2024 LSBC 47
Hearing File No.: HE20230008
Decision Issued: December 13, 2024
Citation Issued: June 14, 2023

THE LAW SOCIETY OF BRITISH COLUMBIA TRIBUNAL

HEARING DIVISION

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

AND:

LEONARD HIL MARRIOTT

RESPONDENT

DECISION OF THE HEARING PANEL ON FACTS AND DETERMINATION

Hearing dates:	May 6 to 9 and June 19, 2024
Written submissions:	August 29, 2024
Panel:	Maia Tsurumi, Chair Clarence Bolt, Public representative Jonathan Yuen, Bencher
Discipline Counsel:	Gagan Mann
Appearing on his own behalf:	Leonard Hil Marriott

INTRODUCTION

[1] Public confidence in the rule of law and in the legal profession requires clear application of law and legal procedures by lawyers. Clients entrust lawyers with matters central to their personal and/or financial identity and wellbeing. They expect competence, professionalism, transparency, efficiency, and ethics, whether the matter is big or small, or involves large corporate bodies, individuals, civil matters, crime, real estate, or wills and estates. The relationship is a sacred trust.

[2] The legal profession in British Columbia expects the same high standards of its lawyers. It is regulated by the *Legal Profession Act* (the "*Act*"). Lawyers must abide by the Law Society Rules (the "Rules") and its *Code of Professional Conduct* (the "*Code*"). The legal profession has mechanisms to hold lawyers accountable, including processes for members of the public and the legal profession to make complaints or raise matters with the Law Society. The expectation is resolution favouring the public interest.

[3] The Law Society of British Columbia (the "Law Society") issued a citation (the "Citation") against Leonard Hil Marriott (the "Respondent") concerning his handling of AB's Will and the settling of her estate (the "Estate").

[4] AB was the founder and leader of a long-running philosophical society ("EPS"), which had a small, long-term group of students/members (the "Members"). In the summer of 2018, AB was 95 years old, in poor health, and had sustained a broken hip.

[5] Around that time and following, she allegedly was the victim of ongoing elder abuse perpetrated by AH, son of one of the Members, MH. AH was living on AB's property.

[6] On July 8, 2018, the Respondent met with AB at her home to receive instructions from her about preparing a will. He was accompanied by some EPS Members and a police officer, whose presence was requested by these members because they alleged AH was blocking access to AB.

[7] After the meeting, the Respondent met with Members and told them that AB had signed a retainer and had told the Respondent that the EPS would be the sole beneficiary of the Estate. The Respondent would also be its executor and trustee.

[8] Following AB's instructions, Members set in motion the process to register the EPS as a non-profit under the provincial *Societies Act*. On August 27, 2018 the EPS was incorporated as the EP Association (the "Association").

[9] The Respondent prepared AB's will (the "Will"). He gave two Members, SF, and her son, BF, a copy of the Will. The Will specified the Association as AB's sole beneficiary. The Respondent misspelled the name of the Association in the Will.

[10] On or around August 29, 2018, AB executed the Will in the presence of SF and BF. The Respondent was not present.

[11] AB died on November 14, 2018.

[12] In December 2018, the Respondent began executing the Will. The final settlement, the Minutes of Release, was signed by Association Members on May 13, 2022 and by the Respondent on June 27, 2022. As of May 9, 2024, at the start of this Citation hearing, final accounting of the funds had yet to occur.

[13] In early 2019, the Law Society received a complaint from Member MH, the mother of AH, about the Respondent's handling of AB's Will.

[14] The Law Society opened an investigation file but closed it under Rule 3-8(1)(a) of the Rules, which states that "[a]fter investigating a complaint, the Executive Director must take no further action if the Executive Director is satisfied that the complaint is not valid or its validity cannot be proven…"

[15] From January through February 2021, the Law Society conducted a compliance audit of the books, records, and bank accounts of the Respondent's Law Firm, Leonard H. Marriott Law Corporation (the "Firm"), for the period June 1, 2019 to January, 2021 (the "Compliance Audit"). The Compliance Audit identified issues about the Firm's accounting practices with respect to the Respondent's client file for AB. Consequently, the Law Society opened an investigation.

[16] On July 12, 2021, a second Association Member, SF, one of the Will's witnesses, submitted a complaint to the Law Society about the Respondent's handling of the Estate, including the Respondent's executor's fees and estate accounting.

[17] The Law Society opened a new investigation file. Based on findings from investigations on both the Compliance Audit and SF's complaint, the Law Society issued the Citation heard by this Panel.

THE CITATION

[18] The Citation says as follows:

TAKE NOTICE THAT by direction of the Discipline Committee of the Law Society of British Columbia, a Hearing Panel of the Law Society will, at a date and time to be set, conduct a hearing to inquire into your conduct or competence as a member of the Law Society of British Columbia, in accordance with section 38 of the *Legal Profession Act*. Parts 4 and 5 of the Law Society Rules outline the procedures to be followed at the hearing. Your appearance before the Hearing Panel may be your only opportunity to present evidence, call witnesses or make submissions. The allegations against you are:

1. In or between approximately July 2018 and February 2019, in relation to your client AB (the "Client") concerning a wills and estates matter, you failed to provide the quality of service required of a competent lawyer in a similar situation, contrary to one or more of rules 3.1-2, 3.2-1, and 3.3-1 of the *Code of Professional Conduct for British Columbia*, including by doing one or more of the following:

    (a) failing to obtain, confirm, and/or correctly document instructions from the Client on all necessary matters;

    (b) failing to determine the status of the "society" as a legal entity or its correct legal name, or both, when you drafted the will naming the "society" as a beneficiary;

    (c) provided the Client's unsigned will [(the "Will")] to a named beneficiary, or representative thereof;

    (d) failing to review the final draft of the Client's [W]ill with them before it was signed;

    (e) failing to ensure the [W]ill was properly executed; and

    (f) failing to take all appropriate steps to deal with matters affecting the validity of the [W]ill, including, but not limited to, bringing these matters to the attention of the court prior to the granting of probate.

This conduct constitutes professional misconduct or incompetent performance of duties, pursuant to s. 38(4) of the *Legal Profession Act*.

2. Between approximately March 5, 2019 and March 15, 2019, while acting as the executor and trustee of the estate of AB, your former client, you improperly withdrew from trust some or all of $71,149.12 in executor fees, prior to receiving signed releases from the beneficiary or their

representative waiving the passing of your accounts or obtaining a court order authorizing the payments, contrary to one or more of Rule 3-64 of the Law Society Rules, rule 3.6-1 of the *Code of Professional Conduct for British Columbia* and your fiduciary duties.

This conduct constitutes professional misconduct, conduct unbecoming the profession, or a breach of the *Act* or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

3. Between approximately March 5, 2019 and March 9, 2021, while acting as the executor and trustee of the estate of [AB], your former client, you misappropriated or improperly withdrew from trust some or all of $26,760.21 when you were not entitled to those funds, contrary to one or both of Rule 3-64 of the Law Society Rules and your fiduciary duties.

This conduct constitutes professional misconduct, conduct unbecoming the profession, or a breach of the *Act* or rules, pursuant to s. 38(4) of the *Legal Profession Act*.

[19] The Citation was authorized by the Discipline Committee on June 8, 2023 and issued on June 14, 2023 as required by Law Society Rule 5-6.1.

[20] The Respondent admits that, on June 20, 2023, he was served with the Citation in accordance with the requirements of Rule 4-19 of the Rules.

[21] The Panel must determine whether the Respondent's alleged conduct was contrary to the *Code* and/or in breach of his fiduciary duties and the Rules specified in the Citation. Next the Panel must determine if the Respondent's proven conduct amounts to professional misconduct or incompetent performance of duties or conduct unbecoming the profession or simply a breach of the *Act* or Rules.

