

IN THE MATTER OF THE *LEGAL PROFESSION ACT*

AND

IN THE MATTER OF A HEARING CONCERNING

**CHRISTOPHER ROY PENTY**

**RESPONDENT**

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**AGREED STATEMENT OF FACTS**

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**Member Background**

1. Christopher Roy Penty (the “Respondent”) was called and admitted as a member of the Law Society of British Columbia on May 10, 1983.
2. Since September 2005, the Respondent has practised with the firm Penty & Company in Kelowna, British Columbia. He practises primarily in the area of residential real estate, family, wills and estates and civil litigation.

**Citation and Service**

3. The citation in this matter was authorized by the Discipline Committee on April 6, 2017 and was issued on April 20, 2017 (the “Citation”).
4. The Respondent admits that on April 21, 2017 he was served through his counsel with the citation and waived the requirements of Rule 4-19 of the Law Society Rules.

## **Attachments**

5. Except where otherwise stated, it is agreed in respect of each document attached to this Agreed Statement of Facts that:
  - (a) it is a true copy of the original document,
  - (b) it was written or created on the date on the face of the document,
  - (c) where by the content or nature of the document it was intended to be sent or delivered, that it was sent or delivered on the date it bears on its face and was subsequently received by the intended recipient,
  - (d) where on its face the document purports to have been written or created under the instructions of the person who signed it or where on its face the document's creation was authorized by the person who signed it, that it was so written, created or authorized,
  - (e) where the document purports on its face to have been received on a particular date or time, that it was so received, and
  - (f) it is admitted into evidence for the proof of the truth of the matters recorded in it.

## **Last Will and Testament of GD**

6. On December 9, 2014, a social worker called on the Respondent to attend to GD at the Kelowna General Hospital. GD was dying of kidney failure and had little time left to live.
7. The Respondent and GD had met once previously.
8. SD, GD's brother, had retained the Respondent to assist with the estate of GD's mother who passed away on February 22, 2012. The Respondent and GD had met briefly in relation to the distribution of that estate.

9. On December 9, 2014, the Respondent went to the hospital to meet with GD.
10. The Respondent was asked by GD to prepare a will.
11. The Respondent states that GD was adamant that his brothers, SD and PD, receive nothing from his estate.
12. The Respondent states that GD told him that he wanted all of his money to go to charity.
13. The Respondent understood that under no circumstances was he permitted to use the estate proceeds for his own purposes.
14. The Respondent states that GD was not able to name which charities he wanted his money to go to.
15. The Respondent suggested to GD that he leave part of his estate to the Kelowna Hospice Foundation, now known as the Central Okanagan Hospice Association Foundation (the “Hospice Foundation”).
16. The Respondent and GD negotiated how much of the estate the Hospice Foundation should receive with the Respondent suggesting that GD leave one-half or a third of his estate to the Hospice Foundation.
17. The Respondent says that GD originally wanted to leave less than a quarter of his estate to the Hospice Foundation, but the two eventually “met at a quarter” at the end of their negotiation.
18. At the time of preparing the will, the Respondent was the President and a director of the Hospice Foundation.
19. The Respondent cannot recall telling GD of his involvement with the Hospice Foundation.
20. The Respondent did not consider whether he was acting in a conflict in suggesting that GD leave a portion of his estate to the Hospice Foundation.

21. The Respondent states that he proposed several other charities to GD, but GD did not agree to any of them and did not give the Respondent any reason why such other charities were not satisfactory to him.
22. On December 9, 2014, the Respondent returned to his office to prepare GD's will.
23. The will bequeathed one-quarter of GD's estate to the Hospice Foundation and three-quarters to the Respondent "for his own use absolutely."
24. The will also appointed the Respondent as the executor and trustee of the will.
25. GD's will also states:

It is my strongest wish and desire that the share of my estate left to CHRISTOPHER ROY PENTY may be paid out, in his unfettered discretion, to various charities, persons and organizations of his choosing. However, I impose no trust conditions therein.

