2013 LSBC 18
Report issued: July 04, 2013
Citation issued: February 28, 2012

The Law Society of British Columbia
In the matter of the *Legal Profession Act*, SBC 1998, c.9
and a hearing concerning

BRIAN JOHN KIRKHOPE

Respondent

Decision of the Hearing Panel on Facts and Determination

Hearing date: December 3, 2012
Panel: Thomas P. Fellhauer, Chair, Ralston Alexander, QC, Lawyer, Patrick Kelly, Public representative

Counsel for the Law Society: Jaia Rai
Counsel for the Respondent: Henry Wood, QC

Background

The Citation

[1] The citation in this matter was authorized by the Discipline Committee on January 26, 2012 and issued on February 28, 2012. Brian John Kirkhope (the "Respondent") has admitted that he was properly served with the citation.

[2] The citation sets out the nature of the conduct to be inquired into:

> On or about September 15, 2010, in the course of representing your client (hereinafter referred to as "PR") in a family law proceeding, you accepted instructions from your client to hold in trust a support payment that your client was obligated to pay on September 15, 2010 pursuant to a Supreme Court Order made on July 13, 2010 when you knew or ought to have known that by doing so you were acquiescing or facilitating a breach of that Order by your client.
>
> This conduct constitutes professional misconduct, pursuant to section 38 of the *Legal Profession Act*.

Facts

[3] The Law Society and the Respondent filed an Agreed Statement of Facts ("ASF").

[4] In addition to the ASF, the Panel also heard evidence from the Respondent.

[5] The Panel accepts the whole of the ASF including the tabbed attachments. For ease of reference in this hearing report, we are summarizing below some of the facts set out in the ASF.

1. Mr. Kirkhope was called and admitted as a member of the Law Society on August 31, 1990.

2. Mr. Kirkhope practises primarily in the area of general civil litigation, including family law.

3. Mr. Kirkhope represented PR in family law proceedings involving PR's former spouse, ("MR"). MR was represented by counsel.

4. The issues between the parties included spousal support and division of assets. Prior to January 2010, the parties reached an agreement whereby PR would pay to MR interim spousal support in the amount of $1,800 per month.

5. Mr. Kirkhope wrote to counsel for MR on January 12, 2010 to advise that PR was unable to make the payments. As a consequence, counsel for MR advised that MR would be proceeding with her claim for retroactive interim spousal support.

6. The application for interim spousal support (and a cross-application seeking orders for asset valuations) was heard on July 12, 2010 in BC Supreme Court. Judgment was reserved to July 13, 2010. On that day, the Judge delivered oral reasons for judgment and made an order (the "July 2010 Order"). The July 2010 Order provided that PR was required to pay monthly interim spousal support payments of $2,028 commencing on July 15, 2009 (the previous year). Arrears of support were to be dealt with when the assets were divided.

7. Later that day, on July 13, 2010, Mr. Kirkhope sent a reporting email to PR in which he explained the decision and the financial consequences to PR.

8. PR made interim spousal support payments to MR in July 2010 and August 2010, in accordance with the terms of the July 2010 Order.

9. Mr. Kirkhope drafted the July 2010 Order and delivered it to counsel for MR by letter dated July 22, 2010. This draft of the July 2010 Order contained several omissions that were subsequently included in the entered order, but do not particularly affect the obligation to pay monthly interim spousal support.

10. On August 13, 2010, Mr. Kirkhope wrote to counsel for MR to request a signed copy of the July 2010 Order, amongst other things.

11. Counsel for MR responded by letter dated August 25, 2010. In that letter, she wrote:

> Upon review of your draft Order we have noted some discrepancies and are awaiting a copy of the transcript of the Reasons for Judgment order by [the Judge] to arrive.

As at today's date no transcript was available from the court file.

12. On September 10, 2010, Mr. Kirkhope spoke with counsel for MR on the telephone regarding the delay in signing the July 2010 Order and was advised that the transcript of the Reasons for Judgment had not yet been received. He also asked counsel for MR to obtain her client's instructions regarding settlement of the remaining issues.

13. PR was also required to make a spousal support payment to MR on September 15, 2010 (the "September 15 Spousal Support Payment") pursuant to the terms of the July 2010 Order. Instead of making the September 15 Spousal Support Payment, PR delivered the funds to Mr. Kirkhope to hold in trust.

