Committee dated June 23, 2023.
6. This consent agreement will now form part of the Lawyer's professional conduct record.
7. Pursuant to Rule 3-7.1(5) of the Rules, and subject to Rule 3-7.2 of the Rules, the Law Society is bound by an effective consent agreement, and no further action may be taken on the complaint that gave rise to the agreement.
8. The admitted facts set out in the Agreed Statement of Facts have been summarized below.

Summary of Facts

Member Background

9. The Lawyer was called to the bar and became a member of the Law Society of British Columbia on May 14, 1969.
10. Since April 1997, the Lawyer has practised law as a sole practitioner in Courtenay, British Columbia, primarily in the area of real estate, family law, wills and estates, and civil litigation.

Background Facts

11. This matter relates to the administration of the estates of OW and JW by the Lawyer from 2019 to 2021.
12. In her will executed on July 24, 2000, OW appointed her daughter JW as executor of her estate, and her son RW as alternate executor.
13. OW's will divided her estate equally between JW and RW.
14. OW's will did not have a charging clause authorizing the executor to charge professional fees for his estate-related work.
15. OW died on February 3, 2019.
16. In or about March 2019, the Lawyer was retained by JW to draft her will.
17. In her will, JW appointed the Lawyer as executor of her estate, and divided the residue of her estate equally between RW's daughters, KW and EW.
18. JW's will also did not have a charging clause authorizing the Lawyer to charge professional fees for his estate-related work.
19. JW died on May 9, 2019.
20. Upon her death, JW's estate consisted primarily of her 50% interest in OW's estate, which had not yet been distributed. OW's estate was therefore to be divided among RW (50%), and KW and EW as the beneficiaries of JW's estate (50%) (collectively, the "Beneficiaries").

Estate of OW

21. On May 10, 2019, the Lawyer advised RW that he was the executor of JW's estate, and that he was also working on OW's estate and arranging to list her house for sale.
22. On or about May 14, 2019, the Lawyer delivered to RW an unfiled copy of a Notice of Proposed Application for probate of OW's estate.
23. The Lawyer did not notify RW that RW's designation as alternate executor in OW's will gave him priority of executorship of OW's estate. The Lawyer also did not confirm whether RW wished to renounce his executorship, or obtain RW's explicit consent to proceed with the proposed application.
24. RW did not file a Notice of Dispute to the Notice of Proposed Application.

25. On June 18, 2019, the Lawyer filed a Submission for Estate Grant for OW's estate and supporting affidavits, prior to a grant of probate of JW's estate.
26. The supporting affidavit of the Lawyer exhibited a copy of OW's will that included the designation of RW as alternative executor. However, the Submission for Estate Grant contained inadvertent errors and omissions that were attributable to the Lawyer's misunderstanding of the applicable legal principles, with the result that the Court was not made aware that RW had priority of executorship over the Lawyer.
27. On July 19, 2019, the court made an order for a grant of probate with the Lawyer as executor of OW's estate.
28. On August 1, 2019, the Lawyer emailed RW to advise him of the grant of probate and his appointment as executor of OW's estate, as well as the pending sale of OW's home.
29. The sale of OW's home completed on September 19, 2019, and the net proceeds of sale were deposited in the Lawyer's trust account to the credit of OW's estate.
30. On September 20, 2019, the Lawyer withdrew an executor fee and taxes of \$22,503.61 from OW's estate funds held in trust prior to obtaining RW's consent or authorization from the court. The fee was calculated at the maximum 5% permitted under s. 88 of the *Trustee Act*.
31. On September 28, 2019, the Lawyer transferred \$143,625.94 from the trust funds deposited for credit to OW's estate to credit JW's estate, prior to obtaining RW's consent or authorization from the court. This sum represented approximately 50% of the net proceeds realized from the sale of OW's house.
32. Between August 27, 2019 and March 15, 2021, the Lawyer withdrew further fees, disbursements, and taxes of \$2,767.77 for what he regarded as professional legal services related to the administration of OW's estate, despite the absence of a charging clause in OW's will authorizing the Lawyer to charge professional fees for estate-related legal services.
33. The Lawyer did not deliver invoices to RW at the time of withdrawal of the funds or in response to subsequent requests made by RW.