26. The Respondent did not make himself a trustee with respect to the three-quarters of GD's estate that was to go to other charities because he wanted to avoid being held accountable to the standard of a trustee. The Respondent stated during his interview with the Law Society:

CP: I'm familiar enough with, with estate and trust law to know that one thing I didn't want to be held accountable for would be the, the standard of the trustee. A trustee involves work and what I thought in, I thought, when I thought of doing this I thought well then I'd, I'd become a trustee for these monies. That is going to set me out for simply a lot of unpaid work. The Trustee Act limits your, what you can take as fees for acting as a trustee and it's, it's a very small amount. You'll note from the notes of what I thought the estate was originally worth. It wasn't worth that much. I saw in becoming a trustee a lot of unpaid legal work so I said I'm going to - and when, backing up, when I talked to GD about that, I said I, I don't really want to be your trustee and do all this and he said I don't care about any of that, I trust you. You just do what you have to with that money and give it away like you're supposed to, words to that effect. And so I said well fine, well I'm gonna create something that says I'm not a trustee and I'm not bound by the laws of the trustee and the obligations of a trustee to maintain records and accounting and all that sort of thing. And he said fine,

I don't care, you just give the money away to the charities that you think are best. So that, that was the purpose for me putting that in there, it was to try to as best I could exempt myself from the duties and obligations of the trustee under the terms of his will.

27. At the time he prepared the will, the Respondent knew “there would obviously be an issue of raising conflict of interest and things of that nature by leaving [himself] as a beneficiary,” that doing so “was inappropriate” and “imprudent” and that “there was obviously the risk that it would be perceived that [he] was simply taking a client’s money”.
28. The Respondent says that because he knew his actions were “imprudent” he also prepared a testamentary declaration to be executed by GD and a witness statement for his assistant.
29. The next day, on December 10, 2014, the Respondent returned to Kelowna General Hospital together with his legal assistant Ms. O and his receptionist KR.
30. On December 10, 2014, GD executed his will and it was witnessed by Ms. O and KR (the “Will”).
31. The Respondent notarized GD’s execution of the testamentary declaration which he had prepared.
32. The Respondent did not advise GD to obtain independent legal advice prior to executing the Will or the testamentary declaration.
33. The Respondent admits that he knew that GD should have obtained independent legal advice prior to signing the Will and testamentary declaration.
34. The Respondent states that in his mind there was no time to obtain independent legal advice as GD was dying soon.
35. On December 11, 2014, Ms. O executed a witness statement prepared by the Respondent.
36. GD died four days after signing his Will, on December 14, 2014.

### **Meeting with SD and PD**

37. On December 22, 2014, the Respondent met with GD's two surviving brothers, SD and PD.
38. The meeting took place in his office and lasted for about 20 minutes.
39. The Respondent says that he told SD and PD that GD's estate had been left to the Hospice Foundation and to other charities.
40. The Respondent did not tell SD and PD that he was the beneficiary of three quarters of the residue of the estate under the Will.
41. The Respondent does not recall giving SD and PD a copy of the Will at the December 22, 2014 meeting.
42. SD and PD both deny ever seeing or receiving a copy of the Will.
43. The Respondent did not mail a copy of the Will to SD or PD.
44. The Respondent did not tell SD or PD to obtain independent legal advice.

### **Obtaining Probate**

45. On February 10, 2015, the Respondent sent a letter to the Hospice Foundation enclosing a Form P1 Notice of Proposed Application in Relation to the Estate and a copy of the Will.
46. The Respondent did not deliver the Form P1 to SD or PD.
47. On March 27, 2015, the Respondent made an application for grant of probate in respect of GD's estate.
48. The Respondent delivered an account for his legal services in obtaining probate.
49. According to an affidavit of assets and liabilities sworn by the Respondent on March 27, 2015, GD's estate held \$274,137 in assets and \$45,344.78 in liabilities.

The liabilities included the Respondent's executor fees, executor expenses, and costs to prepare GD's home for sale, among other things.