14. On September 15, 2010:

(a) Mr. Kirkhope received the following email from PR:

> … Payment to [MR] this month = $2,028 - $102.07 = $1,925.93.
>
> As you know, I believe that this month I should be paying [MR] $369,600.00 in full and final settlement, but in the meantime I shall bring in a cheque for $1,925.93, for you to hold as agreed.

(b) Mr. Kirkhope met with PR and accepted instructions from PR to hold the September 15 Spousal Support Payment in trust and accepted from PR a cheque in the amount of $1,925.93 which he deposited into his trust account.

(c) Mr. Kirkhope wrote a letter dated September 15, 2010 to counsel for MR in which he stated:

…

> However, you still have not commented on the overall issue remaining between our clients. That is, whether the pension and house division proposed by my client is acceptable? This proposal was before the Court in mid-July, although the concept was first suggested to your client about a year ago. In my client's view, MR has had sufficient time to respond to the proposal.
>
> To that end, he has instructed me to receive a cheque for his September spousal support

payment and to hold same in trust. He feels that he should be making an equalization payment today – not a spousal support payment.

He also feels that your client's silence on the proposal is planned, to cause him ongoing monthly expense, rather than concluding all issues between them in a timely manner.

You and I did speak about this proposal on September 10 and I was planning to contact you at the end of this week to determine if you had instructions. PR's instructions of today have necessitated this earlier-than-planned communication.

[emphasis added]

15. When she did not receive the September 15 Spousal Support Payment, MR made a complaint to the Law Society by letter dated September 22, 2010 (the "Complaint").

16. On September 29, 2010, counsel for MR responded to Mr. Kirkhope's September 15, 2010 letter and other communications regarding settlement. In that letter, she took the position that PR was in contempt of the July 2010 Order.

17. On October 1, 2010, a staff lawyer at the Law Society telephoned Mr. Kirkhope and advised him of the Complaint. Following that call, Mr. Kirkhope contacted PR and issued PR a cheque for $1,925.93 from his trust account. PR then promptly made the payment to MR representing the September 15 Spousal Support Payment.

18. The terms of the July 2010 Order were settled by the parties on October 27, 2010 and the July 2010 Order was entered on October 28, 2010. Mr. Kirkhope provided a copy of the entered July 2010 Order to counsel for MR on the same date. The issues between the parties were resolved by way of a final order made by consent on December 6, 2010.

[6] In the course of the Law Society's investigation of the Complaint, the Respondent provided his written answers to the Law Society. In his letter to the Law Society dated November 29, 2011 (attachment 26 to the ASF), he provided his explanation for why he did not pay the September 15 Spousal Support Payment to MR. Much of that explanation is protected by solicitor-client privilege and cannot be quoted in this decision.

[7] In his testimony before the Panel, the Respondent confirmed that his position was as set out in his responses to the Law Society which were attached to and included as part of the ASF.

ISSUES

Issue 1

[8] On September 15, 2010, was there a court order in effect that required PR to pay interim spousal support to MR commencing on the July 15, 2009 and continuing on the 15 day of each and every month thereafter until further order of the Court?

Issue 2

[9] If Issue 1 is answered in the affirmative, was the Respondent acquiescing or facilitating a breach of the July 2010 Order when he accepted instructions from PR to hold in trust the support payment that PR was obligated to pay on September 15, 2010?

Issue 3

[10] If Issues 1 and 2 are answered in the affirmative, did the Respondent do so when he knew or ought to have known that by doing so he was acquiescing or facilitating a breach of the July 2010 Order by PR?

Issue 4

[11] If Issues 1, 2 and 3 are answered in the affirmative, does the Respondent's conduct constitute professional misconduct?

DISCUSSION

Issue 1

[12] From the ASF, it is clear that the July 2010 Order delivered orally on July 13, 2010 was effective immediately. The terms of the July 2010 Order provided that PR was obligated to pay to MR monthly interim spousal support commencing on July 15, 2009 and continuing on the 15 day of each and every month thereafter until further order of the Court.

[13] The Panel also noted that the final entered July 2010 Order did not substantially differ from the draft July 2010 Order that the Respondent prepared with respect to the obligation to pay monthly interim spousal support payments.