Estate of JW

34. On September 30, 2019, the Lawyer filed a Submission for Estate Grant for JW's estate.
35. On October 15, 2019, the court made an order for a grant of probate with the Lawyer as executor of JW's estate.

36. On October 18, 2019, the Lawyer withdrew an executor fee and taxes of \$8,107.13 from JW's estate funds held in trust, prior to obtaining the consent of KW and EW or authorization from the court. This fee was calculated at the maximum 5% permitted under s. 88 of the *Trustee Act*.
37. Between September 30, 2019 and October 14, 2020, the Lawyer withdrew further fees, disbursements, and taxes of \$8,754.58 for what he regarded as professional legal services related to the administration of JW's estate, despite the absence of a charging clause in JW's will authorizing the withdrawal of legal fees from the estate.
38. The Lawyer did not deliver invoices to KW and EW at the time of withdrawal or in response to subsequent requests made by RW.

Communication with the Beneficiaries

39. On May 10, 2019, RW emailed contact information for KW and EW to the Lawyer.
40. Between February 4, 2020 and March 17, 2021, the Lawyer and RW exchanged emails outlining RW's concerns about the Lawyer's delay in administering the estates, and requests for documents and invoices made by RW which were not fully complied with by the Lawyer.
41. The Lawyer also did not communicate directly with KW and EW at any time, but instead relied on RW as a conduit.
42. On April 8, 2022, in the course of the Law Society's investigation, the Lawyer apologized to RW for his failure to provide the requested invoices and queried whether RW still wished to have them.
43. On April 11, 2022, upon RW's request, the Lawyer delivered copies of six invoices to RW for OW's estate file.
44. The Lawyer did not provide invoices to the Beneficiaries for the fees withdrawn from trust for the estate of OW in a timely manner, and for the estate of JW at any time.

Lawyer's Explanation

45. At the time the conduct occurred, the Lawyer advises that he misunderstood the priority of executorship under the *WESA*. In particular, the Lawyer believed that he had statutory authority to assume the role of executor of OW's estate under s. 145 of the *WESA*.

46. The Lawyer was unaware of the legal principle that displaces the chain of executorship allowed by s. 145 of the *WESA* when the will in question names an alternate executor who has not renounced their executorship.
47. The Lawyer acknowledges that due to his misunderstanding of the law, he failed to put all material facts before the court in the application materials for OW's estate.
48. The Lawyer also acknowledges that he gained a personal financial benefit by billing for his services as a result of his appointment as executor of OW's estate.
49. In respect of both estate files, the Lawyer acknowledges that he failed to obtain the written consent of the Beneficiaries prior to withdrawing the executor fees from trust, and prior to transferring \$143,625.94 from funds held in trust for OW's estate to JW's estate trust funds. The Lawyer obtained signed Consents to Interim Distribution from each of the Beneficiaries a few days after each of his withdrawals from trust.
50. The Lawyer mistakenly believed that he was entitled to charge separately for professional legal services provided to both estate files. Upon reviewing these fees in the course of the Law Society's investigation, the Lawyer repaid a portion of them to the beneficiaries in 2021-2022. He has agreed to repay the balance of them as part of this consent agreement. The Lawyer now understands that he was not permitted to charge for professional legal services provided to the estates in the absence of charging clauses in the wills.
51. In respect of both estate files, the Lawyer further acknowledges that he failed to maintain timely and informative communications with the Beneficiaries.

Aggravating Factor

52. The Lawyer has a professional conduct record dating back to 1983. It includes eight conduct reviews, a practice standards referral, and a citation for failure to pay a practice debt and report the resulting judgment.

Mitigating Factors

53. The Lawyer has accepted responsibility for his conduct and has recognized that his actions have fallen short of the expectations of the Law Society. He has expressed his sincere apology.
54. The Lawyer is currently 91 years old and has agreed that he will cease practising law as a sole practitioner by the end of 2023. He also agreed to repay the Beneficiaries.