50. On or about March 27, 2015, Ms. O prepared a submission for estate grant, which the Respondent then reviewed and signed.
51. In the Schedule for Grant of Probate or Grant of Administration with Will Annexed (which forms a part of the submission for estate grant), the Respondent answered "N/A" in the section in which he was to list "each person, if any, who would have been an intestate successor if the deceased had not left a will".
52. The Respondent acknowledges that he practises in wills and estates, that he prepares between ten and 20 submissions for estate grants a year, and that he knew that SD and PD would have been successors if GD had not left a will.
53. The Respondent admits that he should have listed SD and PD in the Schedule.
54. The Respondent admits that his answer of "N/A" in the submission for estate grant was false.
55. On March 27, 2015, the Respondent swore an affidavit stating that the submission for estate grant was correct and complete:

I have read the submission for estate grant and the other documents referred to in that document and I believe that the information contained in that submission for estate grant and those documents is correct and complete.

56. The Respondent admits that the affidavit was false as the submission for estate grant was not "correct and complete" as it made no mention of SD and PD.
57. The Respondent also swore an affidavit of delivery on March 27, 2015, in which he swears that he delivered a copy of the Will to the Hospice Foundation but omits any reference to SD and PD.
58. The Respondent knew that a copy of the Will should have also been delivered to SD and PD.

59. The court granted administration of GD's estate to the Respondent on April 13, 2015.
60. At no time did the Respondent advise the Court that he had filed documents that were false or incomplete.

### **Disbursing the Estate**

61. After substantial renovations, GD's home was sold on June 30, 2015.
62. The Respondent acted as solicitor for the estate on closing and delivered an account for his legal services in that regard.
63. On July 7, 2015, the Respondent wrote to the Hospice Foundation setting out an interim distribution scheme for GD's estate. By that time, the estate funds had been drawn against to pay for certain renovation costs but not all. GD's remaining assets totaled \$259,831.16 and his liabilities totaled \$52,631.23, leaving \$207,199.93 available for distribution.
64. Among the liabilities listed in the interim distribution scheme letter are legal fees to Penty & Company for obtaining probate (\$6,667.59), legal fees to Penty & Company for preparing GD's will (\$614.65), reimbursements to the Respondent for renovation costs (\$5,039.82), and executor fees to the Respondent (\$10,965.52).
65. On July 9, 2015, the Respondent provided a cheque in the amount of \$51,799.98 to the Hospice Foundation, representing one-quarter of GD's estate.
66. At the same time, the Respondent prepared and had executed a release in his favour from the Hospice Foundation.
67. On July 9, 2015, the Respondent issued himself a cheque in the amount of \$155,399.95, representing the remaining three-quarters of GD's estate.

## **Use of Estate Funds Bequeathed to the Respondent**

68. On July 9, 2015, the Respondent deposited the \$155,399.95 from GD's estate into one of his personal savings accounts.
69. The Respondent says that he then noticed that he had "neglected" to deduct his portion of the seller's real estate commission arising from the sale of GD's home.
70. The Respondent states that he had an agreement with the real estate agent that the Respondent would receive 35 per cent of the commission normally paid to the seller's agent, in this case \$1,468.60.
71. The Respondent admits that he did not disclose his receipt of the commission to the Hospice Foundation.
72. On July 22, 2015, the Respondent opened a new personal chequing account in his name at the [Bank] (the "Chequing Account") and deposited \$153,931.35 into it.
73. Other than paying an outstanding Fortis BC account in relation to GD's estate and ordering cheques, the Respondent did not use the funds in the Chequing Account until October 2015.
74. The Respondent says that he waited for the six month time limit to pass from the date of probate, after which he felt it would be safe to distribute the funds.
75. In October 2015, the Respondent made the following payments from the Chequing Account:
  - (a) \$20,000 to BS, a woman who lived with SH and became a friend of GD's in the year prior to his death. The Respondent says that "it was obvious that she had a special relationship with the deceased and was also in need of funds to attend nursing school";
  - (b) \$7,500 as a donation in the Respondent's own name to the Central Okanagan Hospice Association, an organization which is supported by the

Hospice Foundation and has the same executive director as the Hospice Foundation;

