

THE LAW SOCIETY OF BRITISH COLUMBIA

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

and a hearing concerning

CHARLES LOUIS ALBAS

RESPONDENT

DECISION OF THE HEARING PANEL

Hearing date: April 16, 2015

Panel: Herman Van Ommen, QC, Chair
Glenys Blackadder, Public representative
Shona Moore, QC, Lawyer

Discipline Counsel: Kieron Grady
Appearing on his own behalf: Charles L. Albas

INTRODUCTION

- [1] This hearing concerns the conduct of the lawyer who prepared or caused to be prepared wills for a client in which he, or his wife, was named a beneficiary.
- [2] The amended citation alleges that:
- (a) on or about February 20, 2009, the Respondent prepared or caused to be prepared a will for his client, FC, naming himself as a beneficiary contrary to Chapter 7, Rule 1 of the *Professional Conduct Handbook*;
 - (b) in or about May or August 2013, the Respondent prepared or caused to be prepared a will for his client FC naming his [the Respondent's] wife as a beneficiary and himself as a contingent beneficiary contrary to Rules

3.4-26.1 and 3.4-38 of the *Code of Professional Conduct for British Columbia*.

- [3] It is alleged that this conduct constitutes professional misconduct pursuant to Section 38(4) of the *Legal Profession Act*.
- [4] Pursuant to Rule 4-22 of the Law Society Rules, on April 10, 2015, the Respondent made a conditional admission of the discipline violations set out in the amended citation and as more fully set out in the Agreed Statement of Facts jointly filed by the parties.
- [5] The Respondent also consented to the imposition of the following disciplinary action and costs:
- (a) a fine in the amount of \$7,000 payable by October 31, 2015 or such other date as the Hearing Panel may order; and
 - (b) costs in the amount of \$1,736.25 payable by October 31, 2015 or such other date as the Hearing Panel may order.
- [6] The Respondent expressly acknowledged that publication of the circumstances would be made pursuant to Rule 4-38 and that such publication would identify him.
- [7] The Discipline Committee accepted the Respondent's conditional admission and the proposed disciplinary action. Pursuant to Rule 4-22(4), counsel for the Law Society recommended that the Hearing Panel accept the Respondent's conditional admission and the proposed disciplinary action.

ISSUE

- [8] Should the Hearing Panel accept the Respondent's conditional admission and the proposed disciplinary action? Specifically:
- (a) does the Respondent's conduct set out in the amended citation constitute professional misconduct under Section 38(4) of the Act; and
 - (b) if so, are the proposed disciplinary action and costs within the range of a fair and reasonable disciplinary action in all the circumstances.

FACTS

- [9] The parties jointly filed an Agreed Statement of Facts that included the relevant documents. The relevant portions of the Agreed Statement of Facts are summarized below.
- [10] The Respondent was called and admitted as a member of the Law Society of British Columbia on May 14, 1976. He at all material times practised primarily in the area of wills and estates, residential real estate, family law, and corporate and commercial lending transactions.

Allegation 1

- [11] The Respondent had prior dealings with his client, FC over a period of several years. He knew her previous common law spouse JA who, before passing away in 2003, asked the Respondent to “look in on” her after he passed away.
- [12] FC married GZ in 2006. The Respondent then acted for FC and GZ on various matters during the next few years.
- [13] In April 2007, he took instructions from her to prepare a will for her with the following terms:
- (a) one-half of the estate was to go to her husband GZ, or alternately to his son;
 - (b) one-half to the Shriners’ Temple; and
 - (c) the Respondent or his partner was to be the executor.
- [14] The Respondent prepared a will with those terms but FC did not execute it. Her husband died in August 2007. The Respondent handled GZ’s estate.
- [15] After GZ’s death, the Respondent began to look in on FC more frequently. He visited her about once a month and also telephoned her from time to time.
- [16] The Respondent states that, in February 2008, he was instructed to revise the draft will so that one-half of the estate was bequeathed to the Shriners’ Hospital and one-half to himself. He prepared a will in that form, but it was not signed.
- [17] On February 20, 2009, FC attended at the Respondent’s office. In his file he noted that she “wants to give me the residue and would like to sign the Will today but no Power of Attorney.” The Respondent then prepared a will on those terms. It was

executed that day by FC and witnessed by the Respondent's receptionist and legal assistant.