PRELIMINARY MATTERS

Rule 5-8(2) order

[22] On the first day of the virtual hearing, in response to the presence of a member of the media, the Law Society asked the Panel for an order under Rule 5-8(2) to prevent publication of the names of any witnesses and representatives of the beneficiary involved in the estate matter at the heart of the Citation.

[23] The Panel granted the order.

[24] The Respondent said he generally supported a Rule 5-8(2) order.

[25] The Panel found it unnecessary to risk the privacy or reputation of individuals drawn into the matter who are not the Respondent. Privacy is a fundamental consideration in a free society (*Sherman Estate v. Donovan*, 2021 SCC 25). Furthermore, reputation is an integral and fundamentally important aspect of every individual. (*Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130). As their conduct is not in question, publication of the names of the witnesses and representatives of the beneficiary is not required to maintain public confidence in the legal profession and its disciplinary process.

Adjournment Application

[26] At the start of the hearing, the Respondent made an application to adjourn on the following grounds:

(a) he said that he needed his counsel present for these proceedings, as they could have serious consequences for him;

(b) he argued that these proceedings would be subsumed by an ongoing proceeding under s. 96 of the *Trustee Act*, RSBC 1996, c. 464; and

(c) he maintained that the Law Society must provide him with exculpatory recordings and documents.

[27] The Panel dismissed the Respondent's application.

[28] The Respondent had previously raised the two latter grounds at an adjournment and document production application prior to this hearing. The Tribunal Motions Adjudicator dismissed his application but, by the morning of the first day of these proceedings, had yet to issue written reasons. The Respondent said that once he had the written reasons, he would be judicially reviewing that decision and that, therefore, the present hearing should be adjourned.

[29] The Law Society opposed the application, noting that the Respondent had already had a similar adjournment application denied by the Tribunal Motions Adjudicator. Further, the Law Society's counsel contacted the firm of the lawyer that the Respondent claimed he had retained and was told that lawyer was out of the country. The Law Society noted that the Respondent had notice of the hearing since December 7, 2023, but had yet to retain counsel.

[30] The Law Society further submitted the following points which were not contested by the Respondent:

(a) at no time prior to the hearing had anyone purporting to represent the Respondent contacted the Law Society;

(b) on December 7, 2023, the Respondent indicated that he was looking for counsel;

(c) by February 29, 2024, he had not retained counsel;

(d) on April 22, 2024, the Respondent told the Law Society that he was in the process of confirming that a lawyer would represent him but did not provide the Law Society with contact information for this lawyer; and

(e) on April 24, 2024, the Respondent brought his adjournment and document production application, which was heard on April 25th. In oral submissions, the Respondent said he wished to get counsel for the hearing.

[31] The Panel adjourned until the afternoon after learning from Tribunal staff that the Motions Adjudicator's written reasons would be published by then.

[32] After receiving and reviewing the reasons (*Law Society of BC v. Marriott*, 2024 LSBC 24 ("*Marriott Motions Decision*")), the Panel ruled on the Respondent's adjournment application.

[33] Regarding the Respondent's arguments about the *Trustee Act* proceeding and his document production requests, the Panel noted that these were identical to the ones which the Motions Adjudicator had dismissed (*Marriott Motions Decision*). The Respondent provided no new arguments or evidence that might persuade the Panel to reconsider the matter.

[34] The Respondent's argument about having retained counsel and needing counsel present at the hearing was similar to the one he had argued before the Motions Adjudicator. At the time, he had not referred to this as a reason for his requested adjournment (*Marriott Motions Decision*, at para. 12).

[35] The Panel acknowledged that having counsel for the hearing was important to the Respondent. Nevertheless, it dismissed this ground of his adjournment application. In the six months following the notice of the hearing, the Respondent was served with the Law Society's Notice to Admit (the "NTA"), dated February 8, 2024 containing 181 requested admissions of fact along with numerous documents. He provided a detailed response to the NTA by March 22, 2024. The Respondent clearly had adequate notice of the allegations against him and time to retain counsel but had not made reasonable efforts to do so.

[36] The Respondent was inconsistent in his evidence. He told us he had retained counsel but also told us that he was seeking, and wishing, to retain a lawyer. At the April 25, 2024 hearing before the Motions Adjudicator, the Respondent was similarly unclear about retaining counsel (*Marriott Motions Decision*, at para. 12).

[37] When the Panel asked why he believed he had retained counsel, the Respondent said: (1) he had some correspondence about retaining the lawyer with the lawyer's firm; (2) had emailed several times with the lawyer about trying to have a telephone call to discuss his disciplinary matter; (3) had sent a retainer cheque to the firm; and (4) had not been told by the lawyer or his firm that the lawyer was not retained. The Respondent gave the Panel his email correspondence with the lawyer and his firm.

[38] The emails that the Respondent submitted to the Panel indicate the lawyer was not retained. Some of them are unanswered emails from the Respondent asking for help with the proceeding. In one, the lawyer says that he cannot take on the Respondent's matter, although whether this relates to a different Law Society proceeding is not clear. The correspondence indicates only that the Respondent wished the lawyer to represent him.

[39] The Respondent admitted that his most recent communication from the lawyer's firm indicated that the cheque was not deposited into the lawyer's trust account "as we are awaiting [the lawyer's] return [from abroad] and an opportunity for him to speak with you."

[40] On April 22, 2024, the Respondent told the Law Society that he was in the process of confirming that a lawyer would represent him at the hearing.

[41] The Respondent's purported lawyer was not present at the first day of this hearing (May 6, 2024), although the Respondent sent him the hearing dates. The Respondent acknowledged, and the emails indicate, that the lawyer did not tell the Respondent that he would, or could not, appear at the hearing. Furthermore, the lawyer never contacted the Law Society's counsel or the Tribunal about the hearing.

[42] The Respondent said that he was concerned about the fairness of a hearing without counsel. However, he had not retained one in the six months he had to do so or by the time of the hearing. On his own evidence, he had not made reasonable efforts to do this. This contradicts his position about the importance of retaining counsel. Further, even if not indicative of his view, six months is a reasonable period to retain, or attempt to retain, a lawyer. The Law Society's public protection mandate requires hearings into allegations of potential misconduct to occur in a timely and expeditious manner (see e.g. *Law Society of BC v. Hart*, 2019 LSBC 39 at para. 18).

[43] Therefore, because allowance of this adjournment application would have delayed the hearing, likely for several months, and would have impaired public confidence in the Law Society's disciplinary process, the Panel dismissed the Respondent's adjournment application.

Application for transcripts to be ordered and for an extension of time to file closing submissions

[44] At the end of hearing the evidence, the Panel ordered, with the parties' agreement, that closing submissions be provided in writing without oral submissions. The Panel ordered the Law Society to provide its written closing submissions on July 10, 2024, with the Respondent's submissions due on July 31, 2024.

[45] The Law Society's submissions were provided on July 9, 2024. The Respondent did not provide his submissions by the July 31, 2024 deadline. Instead, he brought an application under Rule 5-12(1)(d) for the following:

(a) The parties order the transcripts of the hearing (May 6 to 9 and June 19, 2024).

(b) An extension of time for the Respondent's closing submissions to a date two weeks after he receives the transcripts.

[46] On August 15, 2024, the Panel heard the Respondent's application and granted it in part.

[47] The Respondent explained that he did not have the hearing transcripts but needed them to prepare his closing submissions because the Law Society's closing submissions were "patently incorrect," a fact that he said would be established by the transcripts. The Respondent asserted that the Panel "directly or impliedly" had ordered production of the transcripts on June 19, 2024 at the close of the oral hearing. Therefore, the Law Society was required to order and provide them to him.