- (c) \$5,000 to SH, a neighbor of GD's who the Respondent had hired to perform renovations on GD's home. The Respondent described this as payment of a builder's lien holdback, which he agreed to because SH was "becoming a pest"; and
  - (d) \$5,000 as a donation in the Respondent's own name to the Kelowna BC SPCA.
76. On October 29, 2015, the Respondent transferred \$95,000 of the estate funds from the Chequing Account into an existing, personal [Securities] account in his name.
77. The Respondent made personal use of the estate funds in his Securities account during the period October 29, 2015 and February 21, 2017.
78. Between November 30, 2015 and February 15, 2016, the Respondent withdrew a total of \$16,198.01 from the Chequing Account for his own personal use as follows:
- (a) \$5,200 for a personal loan payment;
  - (b) \$856.97 cash withdrawal;
  - (c) \$129.89 at Wal-Mart;
  - (d) \$227 [Bank] Travel Insurance for his month-long trip to Thailand;
  - (e) \$1,976.65 cash withdrawal;
  - (f) \$3,700 cheque to Penty & Company as a shareholder loan;
  - (g) \$4,007.50 cash withdrawal used to make a shareholder loan to Penty & Company; and
  - (h) \$100 cash withdrawal.

79. When asked what his reasons were for using funds from the Chequing Account for personal purposes, the Respondent said:

JC ... what was your reasoning for using these funds?

CP: Well, this was my, my account, and at the time it seemed, it seemed reasonable and even though I was dealing with the GD monies inside this account at the time, I didn't really direct my mind to differentiating between personal and, and, and what was going on in this account. So that's the best answer I can think of. I really didn't, I didn't really think about it that much.<sup>1</sup>

80. On January 6, 2016, the Respondent withdrew \$2,000 from the Chequing Account as a donation to the Rotary Foundation in his own name.

### **The Complaint**

81. On January 6, 2016, RC, a former legal assistant employed by Penty & Company, made a complaint (the "Complaint") to the Law Society.

82. Alex Wilms, a lawyer then employed with the Investigations, Monitoring and Enforcement Group of the Law Society, was assigned to investigate the Complaint.

83. On February 12, 2016, the Respondent was informed of the Complaint by Mr. Wilms.

84. Between February 15, 2016 and March 4, 2016, the Respondent deposited a total of \$16,200 to the Chequing Account. These funds were intended to reimburse the improper withdrawals set out in paragraph 78 above.

85. On September 29, 2016, Jennifer Chan, a lawyer employed with the Investigations, Monitoring and Enforcement Group of the Law Society, assumed conduct of the investigation of the Complaint from Mr. Wilms.

86. In the course of investigating the Complaint, the Law Society received written responses from the Respondent. The following letters exchanged with the

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<sup>1</sup> Interview of the Respondent on January 27, 2017, p. 14.

Respondent are admitted to prove what statements were made by the Respondent and not for the truth of those statements:

- (a) letter dated February 29, 2016 from the Respondent to the Law Society (Wilms) in response to Mr. Wilms letter dated February 15, 2016;
- (b) letter dated November 21, 2016 from the Respondent to the Law Society (Chan), in response to Ms. Chan's letter dated November 4, 2016.

### **Subsequent Events**

- 87. Following questions from staff regarding withdrawals made from the Securities Account, the Respondent states that he has returned an additional \$1,000 of estate funds by providing such amount to [Law Firm]. This brings the total held by [Law Firm], in trust, to \$138,145. The Respondent confirms that this amount represents only funds from GD's estate and does not include any of his own money.
- 88. On February 21, 2017, the Respondent gave an undertaking to the Law Society to, among other things, (i) not operate a trust account except in accordance with a trust supervision agreement which requires a second signature by a trust supervisor, (ii) not to accept new wills and estates clients, (iii) not work on existing wills and estates matters except under the supervision of a practice supervisor and in accordance with a practice supervision agreement, and (iv) resign from, and refrain from, acting in certain roles, including as a personal representative of a deceased person, trustee of an estate.
- 89. On February 21, 2017, the Respondent also entered into a practice supervision agreement with SR of the Law Firm and entered into a trust supervision agreement with KW of the Law Firm.
- 90. On February 21, 2017, the Respondent provided a copy of a bank draft in the amount of \$137,145 to the Law Firm (being approximately the sum of \$121,513.89 from the Securities Account, and \$18,931.83 from the Chequing

Account, less \$3,300 that the Respondent says he is withholding to pay capital gains tax on the advice of his accountant).