Allegation 2

- [18] Sometime in 2013 the Respondent noticed the new *Code of Professional Conduct for British Columbia* prevented a lawyer from preparing a will in which he was to receive a gift. As a result, the Respondent attended on FC and advised her that she would have to do a new will with a new lawyer.
- [19] The Respondent says FC advised that, if a gift to the Respondent created a problem, she would leave her estate to the Respondent's wife instead of him.
- [20] The Respondent asked a lawyer with whom he shared space to prepare a replacement will in which the Respondent's wife was a beneficiary and attend to its execution. The lawyer agreed to do so. The Respondent provided a draft will to that lawyer's assistant, who then prepared a will naming the Respondent's wife as the beneficiary.
- [21] The Respondent picked up the newly prepared will and took it to FC for signature; however, she did not sign the 2013 will.
- [22] FC was committed under the *Mental Health Act* in July 2013. The Respondent wrote a letter to the hospital as a result of which FC was released.
- [23] FC retained a new lawyer who wrote to the Respondent in September 2013 demanding that the Respondent cease any further contact or communication with FC.

FACTS AND DETERMINATION

- [24] Rule 4-22 permits a respondent to make an admission of a disciplinary violation on the condition of a specified disciplinary outcome. If the Discipline Committee accepts the proposal, discipline counsel is instructed to recommend to the hearing panel that it be accepted.
- [25] The hearing panel is permitted to either accept or reject a proposal. A hearing panel is not permitted to substitute a different adverse determination or a different disciplinary action.
- [26] In considering whether to accept the proposal the hearing panel must be satisfied that:

- (a) the proposed admissions on the substantive matters are appropriate; and
- (b) the proposed disciplinary action is within the range of fair and reasonable disciplinary action involved in the circumstances.

ADMISSION OF PROFESSIONAL MISCONDUCT

[27] The test for “professional misconduct” is whether the facts as made out disclose behaviour that is a marked departure from the conduct the Law Society expects of lawyers. This test, which is set out in *Law Society of BC v. Martin*, 2005 LSBC 16, has been consistently applied in disciplinary hearings in this province.

[28] The *Professional Conduct Handbook*, in force at the time of the conduct set out in the first allegation of the amended citation, states as follows:

Except as otherwise permitted by the Handbook, a lawyer must not perform any legal services for a client if:

- (a) the lawyer has a direct or indirect financial interest in the subject matter of the legal services, or
- (b) anyone, including a relative, partner, employer, employee, business associate or friend of the lawyer, has a direct or indirect financial interest that would reasonably be expected to affect the lawyer’s professional judgment.

[29] The *Code of Professional Conduct for British Columbia* was in force at the time of the conduct set out in the second allegation of the amended citation. Rules 3.4-26.1 and 3.4-38 applied. These rules state:

3.4-26.1 A lawyer must not perform any legal services if there is a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s

- (a) relationship with the client, or
- (b) interest in the client or the subject matter of the legal services.

3.4-38 Unless the client is a family member of the lawyer or the lawyer’s partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

- [30] With respect to allegation 1, it is clear that, by naming himself a beneficiary in the 2009 will, the Respondent had a direct financial interest in the subject matter of the legal services, i.e. preparation of the will, and he was therefore in contravention of Chapter 7, Rule 1(a).
- [31] With respect to allegation 2, it was the Respondent's wife that was named a beneficiary under the 2013 will. Notwithstanding that, we find that the Respondent had an interest in the subject matter of the legal services. His wife stood to gain financially and therefore so did he. He directed the legal assistant to prepare the will, giving her a precedent to follow, and he took the will to FC to have it executed. Therefore he performed legal services in relation to that will and he stood to benefit from it.
- [32] Rule 3.4-38 may not apply in this situation. In view of our finding in relation to Rule 3.4-26.1 it is not necessary to decide that question in this hearing.
- [33] We accept the Respondent's admission of professional misconduct in respect of both allegations and under Section 38(4) of the Act we determine the Respondent has committed professional misconduct.