[48] The Law Society opposed the application. It said that the Panel had not ordered the transcripts to be produced. On June 19, counsel for the Law Society had asked the Panel for three weeks from that June 19 date to file closing submissions in the event that she might wish to order the transcripts.

[49] On June 19, the Respondent had asked the Panel for six weeks after the Law Society made its closing submissions to file his submissions. The Panel denied that request, setting a deadline of three weeks, namely July 31, 2024.

[50] The Law Society sent the Respondent an email on July 10, 2024 notifying him that its closing submissions were available on the Tribunal's file sharing site (the "File Site"). It received no reply to this email and heard nothing further from the Respondent until July 29, 2024 when he emailed Law Society counsel to ask when he would receive the Law Society's submissions and transcripts of the hearing.

[51] In response, the Law Society advised, by email, that it had not ordered the transcripts and, further, that its submissions had been uploaded to the File Site. Upon hearing that the submissions were on the File Site, the Respondent asked the Law Society to send him a copy of its closing submissions by email and asked for help finding the exhibits on the File Site.

[52] On July 29, the Respondent asked Veritext for the transcripts. His order was confirmed on July 31 when he paid for them. He did not order the transcripts on an expedited basis. At the August 15, 2024 hearing of his application, the Respondent told the Panel he should have the transcripts that day.

[53] Rule 5-12(1) requires those making applications to provide an evidentiary foundation in support of their application (*Law Society of BC v. Sangha*, 2022 LSBC 39, at para. 20).

[54] The Panel concluded the Respondent failed to establish a reasonable basis for an extension of time to file his closing submissions for two weeks from August 15, 2024.

[55] The Panel had not ordered the Law Society – or any party – to produce the transcripts. In his closing submissions, the Respondent provided an excerpt of the transcripts from June 19, 2024 which confirms the Panel and the Law Society's recollections about the order. In any event, the evidence showed the Law Society told the Respondent on July 9, 2024, in correspondence on another matter, that Veritext required each party to order their own copies of transcripts. Hence, by that time, the Respondent should have known that he had to order the transcripts for himself.

[56] Further, the evidence indicated that the Respondent took no significant steps to prepare his closing submissions before July 29. He did not ask the Law Society why they had not sent him copies of the transcripts before this date and he had not reviewed the Law Society's closing submissions.

[57] Despite the above, the Respondent insisted that he required the transcripts to respond to the Law Society's submissions and told the Panel that he would have the transcripts by the end of day on August 15, 2024.

[58] In the interests of fairness, and to give the Respondent further opportunity to make his case, the Panel ordered the Respondent to submit his closing submissions by 4:00 PM, August 19, 2024, that is, three days after he received the transcripts.

[59] On August 19, 2024, the Panel received the Respondent's closing submissions. In the document, despite that fact that he already had the transcripts in his possession, the Respondent repeated his desire for an extension: "… the Respondent should be provided the two week [*sic*] extension to prepare submissions in order for this matter to be heard in a fair and judicious manner" and to counteract "false statements" by some of the witnesses and the Law Society's counsel.

[60] His expressed desire for an extension was not a motion for an extension.

[61] The Panel notes that if the Respondent believed that the transcripts were to be provided by the Law Society following the June 19, 2024 hearing date, he should have taken immediate steps to verify that opinion or have ordered the transcripts himself, both to begin preparation for his closing submission and to respond to the Law Society's submissions. Instead, he waited until July 29, 2024, two days before the deadline for him to make his submission, to order the transcripts, and until July 31, 2024, the due date for that submission, to file an application, resulting in the delays noted above.

BACKGROUND

[62] The Respondent was called to the bar of British Columbia on February 14, 1992 and practised as a sole practitioner until July 1, 1992 when he changed careers and became an inactive member. On December 31, 1992, he became a former member.

[63] On November 3, 2015, the Respondent was reinstated with a condition to practise law only in an approved situation and with the Law Society's permission. This condition expired on October 3, 2018.

[64] On October 3, 2016, the Respondent began practising part-time at Gerry M. Laarakker Law Corporation. He remained there until January 1, 2018 when he formed North Valley Law with Mr. Laarakker. On August 1, 2018, he began practising under the name Leonard H. Marriott Law Corporation, doing business as North Valley Law (the "Firm").

LAW: GENERAL PRINCIPLES

Onus of Proof

[65] The Law Society bears the onus of proving, on a balance of probabilities, the facts alleged in the Citation (see *Foo v. Law Society of BC*, 2017 BCCA 151, at para. 63). The Panel must determine whether the Respondent has committed professional misconduct.

Assessing Professional Misconduct

[66] There is no statutory definition of professional misconduct. However, Tribunal decisions have held that the test for professional misconduct is whether the conduct under review is a marked departure from that expected of lawyers (*Law Society of BC v. Martin*, 2005 LSBC 16, at para. 171. See also, e.g., *Law Society of BC v. Edwards*, 2020 LSBC 21, at paras. 44 to 46).

[67] *Martin* is an objective test accepted by many Tribunal panels and affirmed by a review panel in *Law Society of BC v. Lawyer 12*, 2011 LSBC 35.

[68] Determining whether a lawyer's behaviour warrants a finding of professional misconduct is context specific. Hearing panels must consider the circumstances surrounding the misconduct. This may include assessing the gravity of the misconduct, its duration, the number of breaches, the presence or absence of bad faith and the harm caused by the conduct.

Assessing Incompetent Performance

[69] Under section 38(4)(b)(iv) of the *Act*, a panel may determine that a respondent has been incompetent in the performance of their duties as a lawyer.

[70] "Competence" is not defined in the *Act* but rule 3.1-1 of the *Code* defines a "competent lawyer" as one:

> … who has and applies the relevant knowledge, skills and attributes in a matter appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:
>
> (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;

(c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:

(i) legal research;

(ii) analysis;

(iii) application of the law to the relevant facts;

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

(d) communicating at all relevant stages of a matter in a timely and effective manner;

(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

[71] In *Law Society of BC v. Eisbrenner*, 2003 LSBC 3, at para. 48, the Panel describes the requirements for a competent lawyer. They should:

(a) have the intellectual, emotional and physical capacity to carry out the practice of law;

(b) demonstrate professional responsibility and ethics;

(c) set up and maintain office systems and file organization [corresponding] to the current or anticipated practice of the lawyer;

(d) communicate in a timely and appropriate manner with clients, counsel and others and document those communications in an appropriate manner;

(e) have an adequate knowledge of substantive and procedural law in the areas practised, be able to relate the law to a client's affairs and determine when the problems exceed the lawyer's ability; and

(f) develop and apply technical skills such as drafting, negotiations, advocacy, research and problem solving to appropriately carry out a client's instructions.

[72] Ultimately, incompetent conduct by a lawyer demonstrates "a want of ability suitable to the task, either as regards natural qualities or experience, or a deficiency of disposition to use one's ability and experience properly" (*Eisbrenner*, at para. 50).

[73] Commentary 15 of rule 3.1-2 explains that the "rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability…."

[74] Assessing incompetence is a function of looking at the nature and extent of the mistake or mistakes and the circumstances giving rise to it or them (*Law Society of BC v. Goldberg*, 2007 LSBC 3, at para. 50). It may be self-inflicted or the result of negligence or ignorance. Thus, a panel looks at the mistakes and determines whether they are of such significance as to show incompetence (*Law Society of BC v. Cranston*, 2011 LSBC 24, at para. 59).

[75] In *Goldberg,* the lawyer was cited for, among other things, failing to demonstrate adequate knowledge of substantive law, practice, and procedures to effectively apply that substantive law and the skills to represent his client's interests effectively (quality of

service). The panel found the lawyer's conduct demonstrated the incompetent performance referred to in s. 38(4)(b)(iv) of the *Act*.

