2015 LSBC 05
Report issued: February 17, 2015
Citation issued: April 23, 2014

THE LAW SOCIETY OF BRITISH COLUMBIA

In the matter of the *Legal Profession Act,* SBC 1998, c. 9

and a hearing concerning

MAUREEN JOYCE WESLEY

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing date:	October 28, 2014
Panel:	Herman Van Ommen, QC, Chair Woody Hayes, Public representative Bruce LeRose, QC, Lawyer
Discipline Counsel:	Carolyn Gulabsingh
Appearing on her own behalf:	Maureen Wesley

INTRODUCTION

[1] In this case, the Respondent, Maureen Wesley, is cited for failing to serve her client in a conscientious, diligent and efficient manner so as to provide quality of service at least equal to that which would be expected of a competent lawyer in a similar situation.

[2] Ms. Wesley attended a Judicial Case Conference with her client on October 20, 2011. At that conference her client's husband agreed, among other things, to pay child support. The Respondent accepted responsibility for preparing the Order.

[3] The Order was not entered promptly. More than a year later her client was unable to obtain the assistance of the Family Maintenance Enforcement Program to compel the client's husband to make the child support payments.

ISSUE

[4] The issue to be determined is whether the Respondent committed professional misconduct by failing to have the Order entered in a timely fashion.

BACKGROUND

[5] The citation was issued and served on the Respondent on April 23, 2014. The citation states:

> 1. Between October 2011 and June 2013, while representing your client, MS, in a family law matter you failed to serve your client in a conscientious, diligent and efficient manner so as to provide quality of service at least equal to that which would be expected of a competent lawyer in a similar situation. In particular, you failed to do one or more of the following in respect of the entry of the Order made October 20, 2011 (the "Order") at a judicial case conference:
>
> (a) keep your client reasonably informed regarding the status of the entry of the Order;
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> (b) take steps to have the Order entered until June 25, 2013, or explain to your client why it was not entered;
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> contrary to Chapter 3, Rules 3 and 5 of the *Professional Conduct Handbook* then in force; and Rule 3.2-1 of the *Code of Professional Conduct for British Columbia*.

[6] A Notice to Admit was delivered to the Respondent on July 18, 2014. Pursuant to Rule 4-20.1, the Respondent was required to respond within a fixed period of time or be deemed to have admitted the truth of the facts set out in the authenticity of documents listed. The Respondent did not respond.

[7] The Notice to Admit contained 43 paragraphs of facts and referred to eight documents that were attached.

[8] At the hearing, the Law Society relied on the Notice to Admit and did not call any other evidence.

[9] The Respondent attended and testified. The Respondent did not seek to set aside the deemed admission but in her evidence sought to explain what had occurred in

support of her argument that her conduct did not amount to professional misconduct.

FACTS

[10] The key facts from the Notice to Admit are:

(a) (Paragraph 1) – The Respondent was called to the Bar and admitted as a member of the Law Society of British Columbia on July 13, 1982.

(b) (Paragraph 2) – Since her admission to the British Columbia Bar, the Respondent has practised as a sole practitioner in Vancouver, almost exclusively in the area of family law.

(c) (Paragraph 7) – On October 20, 2011 MS and her husband HS attended a judicial case conference ("JCC"), presided over by the Honourable Madam Justice Dardi.

(d) (Paragraph 9) – At the October 20, 2011 JCC, the parties entered into an Interim Consent Order regarding child support, access and custody of the child (the "Interim Order").

(e) (Paragraph 12) – Pursuant to the JCC case management plan, the Respondent was responsible for preparation of the Interim Order.

(f) (Paragraph 14) – On or about October 21, 2011, MS advised the Respondent that she could not comply with the terms of the Interim Order that required HS to relinquish his claim to the family residence in exchange for MS paying the associated outstanding property taxes, assuming the existing mortgage, obtaining a release of HS regarding the mortgage, paying various other family debts, and relinquishing any claim she had for retroactive child support.