PROPOSED DISCIPLINARY ACTION

- [34] Together with the admission of professional misconduct, the Respondent has proposed disciplinary action of a fine of \$7,000 and costs of \$1,736.25.
- [35] As noted in *Law Society of BC v. Rai*, 2011 LSBC 02, a hearing panel should give deference to a recommendation to accept a proposed disciplinary action. The test proposed in that case and accepted by us is:
- The question the panel has to ask itself is, not whether it would have imposed exactly the same disciplinary action, but rather, "Is the proposed disciplinary action within the range of fair and reasonable disciplinary action?"
- [36] When considering the appropriateness of disciplinary action, the guiding principle is found in Section 3 of the Act. That section provides that "it is the object and duty of the Society to uphold and protect the public interest in the administration of justice ..."
- [37] The review panel in *Law Society of BC v. Lessing*, 2013 LSBC 29, noted that the non-exhaustive list of factors to consider in a disciplinary proceeding as set out in

Law Society of BC v. Ogilvie, [1999] LSBC 17, assist in carrying out the object and duty set out in Section 3.

[38] Not all of the *Ogilvie* factors come into play in all cases, and the weight to be given to the factors vary from case to case. In this case, the Panel has given greater significance to the following *Ogilvie* factors in determining whether the proposed disciplinary action falls within the range of fair and reasonable disciplinary action:

- (a) the nature and gravity of the conduct proven;
- (b) the need to ensure the public's confidence and the integrity of the profession;
- (c) the need for specific and general deterrence;
- (d) prior disciplinary history;
- (e) the range of penalties imposed in similar cases; and
- (f) whether the Respondent has acknowledged the misconduct.

Nature and gravity of misconduct

[39] The Respondent committed professional misconduct in relation to both wills that he prepared or caused to be prepared for his client FC.

[40] There is no evidence that he exerted pressure on his client or that the proposed gift to himself was anything other than her true testamentary wishes. However, he prepared the first will, which benefitted himself, without his client having independent advice.

[41] In 2013 when he became aware of the new *Code* and its specific prohibition against preparing a will that benefits the lawyer, he organized and caused to be prepared the second will benefitting his wife, using the assistance of a lawyer with whom he shared space. That lawyer, however, did not direct the preparation of the will or take on responsibility for its execution. The Respondent took the will to FC to have it executed.

[42] In both instances he took steps to benefit himself directly or indirectly without ensuring that his client had independent legal advice. This is a serious breach of duty to a client.

The need to ensure the public's confidence in the integrity of the profession

- [43] The importance of ensuring the public's confidence in the integrity of the legal profession cannot be overstated when determining an appropriate disciplinary action.
- [44] As noted by the review panel in *Lessing*, protection of the public, together with the rehabilitation of the respondent, will in most cases play an important role in determining the sanction to be imposed against the lawyer who commits professional misconduct.
- [45] Most members of the public require a will. Many of them will entrust the preparation of a will to the lawyer that they know personally. They should be entitled to rely on their lawyer to act in their best interests. Given the vulnerability of clients, the lawyer must not accept gifts from a client without ensuring that that client has received independent legal advice.
- [46] The lawyer's role as an independent advisor interested only in the client's best interests is a role that must be protected. The disciplinary action must reflect the importance of the lawyer's duty to his client.

Need for specific and general deterrence

- [47] There is value in reminding the profession that although a client might wish to provide a lawyer with a gift, the lawyer cannot accept such a gift unless that client is independently represented.
- [48] Although the Respondent has a prior disciplinary record we accept that a fine of the magnitude proposed will provide the specific deterrence required.

Prior disciplinary record

- [49] The Respondent has a disciplinary record, although it is dated. In 1985 a citation was issued to the Respondent for purporting to give a borrower independent legal advice when he acted for the lender.
- [50] The Discipline Committee resolved the matter by accepting the Respondent's admission under the Rules in place at that time and took no further action. The Rules permitted a lawyer to make an admission which was endorsed upon their record without additional action.