Assessing Conduct Unbecoming the Profession

[76] Conduct unbecoming is conduct contrary to the best interest of the public or the legal profession, or conduct causing harm to the standing of the legal profession (*Act*, s. 1), and refers to matters in a lawyer's private life (see e.g. *Law Society of BC v. Riddell*, 2021 LSBC 32, at para. 20), in distinction to misconduct related to a lawyer's professional practice, which could be the subject of a citation seeking to determine professional misconduct.

[77] As noted by the panel in *Riddell*, at para. 21, the Law Society, as a self-governing profession that regulates in the public interest, has an obligation, where appropriate, to discipline lawyer's misconduct in areas that fall outside of the professional practice of law.

[78] A member's conduct in their private capacity is not professional misconduct unless it may reasonably be seen to be an outgrowth of their professional activities or status (*Law Society of BC v. Bauder*, 2012 LSBC 13, at para. 16).

[79] Examples of conduct unbecoming the profession are dishonesty (*Law Society of BC v. Berge*, 2005 LSBC 28; *Law Society of BC v Woodward*, 2015 LSBC 49; *Law Society of BC v Hall*, 2007 LSBC 26; *Law Society of BC v Guo*, 2024 LSBC 21); criminal conviction (e.g. *Riddell*; *Law Society of BC v Chow*, 2021 LSBC 18); and domestic violence against a spouse (*Law Society of BC v Kang*, 2021 LSBC 23)).

Breach of the *Act* or rules

[80] A lawyer may breach the *Act* or Rules without their misconduct rising to the level of professional misconduct. The *Lyons* decision identifies this as a "Rules breach" (*Law Society of BC v. Lyons*, 2008 LSBC 9, at para. 32).

[81] A Rules breach, is where conduct is not an insignificant breach of the Rules and arises from the respondent paying little attention to the administrative side of practice (*Lyons*, at para. 32).

[82] In determining whether the facts indicate professional misconduct or a Rules breach, panels weigh several factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of bad faith (*mala fides),* and the harm caused by the respondent's conduct (*Lyons*, at para. 35). These factors are not a complete list nor are all these factors necessarily applicable in each case.

ALLEGATION 1: PROFESSIONAL MISCONDUCT OR INCOMPETENT PERFORMANCE OF DUTIES IN A WILLS AND ESTATE MATTER.

Overview

[83] The Law Society says that the Respondent failed to provide the quality of service required of a competent lawyer regarding his preparation, drafting and execution of AB's Will. This failure included the Respondent:

(a) failing to obtain, confirm, and/or correctly document instructions from AB on all necessary matters;

(b) failing to determine the status of the "society" as a legal entity or its correct legal name, or both, when he drafted the Will naming the "society" as a beneficiary;

(c) providing AB's unsigned Will to a named beneficiary, or representative thereof;

(d) failing to review the final draft of AB's Will with AB before it was signed;

(e) failing to ensure that the Will was properly executed; and

(f) failing to take all appropriate steps to deal with matters affecting the validity of the Will, including, but not limited to, bringing these matters to the attention of the court prior to the granting of probate.

[84] The Law Society argues that this failure to provide the quality of service required of a competent lawyer was contrary to rule 3.1-2 of the *Code*. The Citation alleges that this also constituted professional misconduct or the incompetent performance of duties pursuant to s.38(4) of the *Act.*

[85] The Citation also mentions *Code* rules 3.2-1 and 3.3-1. However, at the hearing, the Law Society said that it would no longer argue its case using rule 3.3-1.

[86] The Panel finds that the Respondent committed all the errors set out in Allegation 1, except for 1(c), and that these constitute professional misconduct.

Law

[87] All the Respondent's alleged misconduct under Allegation 1 occurred in relation to his professional practice and so the question of whether he committed conduct unbecoming the profession does not arise.

[88] In relation to Allegation 1, the Respondent says that the Law Society failed to meet its burden of proof with respect to the applicable standard of care for drafting, executing and probating a will because it did not provide any expert evidence (*Law Society of BC v. Guo*, 2023 LSBC 30, at paras. 403 to 436). Expert evidence is not needed about standards of practice: (1) if there are non-technical matters or those of which an ordinary person may be expected to have knowledge; or (2) where the actions are so egregious that it is obvious that the conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard (*Guo* at para. 411).

[89] Based on the law, facts and analysis below, the Panel finds the Respondent's conduct falls into the latter category. His acts and omissions with respect to the drafting, execution, and probate of the Will were so far below the standard of practice that it was obvious, and would be so to an ordinary person, that his conduct did not meet what is required of a competent lawyer in similar circumstances.

Applicable *Code* rules

[90] *Code* rule 3.1-2 requires a lawyer to perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

[91] As commentary [15] to section 3.1-2 of the *Code* notes, the standard is not perfection. Even errors and omissions that may be actionable in negligence or breach of contract proceedings by a client against the lawyer may not necessarily amount to a failure to maintain the required standard of competence. What is relevant is gross neglect in a particular matter or a pattern of neglect or mistakes in different matters, regardless of tort liability (*Guo* at para. 405).

[92] *Code* rule 3.2-1 requires a lawyer to provide courteous, thorough, and prompt service to clients. The Law Society does not allege the Respondent failed to provide courteous or civil service. However, it relies on rule 3.2-1 with respect to its allegations that the Respondent failed to provide competent, timely, conscientious, diligent and efficient service.

Application of the law to the facts

[93] The Panel finds the following facts:

(a) In July 2018, AB retained the Respondent to prepare her will. She was 95 years old and in frail physical health.

(b) AB founded the EPS, which had a longstanding membership of students and operated out of her property (the "Property"). The Respondent confirms that

in July, 2018, the six core students of the EPS were SF, BF, FP, AP, MH, and TC.

(c) In July 2018, AH, son of MH, was living at the Property and was purportedly AB's caregiver. EPS members, other than MH, were concerned that AB was subject to elder abuse by AH. The Respondent testified that he agreed with all EPS members other than MH about AB living in a situation of significant elder abuse.

(d) On July 8, 2018, the Respondent met with AB at the Property. He attended with a police escort because AH had allegedly been blocking visitor access to AB.

(e) The Respondent met with AB alone about her Will. The Respondent asserted that AB told him that she wanted to leave her estate residue to the "Philosophy Group" and that she wanted him to be her executor. The Respondent did not confirm with AB whether she intended her estate residue to go to the EPS as an entity or to be distributed to the individual members of the EPS.

(f) The Respondent documented the name of the philosophy group by taking a photograph of a sign on AB's property. The Respondent made no other enquiries as to the legal name or legal status of the philosophy group or any other details, such as the names of any directors or members.

(g) During the July 8, 2018 meeting, according to the Respondent's notes, AB told the Respondent that she wanted to provide some financial assistance to AH (her alleged abuser) to assist him to move off the Property. There was no clause in the Will regarding a gift or financial assistance to AH. The Respondent testified that he did not put this in the Will because AB did not want it to be part of it. The Respondent made no arrangements to allow financial assistance to AH to be made as an *inter vivos* gift.

(h) As noted above, following AB's instructions, members registered the EPS as a non-profit under the *Societies Act*. On August 27, 2018, the EPS was incorporated as the Association (see paragraph 8).

(i) The Respondent drafted the Will with himself as executor and trustee. The Will stated, "I direct my Trustee to transfer the residue of my Estate to The EPS". The Association's name was misspelled in the Will as one vowel in the name was substituted with an incorrect vowel.

(j) The Respondent did not meet with AB to review the Will and confirm her instructions. Further, at no time did he give AB or any members of the Association instructions on proper execution of the Will.