[14] The Panel also noted that the Respondent did not raise with counsel for MR the issue of the obligation to pay at any time.

[15] The Panel finds that the provisions of the July 2010 Order were sufficiently clear as at September 15, 2010 and that the terms of the July 2010 Order did obligate PR to make a monthly interim spousal support payment on September 15, 2010. The Panel accepts the Law Society's position that, under the terms of the July 2010 Order, the arrears provision of the July 2010 Order only pertained to "unpaid back support" prior to the July 2010 Order and that the purpose of the July 2010 Order requiring payment of interim spousal support would be rendered meaningless if it permitted PR to pay no monthly spousal support until the assets were divided.

[16] The Panel finds Issue 1 is answered in the affirmative.

Issue 2

[17] According to the ASF, the Respondent accepted instructions from his client to hold the September 15 Spousal Support Payment in trust and accepted from his client, PR, a cheque in the amount of $1,925.93 which he deposited into his trust account.

[18] The Respondent did not deliver the September 15 Spousal Support Payment that he received in his trust account to MR or counsel for MR.

[19] The Respondent knew that his client did not intend to make an additional payment to MR to satisfy the September 15 Spousal Support Payment to MR.

[20] The Respondent confirmed this plan in his letter to counsel for MR dated September 15, 2010:

> To that end, he has instructed me to receive a cheque for his September spousal support payment and to hold the same in trust. He feels that he should be making an equalization payment today – not a spousal support payment.
>
> He also feels that your client's silence on the proposal is planned, to cause him ongoing monthly expense, rather than concluding all issues between them in a timely manner.

[21] The Respondent held the September 15 Spousal Support Payment to MR in his trust account until October 1, 2010 when a staff lawyer at the Law Society telephoned him about the Complaint.

[22] The Panel finds that:

> (a) by accepting instructions from his client to hold the September 15 Spousal Support Payment in trust,
>
> (b) by accepting from the client a cheque in the amount of $1,925.93, which he deposited into his trust account, and
>
> (c) by not paying that amount to MR or to counsel for MR on September 15, 2010,

the Respondent was acquiescing or facilitating a breach of the July 2010 Order by his client.

[23] The Panel finds Issue 2 is answered in the affirmative.

Issue 3

[24] The Respondent says that he did not believe that his client had an obligation to make a monthly spousal support payment on September 15, 2010.

[25] However, there are other instances in which the Respondent has made statements that do not support this view.

[26] On July 13, 2010 (which was the same day as oral reasons for the July 2010 Order were delivered) the Respondent sent an email reporting to his client.

[27] This email was written and delivered to the client very shortly after the hearing and the Respondent states that it is his usual practice to report on the outcome of a hearing immediately after the hearing. From this, we conclude that this email represented the Respondent's belief as to what had been ordered and what the consequences of the July 2010 Order were. The fact that the Respondent does a rough calculation of the impact of the July 2010 Order on his client's monthly cash flow indicates that the Respondent believed that his client had an unequivocal obligation to make these monthly payments.

[28] The Respondent acknowledged in his November 29, 2011 response to the Law Society that MR would have been able to garnishee his trust account. In saying that, the Respondent must have believed that the interim spousal support payment obligations within the July 2010 Order gave MR the right to garnishee his trust account. If there was not a legal obligation to pay spousal support, then MR would not have been able to garnishee his trust account.

[29] In addition, it is clear from the communications between the Respondent and PR, and from the Respondent's November 29, 2011 letter to the Law Society that PR was very reluctant to make these interim spousal support payments. It is also clear that PR believed that an agreement as to the division of assets was actually in place, when in fact there was no such agreement.

[30] On September 15, 2010 the Respondent received an email from his client which stated:

> … Payment to [MR] this month = $2,028 - $102.07 = $1,925.93.
>
> As you know, I believe that this month I should be paying [MR] $369,600.00 in full and final settlement, but in the meantime I shall bring in a cheque for $1,925.93, for you to hold as agreed.

There was no final agreement or settlement. Yet it appears that the Respondent did not attempt to clear up this misunderstanding by his client.