(g) (Paragraph 16) – By the end of November 2011, MS had complied with the Interim Order.

(h) (Paragraph 18) – Commencing in November 2011, HS paid child support to MS as required by the Interim Order.

(i) (Paragraph 20) – Between November 2011 and August 2012, the Respondent did not explain to MS that the Interim Order had not been entered or provide her with the reason it was not entered.

(j) (Paragraph 26) – In January 2013, HS stopped making child support payments to MS as required by the Interim Order.

(k) (Paragraph 27) – In or about January 2013, MS contacted the Family Maintenance Enforcement Program ("FMEP") to enroll the Interim Order for enforcement.

(l) (Paragraph 28) – FMEP advised MS that they could not assist her because the Interim Order had not yet been entered.

(m) (Paragraph 29) – In January 2013, MS contacted the Respondent and advised that HS had stopped paying the child support required by the Interim Order.

(n) (Paragraph 30) – MS told the Respondent that FMEP could not assist her in enforcing the Interim Order, because it was not entered.

(o) (Paragraph 31) – Before January 2013, the Respondent did not explain to MS that the child support term of the Interim Order could not be enforced because the Interim Order was not entered.

(p) (Paragraph 35) – The Respondent says she attempted to reach SD, counsel for the husband, by telephone between the end of February 2013 and May 2013 to address entry of the Interim Order and was told SD was on medical leave and was then advised SD was no longer working.

(q) (Paragraph 39) – The Respondent did not explain to MS the reasons why the Interim Order was not entered until June 2013.

[11] From the oral testimony of the Respondent, there are further details to be added to this narrative.

[12] The Respondent testified that she prepared a form of order in the fall of 2011. She testified that the other counsel did not agree with her form of order. She took no steps to resolve the dispute over the proper form of order at that time.

[13] The Respondent says her client was concerned about costs but acknowledges that she did not advise her client of the risks of not entering the Order or the cost of attending before a Registrar to have the terms of the Order settled. She explained that, in the fall of 2011, in her view, entry of the Order was not pressing as the husband was paying the child support.

[14] The husband retained new counsel, AS, in the summer of 2012. The Respondent says she attempted to have him sign the JCC form of order. He declined to do so saying his client had resiled from his consent. He said that he preferred to attempt to settle the whole matter rather than resolve the issues with the Interim Order. The Respondent agreed with that approach, and over the next months they prepared a tentative form of final order they hoped would resolve all matters.

[15] The husband ceased making child support payments in January 2013. A stalemate between the clients developed in February 2013. The husband refused to pay child support unless MS consented to a divorce. MS would not consent to the divorce until she was paid the arrears of child support. The Respondent and the other counsel were not able to assist their clients to resolve this impasse. The husband then fired his counsel in February 2013.

[16] The Respondent acknowledged that, although she was aware that her client needed the Order entered so that FMEP could enforce it, she did not take steps to have the terms of the Order settled. She testified as follows:

> Now what I really should have done is I really should have just gone into Court and I should have just served AS with an appointment to settle the Order. That's what I really should have done. I don't know why I was on that track. I really don't know why. I have no clue why I did it that way.

[17] Instead, the Respondent attempted to locate previous counsel who had attended the JCC in October 2011. She learned that previous counsel had moved firms and was on medical leave. She was finally able to make contact with prior counsel in April 2013. Prior counsel insisted on signing her own form of order and only when that form of order was rejected by the Registry did she ultimately agree to sign the form of order prepared by the Respondent. It was entered on June 25, 2013, at least five months after the Respondent was aware that entry of the Order was urgently required.

[18] The Respondent, at the conclusion of her evidence, stated:

> I just had one last thing to say in reference to your last question because I actually had spent a lot of time thinking about – because it really amazed me why I just didn't just go and get the Order settled. It really just amazed me.

ONUS OF PROOF

[19] It is well accepted that the onus is on the Law Society to prove professional misconduct or incompetence on the balance of probabilities. The evidence must be "scrutinized with care" and be "sufficiently clear, convincing and cogent to satisfy the balance and probabilities test."