(k) At some time between July 8 and August 28, 2018, the Respondent gave a copy of the Will to BF. SF may have also been present. Neither BF nor SF was AB's attorney or legal representative and the Respondent did not have permission from AB to provide the Will to BF or SF.

(l) The Respondent confirmed in his cross-examination that the Will he provided to BF was "not complete."

(m) On August 28, 2018, BF and SF brought the Will to AB's residence and witnessed her execute the Will. The Respondent was not present. Sometime later, the executed Will was given to the Respondent.

(n) Between August 28 and November 14, 2018, the Respondent took no steps to communicate with AB to confirm that the Will complied with her wishes.

(o) AB died on November 14, 2018.

(p) The Respondent, as executor, had the Will probated. The probate documents fail to note the incorrect spelling of the Association in the Will. They also do not indicate that the executed Will was incomplete.

Allegation 1(a): failing to obtain, confirm, and/or correctly document instructions from AB on all necessary matters

[94] The Panel finds Allegation 1(a) is established. The Respondent's behavior regarding the drafting of the Will was a marked departure from the conduct that the Law Society expects from its members and was professional misconduct.

[95] The primary purpose of a will is to distribute the testator's estate in accordance with their wishes, in a manner that is legal and practicable. The lawyer preparing the will must clearly ascertain the testator's wishes and ensure that the testator understands the consequences of those wishes.

[96] The Respondent did not do this. AB's instruction to leave her Estate "all to the Philosophy Group" did not provide sufficient information to allow a lawyer to accurately and correctly identify the beneficiary of her estate. The Respondent had a professional obligation to get more information from AB regarding her intended beneficiary so that the Will would be clear and unambiguous.

[97] The lack of specificity and accuracy in the Will about AB's wishes regarding the beneficiary is confirmed by the Respondent's actions as executor of the estate. As executor, the Respondent had several meetings with the members of the Association after AB's death about whether the estate should be given to the Association (the organization) or divided personally among Association members. Had the Respondent properly confirmed and documented AB's instructions, there should have been no confusion about whether the beneficiary of the estate was the Association or its members.

[98] In addition to the issues regarding the beneficiary of the estate, at the July 8, 2018 meeting with AB, the Respondent notes that AB instructed him to provide financial assistance to AH (AB's alleged abuser) to help him move off the Property. The Will makes no mention of any gift to AH. The Respondent said that this was because AB instructed him that she did not want this gift to be in the Will. However, such instructions required the Respondent to clarify what AB intended regarding such a gift.

[99] If AB wanted AH to receive a gift but did not want the gift to be in the will (i.e., not a testamentary gift), then it could only be made as an *inter vivos* gift. But the Respondent did not have the legal authority to make an *inter vivos* gift on behalf of AB. His only authority was as the executor for the estate and that authority would not exist until AB's death. Any gift that the Respondent gave to AH as executor could only be a testamentary gift, which was contrary to AB's instructions. It was impossible for the Respondent to comply with AB's instructions. The contradictory nature of AB's instructions should have been clear to the Respondent as should have been his obligation to clarify his instructions regarding the gift to AH.

[100] Instead, by paying money to AH out of the estate, the Respondent acted contrary to AB's instructions and contrary to the Will. The Respondent classified these payments as estate expenses, but they are not valid estate expenses because the payments were not regarding the maintenance of the estate, nor was AH a creditor of the estate or someone who otherwise had any claim against AB or the estate.

[101] The Respondent testified that he made these payments to AH under the belief that he was doing so in accordance with AB's wishes. However, there was no such bequest in the Will and, therefore, such payments were contrary to the Respondent's obligations as executor. The Respondent's statement reinforces the conclusion that he failed to properly obtain, clarify and document his instructions from AB about her estate.

[102] The Respondent's testimony that the Will provided to AB "was not complete." is an admission that he knew when drafting the Will that he did not have the information required to complete the Will. It is also an acknowledgement that he knew he needed further communication with AB to get the information required to properly complete the Will.

[103] The Respondent testified that it was his standard practice to meet with wills clients on at least two occasions to confirm that the will is correct and complete. He said that aside from AB and a couple of other clients, he always met with clients on multiple occasions and was also personally present when their wills were executed.

[104] The Respondent was asked why he did not follow his standard practice on this occasion. He replied he did not do so because: (1) there was only a short amount of time between his initial meeting with AB and her death; and (2) he was surprised that AB passed away so soon after he met her.

[105] Regarding the former, AB passed away on November 14, 2018, four months and six days after the Respondent met with her on July 8, 2018. That is not, in the circumstances, a short period of time. It is over a third of a year and more than enough time for a lawyer, even one with a busy practice, to have a follow-up meeting with a client, particularly an elderly one in poor health.

[106] When the Respondent met with AB, he was aware that she was:

(a) 95 years of age;

(b) in poor health, and had recently suffered a broken hip; and

(c) living in a situation where she was the victim of elder abuse.

[107] The Respondent's assertion that he was taken by surprise by AB's death is not credible or reasonable. Her passing was obviously foreseeable. Given the circumstances, there should have been a sense of urgency to obtain or confirm necessary information to finalize the Will. The Respondent needed to meet promptly with AB again, particularly given the Will's shortcomings of which the Respondent was, or should have been, aware.

[108] Several of the above failures raise concerns about the Respondent's competence under rules 3.1-1 and 3.1-2 of the *Code*. A competent wills and estates practitioner would have met with AB to seek further instructions or at least review the draft Will with her.

[109] Further, the Panel finds the Respondent's misspelling of the beneficiary's name in the Will failed to meet the quality of service required of a competent wills and estate lawyer in a similar situation. The Respondent testified that the misspelling of the name of the Association was the result of the spellcheck function of the word processing software used by his office. He said that his word processor had changed the spelling and that neither he, nor his staff, knew how to change the spelling back or otherwise edit the Will to correct the name.

[110] In short, after the Respondent noticed the misspelling of the Association's name in the draft Will, he could have, and should have, corrected the error so that the beneficiary was correctly documented and identified, certainly before giving a copy of the Will to BF and before he probated it.

Allegation 1(b): failing to determine the status of the "society" as a legal entity or its correct legal name, or both, when he drafted the Will naming the "society" as a beneficiary

[111] The Respondent's lack of diligence in determining the legal name and status of the beneficiary of AB's Estate is a marked departure from the conduct that the Law Society expects from its members and was professional misconduct.

[112] AB told the Respondent that she wanted the beneficiary of her estate to be "the Philosophy Group." This instruction required him to confirm both the existence of the "Philosophy Group" as a legal entity and its exact name so that it could be correctly named in the will. If it was not a legally recognized entity, then for it to be the beneficiary of AB's estate, a legal entity would have to be formed, or other measures, such as setting up a trust, would need to be taken.

[113] The Respondent confirmed that he made no effort to determine the legal status or other details of the society that was eventually incorporated as the Association. He took a photograph of a sign at AB's property and believed that this was (or would be) the name of the society, but did nothing to confirm this belief. He did not communicate with AB or the Association's members about the name or legal status of the group nor did he do an online search to confirm its name or other information before or after drafting the Will.

[114] The Respondent's explanation as to why he took no steps to confirm the legal name or legal status of the society was that he did not think that he needed to. The Respondent did not appear to understand the importance of correctly naming the beneficiary in the Will, or the potential consequences if the name was incorrect.

Allegation 1(c): providing AB's unsigned Will to a named beneficiary, or representative thereof

[115] The Panel finds the Law Society has not established professional misconduct or incompetence with respect to Allegation 1(c).

[116] The evidence at the hearing did not establish that the Respondent provided the unsigned Will to a named beneficiary. SF and BF were not named beneficiaries. The Law Society also did not establish that SF or BF were legal representatives of the named beneficiary.

