

IN THE MATTER OF THE LEGAL PROFESSION ACT
AND IN THE MATTER OF A HEARING REGARDING THE CONDUCT OF
David Bourdon, A MEMBER OF THE LAW SOCIETY OF ALBERTA

REPORT OF THE HEARING COMMITTEE

On November 3, 2008, a Hearing Committee composed of Bradley G. Nemetz, Q.C. (Chair), Neena Ahluwalia, Q.C., and J. Royal Nickerson, Q.C. convened at the Law Society offices in Edmonton to inquire into the conduct of David Bourdon. The member appeared for himself and Mr. Lindsay MacDonald, Q.C. appeared for the Law Society.

INTRODUCTION

1. Nine years after the death of the deceased, \$20,000 came into the Estate of the deceased in respect of which the member was the sole Executor. While negotiations, and eventually a court application, were underway among representatives of various claimants the member lent to one of the beneficiary claimants, who was also his client, more than her proportionate share of the funds. He failed to advise representatives of others having a claim to the funds of the loan.

2. The member pleaded guilty to breaching his fiduciary duty by the lending of the funds and to failing to respond to, and promptly disclose, the fact of the loan to representatives of the other claimants.

3. The Hearing Committee found that this conduct was deserving of sanction, fined the member \$2,500, and ordered that he pay the actual costs of the hearing, which were estimated to be approximately \$5,000.

THE CITATION

4. The member was charged with the following citations:

1. IT IS ALLEGED that you breached your fiduciary duty by "lending" estate funds of the S.E. Estate without authority and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.
2. IT IS ALLEGED that you deceived the Executor of the I.E. Estate, the beneficiary of the funds in question, by failing to disclose in a timely manner to the Executor of the I.E. Estate that you had "lend" funds of the S.E. Estate and thereby breached the *Code of Professional Conduct* and that such conduct is conduct deserving of sanction.
3. IT IS ALLEGED that you failed to respond in a timely manner to communications from the Executor of the I.E. Estate and to the Law Society of Alberta, and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.

4. IT IS ALLEGED that you acted in a position of conflict in concurrently acting as Executor of the S.E. Estate and in representing D.G. and thereby breached the *Code of Professional Conduct*, and that such conduct is conduct deserving of sanction.
5. An application was made on behalf of the Law Society and the member to consolidate the first three citations into one and dismiss the fourth citation. The Committee accepted the joint recommendation and the hearing proceeded on the basis of one citation as follows:
 1. IT IS ALLEGED that you are guilty of conduct deserving of sanction, the particulars of which are that you:
 - (a) Breached your fiduciary duty by "lending" estate funds of the S.E. Estate without authority and thereby breached the *Code of Professional Conduct*, and that such conduct is deserving of sanction;
 - (b) Were less than candid with the Executor of the I.E. Estate, the beneficiary of the funds in question, by failing to disclose in a timely manner to the Executor of the I.E. Estate that you had "lent" funds of the S.E. Estate and thereby breached the *Code of Professional Conduct*, and that such conduct is deserving of sanction; and
 - (c) Failed to respond in a timely manner to communications to telephone calls from the Executor of the I.E. Estate and thereby breached the *Code of Professional Conduct* and that such conduct is deserving of sanction.
6. With respect to the amended citation the member admitted guilt and admitted that his conduct was deserving of sanction.

JURISDICTION

7. Jurisdiction was established by entering as exhibits the Letter of Appointment, Notice to Solicitor, Notice to Attend, Certificate of Status and Certificate of Exercise of Discretion. Further, the member accepted the jurisdiction and composition of the panel.

OTHER PRELIMINARY MATTERS

8. There were no other preliminary matters.

DISCUSSION

9. Much of the evidence and the submissions before the Hearing Committee dealt with the circumstances leading up to and surrounding the receipt of the funds, the court application concerning entitlement to the funds, and the difficult family dynamics involved. We will provide a brief summary of that evidence. However, the Hearing Committee concluded that the complications of the setting did not alter the fact that the member should not have lent estate

money to one of the beneficiaries who was also his client, and should not have delayed in advising the representative of the other claimants of the loan.

10. In 1990 when the member was a student-at-law he reluctantly agreed to serve as executor to the estate of a client whose will he was preparing. The testator was a widow who had one daughter and a number of step-sons and step-daughters. The testator was deaf. The testator anticipated difficulties and hard feelings between her daughter and her step-children over the will. She did not want a member of the family to be the executor. Her daughter was also married and in an abusive relationship and the testator did not want her son-in-law to have a claim to the estate. The testator's parents were alive.

11. The testator decided to leave her personal effects, car, RRSP, to her daughter, but to leave the residue of her estate to her parents absolutely, expecting that they would see to the distribution of the estate to her daughter as she needed it over time.

12. When the mother died the grandparents consulted the daughter on the distribution of the residue and the daughter asked that it be distributed to her and her step-brothers and step-sisters in equal portions.

13. Approximately 10 years later the testator became entitled to \$20,000 as a result of a pay equity decision involving Federal Government employees. By this time the grandparents had both died and their will left their estate to the granddaughter and 7 nieces and nephews.

14. The member and the daughter, who was now his client, felt that the testator never intended for her estate to be distributed to her mother's nieces and nephews. Initially it was felt that those nieces and nephews would see the reasonableness of this and waive their claim in favour of the daughter. Unfortunately this did not happen.