PROFESSIONAL MISCONDUCT

[20] Professional misconduct is not defined in the *Legal Profession Act*, the Law Society Rules, the *Professional Conduct Handbook* or the *Code of Professional Conduct for British Columbia*. It is a concept that has been defined in the jurisprudence developed by Law Society hearing panels.

[21] The leading case is *Law Society of BC v. Martin*, 2005 LSBC 16. The test set out in that case is "whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct."

[22] The panel in Martin also stated "the real question to be determined is essentially whether the Respondent's behaviour displays culpability which is grounded in a fundamental degree of fault, that is whether it displays gross culpable neglect of his duties as a lawyer."

[23] In this case the Respondent failed to take the steps required to have the Order entered for a period of approximately 20 months.

[24] Although the Respondent was aware in the fall of 2011, shortly after the JCC, that the other counsel did not agree with her form of order, she took no steps to resolve the issue at that time. She did not give her client any advice on the risks that she would face because the Order was not entered, nor did she give any advice concerning the costs and steps involved in having a Registrar settle the form of order.

[25] In the fall of 2012, when she learned from new counsel that the husband was resiling from his agreement to pay child support, she also failed to take steps to have the form of order settled. Further, she failed again to advise her client of the risks she was facing and the alternatives that were available to her.

[26] The prejudice her client suffered from the lack of an entered Order was twofold. Firstly, when the impasse developed, the husband was able to refuse to pay child support and demand her client's consent to a divorce in circumstances where there

should have been an entered Order to compel his payment of child support. The impasse should never have occurred.

[27] Secondly, in January when advised that FMEP required an entered Order before taking steps to enforce, the Respondent again failed to take appropriate and effective steps.

[28] An appointment to settle the terms of the Order should have been obtained forthwith, and the Order could have been entered in short order. Instead the Respondent took months attempting to locate prior counsel and then further months debating over the form of order. The Respondent knew in January 2013 that her client was experiencing prejudice due to the fact the Order was not entered, and yet, because of the way the Respondent dealt with matters, the Order was not entered until June 25, 2013.

[29] The Law Society provided the Panel with several prior cases dealing with professional misconduct in the context of the lack of quality of service.

[30] In *Law Society of BC v. Perrick*, 2014 LSBC 39, the panel discussed the meaning of quality of service at paragraphs 44-47:

> … This Panel feels the question of quality of service means something beyond pure negligence. This comes from the requirement of a marked departure that is characterized by gross culpable neglect of a lawyer's duties. Although that threshold may be passed in the single instant, it is more likely to happen in multiple occurrences in representing the client. In addition, the quality of service requirement may happen when each of the individual occurrences of themselves are not sufficient to raise concerns about quality of service. However, cumulatively, they may raise issues of quality of service.
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> Issues of quality of service can be divided into two general categories. One category can be described as the common sense category. An average person can determine this. This category would include such matters as: keeping the client informed, responding to correspondence, and filing court documents on time, to name a few.
>
> The second category is more sophisticated. What is the standard of a competent lawyer in handling the file? How do you gather the facts? What legal search do you do? How do you prepare for settlement, mediation or trial? This *may* require evidence from other lawyers

> practising in the area. This could be described as the professional category.
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> This Panel wishes to make it clear that these two categories are not mutually exclusive. They can overlap. For instance, the failure of a lawyer to interview witnesses, to review important documents, to name a few, may be proved by a common sense approach or by professional evidence.

[31] It is significant that the Respondent cannot now, with the benefit of hindsight and an opportunity to reflect, explain why she failed to take the appropriate steps that were available to her. It is clear that her conduct was a marked departure from the norm and for which she is culpable.

CONCLUSION

[32] We find the Respondent's failure to take the necessary steps to have the Order entered and her failure to advise her client concerning the risks of not entering the Order or the costs involved to settle terms of the Order were marked departures from the norm. We find her conduct was a culpable neglect of her duties.

[33] We find the Respondent committed professional misconduct.