[117] The Panel has concerns that the Respondent's actions in providing the Will to BF may have breached his duty of confidentiality to AB, but while the Citation alleged the Respondent's actions were contrary to rule 3.3-1 of the *Code* (confidentiality of client information), at the hearing, the Law Society indicated it was no longer alleging a breach of rule 3.3-1.

Allegation 1(d): failing to review the final draft of AB's Will with her before it was signed

[118] The Respondent's failure to review the draft Will with AB prior to its execution was a failure to meet the quality of service required of a competent lawyer, amounted to a marked departure from the conduct expected from a lawyer in this situation, and was professional misconduct.

[119] Lawyers drafting wills have a professional obligation to ensure that a will accurately reflects the client's testamentary wishes before the will is executed. Lawyers usually discharge this obligation by meeting with their client and have them review a draft will before it is signed, or otherwise ensure that their client has reviewed the will and approved its contents before it is executed.

[120] The Respondent confirmed that his usual practice was to meet with the testator on a minimum of two occasions to take and confirm their instructions and ensure that the wording in the will is in accordance with their wishes. He confirmed that his customary practice was also to review the finalized draft of the will with the testator before execution.

[121] In this case, the Respondent did not follow his usual practice. AB did not review the Will with the Respondent prior to executing it. His explanation for his omission (detailed above at paragraphs 113 to 116) shows that his approach was not reasonable in the circumstances and did not meet the standards of the quality of service provided by a competent wills and estates lawyer in similar circumstances.

[122] In this case, the Respondent knew the Will was incomplete. He knew the Will did not completely or accurately represent AB's wishes. He had an obligation to ensure that the Will was not executed until it could be reviewed and revised. Despite this, the Respondent made no effort to have the Will reviewed by AB prior to its execution, nor did he attempt to correct the Will's deficiencies after execution by AB.

Allegation 1(e): failing to ensure that the Will was properly executed

[123] Given the professional obligations that lawyers have to ensure that a will is executed properly, the Respondent's actions regarding the execution of the Will failed to

meet the quality of service required of a competent lawyer, amounted to a marked departure from the conduct expected from a lawyer in this situation, and was professional misconduct.

[124] Errors in the execution of a will can affect its validity, so a lawyer acting in a wills matter has an obligation to ensure compliance with the formalities of proper execution. The Respondent testified that it is his usual practice to be present when a will is executed to confirm that it was done properly.

[125] The Respondent did not follow his usual practice in this case. Instead, he gave the Will to a third party to give to AB. He gave no instructions as to what AB should do with the Will. He did not provide instructions on how to execute the Will. Neither did he instruct AB to do nothing, that is, not sign the Will until he had reviewed it with her, an instruction which would have been prudent given the Will's deficiencies.

[126] The Respondent's explanations about why he did not follow his usual practice are the same as to why he did not confirm AB's instructions or review the final draft of the will with her before it was signed. These explanations were not a reasonable approach to the circumstances.

Allegation 1(f): failing to take all appropriate steps to deal with matters affecting the validity of the Will, including, but not limited to, bringing these matters to the attention of the court prior to the granting of probate

[127] The Respondent's failure to deal with the matters affecting the validity of the Will was a failure to meet the quality of service required of a competent lawyer, is a marked departure from the conduct expected from a lawyer in this situation, and was professional misconduct.

[128] The Respondent admits that the Will was incomplete. In particular, the beneficiary was not properly identified and no provision was made with respect to AB's wishes that AH be assisted to move off her property.

[129] The Panel finds it surprising that the Respondent did nothing to rectify these issues before he received the executed Will, before AB passed, or during the application for probate. Rather, the Respondent swore an affidavit Form P3 in support of the probate application, deposing that:

> 8. I believe that the will complies with the requirements of Division 1 of Part 4 of the *Wills, Estates and Succession Act* and I am not aware of any issues that would call into question the validity or contents of the will.

> 9. 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.

[130] As noted above, when the Respondent swore the affidavit, he was aware or should have been aware of issues that could call into question the validity or contents of the will. With regard to paragraph 9 of the affidavit, the Respondent knew, or should have known, that the information referenced was incorrect and incomplete. He should not have sworn to the information set out in paragraphs 8 and 9 of that affidavit.

[131] The Respondent's explanation about why he took no action to address the issues with the Will during the probate process was to deny that there were any issues with the Will that would have affected its validity[1]. The Panel is unable to accept this explanation when the evidence establishes that there were issues with the Will that would have affected its validity and that the Respondent was aware of at least some of these issues (e.g., the Will being incomplete, the gift to AH) at the time the Will was drafted and executed, a few months prior to the application for probate.

Conclusion

[132] In summary, the Panel finds Allegations 1(a), (b), (d), (e) and (f) are made out. We dismiss Allegation 1(c).

[133] Many of the Respondent's actions failed to meet the quality of service of a competent wills and estates lawyer. His explanation for how the name of the beneficiary came to be misspelled demonstrated a serious lack of diligence or conscientiousness. His explanations for why he never met with AB to confirm her instructions or review the draft Will with her or execute the Will showed a lack of common sense and a serious failure to provide competent legal service.

[134] The evidence and testimony at this hearing confirms that the Respondent did not appear to know the general principles and procedures in his practice area; did not sufficiently investigate facts, identify issues or ascertain client objectives; and did not communicate at all relevant stages in a timely and effective manner; or perform all functions conscientiously, diligently and in a timely manner.

[135] The Respondent failed to meet his professional obligations regarding many aspects of drafting and executing AB's Will. These failures resulted in significant difficulties and delays in distributing the Estate. The Respondent's actions with regard to the drafting and

[1] Exhibit 4 – Amended Response to Notice to Admit, amended March 21, 2024, responses 92, 97 to 99

execution of AB's Will were a marked departure from the conduct expected from a lawyer and constitute professional misconduct.

ALLEGATION 2: WITHDRAWAL OF $71,149.12 IN EXECUTOR FEES

Overview

[136] The Law Society says the Respondent improperly withdrew $71,149.12 in executor fees (the "Executor Fees") from the Estate when he took this amount from his trust account without signed releases from the beneficiary or its representatives waiving the passing of the Respondent's accounts or obtaining a court order authorizing payment.

[137] The Law Society says the Respondent was not entitled to Executor Fees of 5% of the gross Estate.

[138] The Law Society asserts that these actions were contrary to Law Society Rule 3-64, *Code* rule 3.6-1, his fiduciary duty, or one or more of these. The Citation alleges this was professional misconduct, conduct unbecoming a lawyer or a breach of the *Act* or rules. In submissions the Law Society sought a finding of improper withdrawal which it submits amounts to professional misconduct.

[139] The Panel finds the Respondent's pre-taking of the Executor Fees was professional misconduct.

Law

[140] All the Respondent's alleged misconduct under Allegation 2 occurred in relation to his professional practice and so the question of whether he committed conduct unbecoming the profession does not arise.

Law Society Rule 3-64

[141] Under Rule 3-64(1), a lawyer must not withdraw or authorize the withdrawal of trust funds except in specific circumstances.

[142] Relevant for this proceeding is Rule 3-64(1)(a), which says a lawyer may only take funds out of their trust account if the funds are properly required for payment to or on behalf of a client or to satisfy a court order.

Code rule 3.6-1

[143] *Code* rule 3.6-1 prohibits a lawyer from charging or accepting any fees or disbursements that are not fair and reasonable and have not been disclosed in a timely fashion.

Fiduciary duties

[144] At the hearing and in its closing submissions, the Law Society did not make any arguments about the Respondent's conduct constituting a breach of fiduciary duties separate from the question of whether he breached Rule 3-64(1), which the Law Society encapsulates as one of the core elements of a lawyer's fiduciary duty to their client. Thus, the Panel does not separately address the Respondent's fiduciary duty.