[51] This conduct occurred 30 years ago, and there is no evidence of any other misconduct during that 30 year period.

Range of penalties imposed in similar cases

[52] In *Law Society of BC v. Lloyd*, 2002 LSBC 14, a lawyer was found to have committed professional misconduct by failing to ensure that his client received independent legal advice before executing a codicil that left the lawyer one-half of the testator's estate.

[53] The lawyer was fined \$10,000. He had received \$300,000 from the estate but paid \$250,000 of the funds as a gift to a school to fund capital projects in his client's memory and \$50,000 to settle a claim against the estate.

[54] In that case the hearing panel noted that, while the respondent acted in accordance with his client's wishes and did not directly benefit from the estate residue, he did receive an indirect benefit since the charitable gift resulted in a substantial personal income tax benefit.

[55] In the decision of *Nova Scotia Barristers' Society v. Muttart*, 2009 NSBS 4, the lawyer prepared for the same client two wills in which he received substantial testamentary gifts and the client did not have independent legal advice. The lawyer was reprimanded and a restitution order was made.

[56] The hearing panel in *Muttart* was advised that the Barristers' Society would ordinarily have sought a suspension but because of the unblemished record of the lawyer over his 40 year career it was felt that the appropriate sanction was a reprimand with restitution.

[57] Although the case did not involve a will, the hearing panel in *Law Society of BC v. O'Neill*, 2013 LSBC 23, considered the same provisions of the *Professional Conduct Handbook*. In that case the lawyer committed professional misconduct himself when he acted in a conflict of interest by negotiating a Finder's Fee Agreement when he had a direct or indirect financial interest in the subject matter of the contract.

[58] The lawyer in that case admitted the allegations and made a joint submission to the hearing panel with Law Society counsel that the appropriate range of disciplinary action would be a fine in the range of \$3,000 to \$5,000 plus costs. The hearing panel ultimately fined the Respondent \$5,000 and also ordered that he be reprimanded.

[59] None of these cases considered a suspension necessary for this type of behaviour. The fines ranged from \$5,000 to \$10,000, and a reprimand was considered sufficient in one case. The proposed fine of \$7,000 is mid-range.

Whether the respondent has acknowledged the misconduct

[60] The Respondent at an early stage admitted all of the conduct and the conclusion that his conduct constituted professional misconduct.

SUMMARY

[61] Having considered all of the law and the evidence before us, we have concluded that the proposed disciplinary action of a fine of \$7,000 plus payment of costs is appropriate. We are mindful of the need to ensure the public's confidence and the integrity of the profession.

[62] While the Respondent's client FC apparently wished to benefit him, his obligation as a lawyer was to ensure that she obtained independent legal advice if she wished to proceed with that gift. Although his prior misconduct has some similarities to the current matter, a 30-year absence of any misbehaviour is noteworthy.

[63] We do not think a suspension or a higher fine is necessary or appropriate in the circumstances.

COSTS

[64] Rule 5-9 of the Law Society Rules provides in part as follows:

(1.1) Subject to subrule (1.2), the panel or review board must have regard to the tariff of costs and Schedule 4 to these Rules in calculating the cost payable by an applicant, a respondent or the Society in respect of a hearing on an application or a citation or a review of a decision in a hearing on an application or a citation.

[65] Under Item 23 of Schedule 4 the range is \$1,000 to \$3,500 for a Rule 4-22 hearing. Costs of \$1,736.25, as agreed, are within that range, although towards the lower end.

[66] The Respondent's admissions and cooperation with the disciplinary process are appropriately recognized. We agree that costs in the amount \$1,736.25 are appropriate.

CONCLUSION

[67] On the basis of the above, the Hearing Panel accepts the Respondent's admission of professional misconduct with respect to the allegations made in the amended citation as well as the proposed disciplinary action.

ORDER

[68] The Hearing Panel orders that the Respondent:

- (a) pay a fine in the amount of \$7,000 on or before October 31, 2015; and
- (b) pay costs in the amount of \$1,736.25 on or before October 31, 2015.

[69] The Executive Director is instructed to record the lawyer's admission on the lawyer's professional conduct record.