[31] In his letter dated November 29, 2011 to the Law Society, the Respondent says he considered the consequences of non-compliance of the July 2010 Order:

> I was concerned that he was going to refuse to pay anything and, anticipating that more courts applications were likely to be necessary down the road, as his counsel I wanted to avoid anything that might be interpreted as blatant non-compliance …

This shows that the Respondent turned his mind to the fact that non-payment of interim monthly spousal support would be interpreted as non-compliance by his client.

[32] The Respondent relies on a July 16, 2010 email to his client as evidence that on September 15, 2011 the Respondent believed that the reference to arrears in the July 2010 Order permitted the non-payment of the September 15 Spousal Support Payment. However, this email is a response to a hypothetical question from PR and does not provide us with compelling evidence of the Respondent's beliefs on September 15, 2010. At best, the Respondent's explanations in his emails and in his responses suggest unclear thinking on his part. For example, the Respondent appears to have concluded that taking the September 15 Spousal Support Payment and holding it in his trust account was somehow acceptable because it might avoid a breach by his client.

[33] In addition, the Respondent immediately returned the September 15 Spousal Support Payment to his client on October 1, 2010 after being contacted by the Law Society. Although the Respondent used words to the effect of "when the Law Society tells you to do something, you do it", it suggests to the Panel that the Respondent did not feel strongly that his beliefs were correct.

[34] We find that the Respondent's belief that holding the funds in trust was not a breach of the July 2010 Order was not a reasonable belief.

[35] We find that the Respondent was under constant pressure from his client to settle this matter. There are numerous instances in the statements made by the Respondent and in the notes and emails between the Respondent and his client that indicate that the client was angry and frustrated with the pace of the proceedings and suggest that the Respondent was responding in a way to redirect and deflect that anger and frustration.

[36] It is clear from the Respondent's explanation to the Law Society in his letter dated November 29, 2011 that the strategy employed by the Respondent and his client was to use the non-payment of the September 15 Spousal Support Payment as leverage to compel MR and counsel for MR to respond more quickly to their settlement proposal on the division of assets so that the interim spousal support payments would end.

[37] The Respondent has stated that he did not know that his actions constituted a breach of the July 2010 Order. However, the Panel finds that, even if the Respondent did not know that, the Respondent should have known that non-payment of the September 15 Spousal Support Payment was a breach of the July 2010 Order and further that his participation in that breach was improper.

[38] The Panel finds that Issue 3 is answered in the affirmative.

Issue 4

[39] The test for professional misconduct is the "marked departure" test set out in *Law Society of BC v. Martin*, 2005 LSBC 16 ("*Martin*"). In particular, the test as set out in Martin is as follows:

> Whether the facts as made out disclose a marked departure from the conduct the Law Society expects from its members; if so, it is professional misconduct.

[40] There is a second component to the test in *Martin* that requires attention in order to properly apply the test. The impugned behaviour being a "marked departure" from the conduct the Law Society expects of its members must also amount to gross culpable neglect of the member's duties as a lawyer. This requires more than simple negligence. There must be an element of advertence to the wrongdoing.

[41] Counsel for the Law Society and counsel for the Respondent both referred the Panel to the decision of a Bencher Review Panel in *Law Society of BC v. Scholz*, 2009 LSBC 33. That review affirmed the decision of a hearing panel's finding that releasing, without consent, funds that were required to be held pursuant to a Court Order constitutes professional misconduct.

[42] The Bencher Review Panel quoted the hearing panel on penalty as follows:

> All citizens have a duty to observe Court Orders. This is particularly true for members of the Law Society, who are Officers of the Court and owe a duty to maintain the integrity of our legal system. Courts and Court Orders are at the core of our legal system.

[43] It is the view of this Panel that there is no circumstance in which a member of the Law Society can lawfully participate in a program that has as an outcome of the intentional breach of a Court Order.

[44] Accordingly, the Respondent's active participation in his client's strategy to withhold payment of the September 15 Spousal Support Payment as motivational leverage was entirely inappropriate.

[45] In support of the proposition that a lawyer may not rely on instructions from a client to justify improper behaviour, counsel for the Law Society referred to the decision of the hearing panel in *Law Society of BC v. McCandless*, 2010 LSBC 03, in which the hearing panel stated (at paragraph [56]):

> The Respondent was not at liberty to ignore his professional obligations simply because of TIC's instructions. That principle is drawn from *Law Society of Upper Canada v. Di Francesco*, [2003] LSDD No. 44. That panel held at paragraph 26 that:
>
> > The member had an obligation not to allow himself to be a mere unquestioning instrument of his client's wishes …

[46] It is accordingly our view that when, as in the situation before this Panel, a client asks his or her lawyer to do something that is inconsistent with the lawyer's professional obligations, that lawyer must say no. There is no flexibility on this issue.