The *Trustee Act*: pre-taking and reasonable remuneration

[145] When executor fees are taken before an executor's accounts are passed by a court, this is called "pre-taking". There is no statutory authority in BC that allows pre-taking of compensation. Section 88 of the *Trustee Act* says the fairness and reasonableness of an allowance is for the Supreme Court of British Columbia ("BCSC") to decide. Thus, pre-taking is improper and a breach of trust (*Re Abbott Estate*, 2023 BCSC 1738, at paras. 22 to 24; *Zadra v. Cortese*, 2016 BCSC 390, at paras. 49, 90, 92).

[146] Exceptions to this rule are if the terms of a will allow for pre-taking, if the beneficiaries consent, or it is ordered by a court (*Trustee Act*, ss. 88 to 90, 99; *Re Abbott Estate*, at paras. 22 to 24).

[147] An executor is not entitled to pay themself executor fees if they have done nothing to earn them (*Burkett v. Burkett Estate*, 2018 BCSC 320, at para. 236).

[148] Under section 88 of the *Trustee Act*, an executor is entitled to remuneration of up to 5% of the gross aggregate value, including capital and income, of all the assets of an estate at the date of death. Subject to the 5% ceiling, the appropriate amount is determined on a *quantum meruit* basis, which is the reasonable value of the services rendered (*Chau Estate (Re)*, 2016 BCSC 2541, at para. 15 to 18).

[149] Maximum remuneration is not awarded as a matter of routine (see e.g. *Mikaloff (Re)*, 2018 BCSC 756, at para. 42). An executor is entitled to a level of remuneration that is appropriate, fair, and reasonable in the circumstances.

[150] The criteria to determine the appropriate remuneration are as follows: (1) the magnitude of the trust; (2) the care and responsibility involved; (3) the time occupied in

administering the trust; (4) the skill and ability displayed; and (5) the success achieved in the administration (*Chau Estate (Re)*, at paras. 14 to 16, 18; *Mikaloff (Re)*, at para. 18).

Application of the law to the facts

[151] The following facts are uncontested and relevant to the Panel's determination about Allegation 2:

(a) The Association was the intended sole beneficiary of the Will.

(b) The Will appointed the Respondent as executor and trustee but does not have any specific provision about executor remuneration.

(c) The Respondent, as executor, began the probate process for the Will on December 8, 2018 and the court granted probate in the Estate and administration of the Estate to the Respondent on February 25, 2019.

(d) On March 5, 2019, the Respondent prepared, for Executor Fees, Invoice #18425 for $71,149.12, tax inclusive. This amount was 5% of the gross value of the Estate of $1,270,520.38 plus tax. The Description on the Invoice says: "For Services Rendered – Executor Fees 5% - Gross Value of Estate Monies $1,270,520.38."

(e) At 5% of the gross value of the Estate, the Executor Fees were the maximum allowed under section 88(1) of the *Trustee Act*.

(f) On March 5, 2019, the Respondent issued trust cheque #2341 for $71,149.12, payable to Leonard H. Marriott Law Corporation. This cheque was deposited into the Firm's general account on March 15, 2019.

(g) There was no court order authorizing withdrawal of the Executor Fees.

(h) There was no charging clause in the Will allowing pre-taking of the Executor Fees.

(i) The Respondent did not get the written consent from the Association for withdrawal of the Executor Fees.

[152] With respect to the EPS, we find:

(a) The EPS was incorporated as the Association on August 27, 2018. On this date, TC, FP and LB were directors.

(b) As at February 8, 2019, TC and FP were the directors.

(c) SF has been a director from March 19, 2019 to the time of the hearing.

(d) BF was the Association's secretary and a director between approximately December 2019 and April 2020.

(e) On August 2, 2020, TC resigned as a director.

(f) A BC Society Summary for the Association dated February 17, 2021 lists the directors as TC, SF, BF, FP and DF.

(g) At the time of the hearing, the Association's directors were SF, BF, FP and DF.

(h) AP was never a director of the Association.

(i) The Respondent sometimes presented a legal report at Association meetings, which Association Members generally approved. At least once, when giving his legal report, he showed one or more people present a printout of his trust account, which he did not allow them to copy or keep.

Pre-taking

[153] We conclude that the Respondent paying himself the Executor Fees on March 5, 2019 breached Rule 3-64 by improperly withdrawing funds he held in trust for the Estate. This action was a marked departure from expected conduct and constitutes professional misconduct.

[154] As explained above, an executor may not pre-take their fees unless authorized by the will, the beneficiaries, or a court order. There was no charging clause in the Will or a court order allowing the Respondent's pre-taking. The Association never consented to this pre-taking.

[155] The Respondent said he showed his Executor Fees invoice to BF, SF, TC and other members of the Association and they approved it.

[156] BF, SF and TC testified that they did not see Invoice #18425 for the Executor Fees and were not aware of this amount coming out of the Estate until January 21, 2022, when the Respondent's counsel sent the counsel for the Association an unsworn affidavit setting out the Estate accounts. FP and DF did not testify at the hearing.

[157] All witnesses, including the Respondent, testified the Respondent attended Association meetings and would give a legal report, which would then generally be approved. The witnesses and audio recordings indicate that the Respondent sometimes

passed around printouts of his statement of trust account, and maybe some estate accounting, for review during the meeting. Association members were not allowed to keep copies of these documents and the printouts did not appear to reach all the members during a meeting. The Respondent never otherwise provided accounting documentation to the Association or its members.

[158] However, no meeting recording in evidence indicates that the Respondent discussed, or specifically referred to, Invoice #18424 or the amount being billed for legal fees on this Invoice. At no time was there a resolution approving Invoice #18424 and directing payment of it out of the Estate. The Panel accepts the evidence of BF, SF, and TC and finds that a copy of Invoice #18424 was neither delivered to nor approved by the Association.

[159] The Respondent submitted that, in signing the Minutes of Settlement, the Association approved his Executor Fees. However, this is not evidence that the beneficiary consented to his Executor Fees. The Minutes of Settlement were entered long after he improperly withdrew the Executor Fees from the Estate.

[160] The Respondent says that he pre-took the Executor Fees because this was the practice he learned during his articles from his supervising lawyer who later became his partner.

[161] The Panel accepts that the Respondent thought that he was entitled to pre-take the Executor Fees and, thus, had no bad intentions. However, the presence of bad faith (*mala fides*) is not required for a finding of professional misconduct.

[162] First, executor fees of more than $71,000 from an approximately $1.2 million estate is a substantive amount (5%). Pre-taking this amount without authorization was harmful to the Estate especially as the Estate had not yet been fully administered.

[163] In *Zadra v. Cortese*, the court found an executor's pre-taking was a breach of trust even though the executor honestly believed that he was entitled to pre-take some of his fees (at para. 92 and 102).

[164] In somewhat analogous circumstances to the Respondent's actions, in *Law Society of BC v. Comparelli*, 2020 LSBC 2, the lawyer admitted that he committed misappropriation and professional misconduct contrary to his fiduciary duties and Rule 3-64 when, as executor of an estate, he withdrew monies from trust in payment of his executor fees, before receiving signed releases from the beneficiaries waiving the passing of his accounts.

[165] In *Law Society of Ontario v. Rumack*, 2020 ONLSTH 26, the lawyer paid himself unauthorized estate trustee compensation. He also failed to keep accounting records and complete monthly reconciliations for bank accounts for which he was estate trustee or held power of attorney. The lawyer's billings amounted to approximately 6% of the value of the estate, which was beyond the accepted range. The panel accepted the lawyer's admission of professional misconduct and noted that an estate trustee is entitled to compensation only when the amount of compensation has been fixed by a court on a passing of accounts or approved by the beneficiaries (at para. 13).