### **Admission of Misconduct**

91. The Respondent admits that, as set out in allegation 1 of the citation, in December 2014, he prepared the Last Will and Testament of GD dated December 10, 2014 and named himself as a beneficiary, contrary to Rule 3.4-38 of the *Code of Professional Conduct for British Columbia* (the “*BC Code*”).
92. The Respondent admits that his conduct in doing so constitutes professional misconduct.
93. The Respondent admits that, as set out in allegation 2 of the citation, in preparing the Last Will and Testament of his client, GD, dated December 10, 2014 naming himself and Kelowna Hospice Foundation as beneficiaries, he acted in a conflict of interest by:
  - (a) failing to ensure that his client obtained independent legal advice about the testamentary gift to him in the Will, contrary to Rule 3.4-28 of the *BC Code*.
  - (b) accepting a more than nominal gift from his client when his client had not received independent legal advice, contrary to Rule 3.4-39 of the *BC Code*;
  - (c) failing to disclose and explain to his client the nature of his interest in the Kelowna Hospice Foundation or failing to recommend and require his client to obtain independent legal advice prior to executing the Will with a testamentary gift to the Kelowna Hospice Foundation, contrary to Rule 3.4-29 of the *BC Code*;
  - (d) preparing the Will and a testamentary declaration exempting himself from the requirement that he act as trustee of his share of the residual estate

funds when he knew those funds were to be held subject to trust conditions, contrary to Rule 3.4-26.1 of the *BC Code*;

- (e) failing to deliver a copy of the Will and a Notice of Application for Probate to those persons who he knew would have been intestate successors if the deceased had not left a will, contrary to Rule 25-2 of the *Supreme Court Civil Rules*;
- (f) failing to candidly inform PD and SD that he was a beneficiary under the Will, contrary to Rule 2.2-1 of the *BC Code*.

- 94. The Respondent admits that his conduct in doing so constitutes professional misconduct.
- 95. The Respondent admits that, as set out in allegation 3 of the citation, as of November 30, 2015 he failed to comply with his client's instructions to donate his share of the residual estate funds to charities by withdrawing and using some or all of those funds for his own personal use.
- 96. The Respondent admits that his conduct in doing so constitutes professional misconduct.
- 97. According to the Respondent it remained his intention to comply with his client's instructions to donate the residual estate funds to charities.
- 98. The Respondent admits that, as set out in allegation 4 of the citation, he made misrepresentations to the court contrary to Rules 2.1-2 and 2.2-1 of the *Code of Professional Conduct for British Columbia* by:
  - (a) preparing, signing and filing an affidavit of applicant for grant of probate pursuant to Rule 25-3(2) of the *Supreme Court Civil Rules* in which he deposed that he had read the submission for estate grant and the other documents referred to in that document and believed that the information contained was correct and complete when he ought to have known that this representation was untrue as he had failed to disclose the identity of

PD and SD as persons whom he knew would have been intestate successors if the deceased had not left a will;

- (b) preparing, signing and filing an affidavit of delivery in Form P9 for the purposes of confirming to the court that the documents referred to in Rule 25-2 of the *Supreme Court Civil Rules* were delivered to all of the persons to whom under that rule the documents were required to be delivered, which he knew omitted reference to PD and SD whom he knew were persons to whom the documents were required to be delivered;
- (c) preparing and filing a submission of estate grant pursuant to Rule 25-3(2) of the *Supreme Court Civil Rules* to which he attached a schedule for grant of probate which he knew failed to list PD and SD as persons who would have been intestate successors if the deceased had not left a will.

99. The Respondent admits that his conduct in doing so constitutes professional misconduct.

As a result of these admissions the Respondent obtained the permission of the Discipline Committee to resign from membership in the Law Society effective September 28, 2017 and undertook for a period of seven years, commencing on September 28 2017, as follows:

- (a) not to apply for reinstatement to the Law Society of British Columbia (the “Law Society”) until on or after September 28, 2024;
- (b) not to apply for membership in any other law society (or like governing body regulating the practise of law) without first advising in writing the Law Society; and
- (c) not to permit his name to appear on the letterhead of, or otherwise work in any capacity whatsoever for, any lawyer or law firm in British Columbia, without obtaining the prior written consent of the Discipline Committee of the Law Society.