[47] The decision of the Benchers on Review in *Re: Lawyer 12*, 2011 LSBC 35 ("*Lawyer 12*") is the most

recent statement by the Benchers of the test for professional misconduct.

[48] Both the majority and the dissent (on other grounds) of the Bencher Review Panel in *Lawyer 12* agreed that the *Martin* test of a marked departure from expected behaviour required, in addition, an element of culpable neglect.

[49] With this determination, both majority and dissenting decisions in *Lawyer 12* agreed that if the "marked departure" alleged was the result of events beyond the lawyer's control or the result of an innocent mistake, it was likely not a marked departure after all. In that outcome, the culpable neglect component of the *Martin* test was affirmed.

[50] We have considered the decision of the Bencher Review Panel in *Re: Lawyer 10*, 2010 LSBC 02 ("*Lawyer 10*") on the test for professional misconduct. To the extent that the application of the *Lawyer 10* reasoning would yield a different result on the facts of this case, this Panel states a preference for the reasoning in *Lawyer 12* and *Martin*.

[51] We adopt and reiterate the reasoning of the dissent decision in *Lawyer 12*. In this regard the dissenting Benchers were in accord with the majority - it was on the application of the test to the facts that the dissent was developed. The test (for professional misconduct) was articulated in *Lawyer 12* at paragraphs [50] and [51] as follows:

> *Martin* describes the threshold as gross culpable neglect. That is to say that the culpability is of an aggravated character and not a mere failure to exercise ordinary care.
>
> If the conduct of the lawyer falls into the latter category then it is not a marked departure from the norm, and thus the lawyer cannot be found to have committed professional misconduct. If the conduct rises to the level of the former category, then there must be a finding of professional misconduct and there is no need to look any further.

[52] The Panel finds that the Respondent's indifferent approach to and demonstrated lack of respect for the effect of a Court Order evidences a marked departure from the conduct that the Law Society expects of its members.

[53] We are also satisfied that the Respondent has demonstrated, in his responses to the Law Society and in his evidence provided to this Panel at the hearing, the necessary degree of gross culpable neglect to support a finding of professional misconduct.

[54] This Panel finds that the Respondent's conduct, disregard of the July 2010 Order and his participation in his client's strategy to withhold the September 15 Spousal Support Payment in order to "motivate" opposing counsel and MR meets the threshold as gross culpable neglect and therefore constitutes professional misconduct.

[55] This Panel finds that Issue 4 is answered in the affirmative.

CONFIDENTIALITY AND SOLICITOR-CLIENT PRIVILEGE

[56] The Respondent asks that certain personal, privileged and confidential information or information related to the underlying family law proceedings disclosed at the hearing not be disclosed to the public.

[57] Although transparency is an important aspect of the hearing process, certain personal information presented at the hearing and contained in the ASF and the attachments thereto and the exhibits is highly personal and sensitive and, beyond the references in this decision, its disclosure is not required.

[58] The privileged information may not be disclosed. PR has not waived his privilege.

[59] Under Rule 22-8 of the BC Supreme Court Family Rules, public access to the registry file in a family law case is prohibited. We understand that the principle behind this Rule also prohibits public access to a transcript of proceedings in a family law case. Therefore, references to the transcript of the proceedings of the family law case in the ASF, attachments, and exhibits may not be disclosed.

[60] Pursuant to Rule 5-6(2)(a), there will be an order that, except for the use made in our reasons, the information described in Schedule 1 and Schedule 2 to the order must not be disclosed or published. References in the transcript of the hearing to the information described in Schedule 1 and Schedule 2 must also not be disclosed or published.

[61] We have considered all of the evidence and all of the submissions made in reaching our decision. We have attempted to refer to all of the evidence and submissions that we relied upon; however, as a result of our order under Rule 5-6(2)(a) above, we are unable to refer to all of the evidence and submissions that we relied upon in this decision.