15. The member then applied for advice and directions. That application eventually resulted in a decision that the will was not ambiguous, that parole evidence as to the mother's true intention was not admissible, and that the distribution would have to be in accordance with the two wills.

16. In the meantime the member had advanced to the daughter more than her 1/8th share.

17. Those payments were made over time and initially without documentation or security. For example, \$1,000 was advanced in October of 2001 and a further \$2,000 advanced November 28, 2001. In 2002 the following payments were made:

March 7 th	\$500
May 16 th	\$2,000
June 19 th	\$800
July 26 th	\$525
August 12 th	\$1,000
September 10 th	\$1,900

18. As a result, by September 13, 2002 only slightly more than \$8,000 of the \$20,000 originally received was still held in trust by the member. On that date he paid the balance over to the mother's estate. By that time he had secured a promissory note from the daughter covering the funds advanced and had registered that note against the daughter's house. However, there were delays associated with realizing on the promissory note and the security. Eventually the money was recovered and distributed in accordance with the grandmother's will. However, significant legal fees were expended in the advice and directions application and considerable length of time elapsed before final distribution.

19. As can be seen from the above, the member improperly advanced money from the estate to one of the beneficiaries who was also his client. He initially did this without any security. The result of the advances was also a delay in recovery and distribution of the funds to the estate.

20. On the court application for advice and directions the Chambers judge was sufficiently unimpressed with the position taken by the member that he ordered costs to be paid personally by the member. The member paid those costs. The member also waived all costs and time associated with these matters so that, in the end, the member suffered significant financial loss as a result of his actions.

21. The above facts sufficiently set out the circumstances surrounding the loan and its recovery and the first particular citation.

22. With respect to the two other particulars of the citation, the member received the bulk of the \$20,000 in 2000. On December 4, 2001 he wrote to the executor of the grandparents' estate, one of the nieces and nephews who would share in the distribution, referring to prior telephone conversations with that individual and indicating that the member had received a series of cheques from the Federal Government totaling \$19,190.76, net of deductions. The letter leaves the impression that the funds are still with the member and asks that the nephew canvass with other beneficiaries of the grandmother's estate whether or not they would disclaim in favour of the

deceased's natural daughter. By this date the member had advanced to the daughter, or applied to accounts that the daughter owed him, approximately \$3,300, which was more than the daughter's 1/8th share. Further, the funds had been advanced without any promissory note, any security, or any terms as to interest.

23. The executor of the grandparents' estate called the member on a number of occasions after receipt of this letter. Eventually the executor retained counsel in June 2004. It wasn't until September of 2004 that the member advised that he had advanced the funds to the daughter.

24. Prior to the commencement of the hearing the member apologized to the complainant.

SANCTION

25. In light of the admission of guilt and the above facts the Committee considered that, while this was the first conviction of the member in disciplinary proceedings, a reprimand would not satisfactorily indicate the seriousness of the member's behaviour.

26. The Hearing Committee had some sympathy for the member in that the member had agreed to act as executor given the family dynamics and the specific requests of the mother. The unexpected outcome, involving a very late payment to the estate, which was never anticipated by the mother at the time of the preparation of the will, and its distribution to distant relations did appear to be contrary to the mother's reasonable hopes and expectations. However, this does not excuse the member's behaviour. To advance funds to the beneficiary repeatedly over an extended period of time, in excess of her entitlement, was inappropriate and he must have known that it was inappropriate. A member, even when he is an executor, in dealing with fiduciary funds must do so appropriately and not let his feelings override proper behaviour. Failing to advise the executor of the grandparents' estate of what he was doing further compounds the behaviour.

27. While the Committee is satisfied that the member will not repeat his behaviour, it is also concerned about the need to maintain the public confidence in the integrity of the legal profession and the need to consider, in sanctioning, the aspect of providing a general deterrent to other members.

28. The cumulative delay occasioned by the member's actions is of concern in this matter, particularly given that this is an estate situation where, since the time of Charles Dickens, lawyers have been publicly criticized for delay in the administration and distribution of estates. Here, the bulk of the funds were received in 2000 and the funds were not covered and made available to the beneficiaries of the parents' estate until 2006.

29. The Hearing Committee, in coming to the sanction of \$2,500, was mindful of the expense that the member has been put to, by way of payment of costs personally and in conducting the matter without charging fees for much of the proceedings. However, the Committee does not feel that a reprimand alone, in light of the facts and considerations set out above, is sufficient to demonstrate to the public and to the beneficiaries for the grandmother's estate the seriousness of the duties that have been breached. Accordingly, the Committee came to the conclusion that a fine of \$2,500 in the circumstances was appropriate. It ordered that the actual costs of the hearing, estimated to be just in excess of \$5,000, be paid. It gave the member 60 days from the date of delivery of the actual costs for the member to pay both the fine and the costs.

CONCLUDING MATTERS

30. There will be no circulation of the Notice to the Profession or referral of the matter to the Attorney General. As the hearing proceeded in public the exhibits and the transcript will be made available upon request with redaction of any client names.

Dated this 5th Day of December, 2008

Bradley G. Nemetz, Q.C. (Chair)

Neena Ahluwalia, Q.C.

J. Royal Nickerson, Q.C.