[166] Second, the Panel finds the Respondent's fee was not fair and reasonable and, therefore, was contrary to *Code* rule 3.6-1. He was not entitled to 5% of the Estate under section 88 of the *Trustee Act*.

[167] As explained above, under section 88, the appropriate amount for executor fees is determined on a *quantum meruit* basis, which is the reasonable value of the services rendered (*Chau (Re)*, at para. 18). Maximum remuneration is not awarded as a matter of routine.

[168] None of the criteria for determining appropriate remuneration were met in this case (*Chau Estate (Re)*, at paras. 14 to 16, 18; *Mikaloff (Re)*, at para. 18).

[169] The Estate was moderate (*Mikaloff (Re)*, at para. 21, an approximately $1.7 million estate; *Borkovic v. Borkovich*, 2023 BCSC 2050, at para. 83, a $1.85 million estate). The care and responsibility involved were also moderate. As the Law Society points out, the Estate consisted of simple assets, primarily the Property, and was gifted to a single beneficiary.

[170] While the Respondent testified that he spent many hours administering the estate, he did not provide documentary evidence that this was the case. In any event, other than probate, which itself included a mistake in the beneficiary's name, delays and sloppy execution resulted in the Association retaining a lawyer to get the Respondent to provide accounting and pass his accounts.

[171] The Panel finds the circumstances and duties in *Mikaloff (Re)* are similar to those of the Respondent as executor of the Estate. In *Mikaloff (Re)* the court awarded the executor 3% in fees for administrating a $1.7 million (moderate) estate where the executor:

(a) had to ensure the property was secured, insured, kept clean and maintained, listed for sale and arranged the sale or disposal of personal items;

(b) travelled from Victoria to Vancouver each month for 14 months;

(c) had to instruct counsel on various legal actions and deal with the bank and other professional advisors;

(d) fielded "an inordinate amount of calls" from one of the beneficiaries;

(e) did not act in a neutral role; and

(f) the main asset of the estate was the property.

[172] In *Litt Estate (Re)*, 2020 BCSC 1921, the Registrar awarded approximately 4% in executor fees for an estate valued around $10 million. The executor's work in *Litt Estate (Re)* was far more complicated and involved than the evidence offered by the Respondent concerning his work and responsibilities as AB's executor.

Notice of Application under section 96 of the *Trustee Act*

[173] As noted under the "Preliminary Matters" section above, at the outset of the hearing, the Respondent asked for an adjournment, in part because, on April 23, 2024, he filed a Notice of Application in the BCSC under section 96 of the *Trustee Act* ("Section 96 Application"). We dismissed this ground of his adjournment application because it had already been determined by the Motions Adjudicator. The Respondent provided no new arguments or evidence that might persuade us to reconsider the matter.

[174] During the hearing, the Respondent submitted a copy of the Section 96 Application. The Respondent is asking the court, under section 96, to excuse him from a breach of trust and relieve him of any personal liability in relation to his administration of the Estate.

[175] At the hearing and in closing submissions, the Respondent said any decision of the BCSC displaces the Tribunal's authority because of the principle of *stare decisis* and so the Panel has no jurisdiction to decide allegations 2 or 3.

[176] The Panel rejects this submission.

[177] Section 96 allows a court to relieve, completely or in part, a trustee of personal liability for breach of trust if they acted honestly and reasonably and ought fairly to be excused. This is a different matter from what is being adjudicated in the disciplinary proceeding resulting from this Citation. A successful Section 96 Application by the Respondent would merely determine whether he should be excused for a breach of trust as a trustee. Allegations 2 and 3 require the Tribunal to decide whether the Respondent breached the *Act*, Rules, or *Code*, and whether under the *Act*, this was professional misconduct.

[178] In any event, *stare decisis* does not apply in the circumstances of the Citation. The doctrine of *stare decisis,* to stand by previous decisions and not to disturb settled matters, requires judges to apply authoritative precedents and have like matters be decided by like (*R. v. Kirkpatrick*, 2022 SCC 33). *Stare decisis* does not displace a tribunal's jurisdiction to decide a matter when the BCSC has not yet issued its judgment. The Section 96 Application is scheduled to be heard in September 2024 and there is no decision.

Conclusion

[179] The Respondent's pre-taking of the Executor Fees was professional misconduct.

ALLEGATION 3: WITHDRAWAL OF $26,760.21 IN LEGAL FEES

Overview

[180] The Law Society says the Respondent misappropriated or improperly withdrew $26,760.21 (the "Legal Fees") in fees from AB's estate without entitlement, contrary to Rule 3-64 and his fiduciary duty. The Citation alleges this was professional misconduct, conduct unbecoming a lawyer, or a breach of the *Act* or rules. The Law Society alleges the Respondent misappropriated the funds when he withdrew from trust some or all of $26,760.21 in legal fees.

[181] The Legal Fees include $7,560, which the Respondent spent responding to the Law Society complaint against him and for filing the Speculation Property Tax. The Panel finds that only the withdrawal of this $7,560, not the remaining $19,200.21 was contrary to Rule 3-64(1) and constituted professional misconduct.

Law

[182] All the Respondent's conduct in relation to Allegation 3 occurred in relation to his professional practice and so the question of whether he committed conduct unbecoming the profession does not arise. When the Respondent billed the Legal Fees, he did so in relation to supposed legal services performed on behalf of the Estate.

Law Society Rule 3-64 and fiduciary duties

[183] As noted above, under Rule 3-64(1), a lawyer must not withdraw or authorize the withdrawal of trust funds except in specific circumstances.

[184] At the hearing and in its closing submissions, the Law Society did not make any arguments about the Respondent's conduct as a breach of fiduciary duties separate from

the question of whether he breached Rule 3-64(1). Thus, the Panel does not separately address the Respondent's fiduciary duty.

Misappropriation

[185] The panel in *Law Society of BC v. Sahota*, 2016 LSBC 29, at para. 60, defines misappropriation as the unauthorized, improper or unlawful use of client funds (see also *Law Society of BC v. Gellert*, 2013 LSBC 22, at paras. 71 to 73).

[186] Misappropriation can occur knowingly or through negligence or incompetence so gross as to prove a sufficient element of wrongdoing (*Law Society of BC v. Harder*, 2005 LSBC 48, at para. 55; *Low Society of BC v. Edwards*, 2022 LSBC 27, at para. 42). While misappropriation requires a mental element of wrongdoing or fault, this subjective element does not need to rise to the level of dishonesty (*Gellert*, at para. 71; *Harder*, at para. 56) and it does not matter if the amount involved was small (see references in *Law Society of BC v. Guo*, 2024 LSBC 17, at para. 47).

Application of the law to the facts

[187] The following facts are uncontested:

(a) The Will (at paragraph 7) has a charging clause that says AB's Trustee may employ qualified advisers, including lawyers, to give advice or services to the Estate and the Trustee may pay the fees and expenses of these advisers from either the income or capital of the Estate. However, it does not have a charging clause that says the Respondent has the discretion to charge the Estate for legal services provided by him, or the Firm.

(b) On March 5, 2019, the Respondent prepared Invoice #18424 for $14,502.10 (tax and disbursements inclusive) for legal fees in relation to the Estate. The Invoice says: "For Services Rendered – legal fees 1% of Estate."

(c) On March 5, 2019, the Respondent issued trust cheque #2255 for $14,502.10 payable to Leonard H. Marriott Law Corporation. That same day, he deposited this cheque into the Firm's general account.

(d) On January 20, 2020, the Respondent signed the Vendor's Statement of Adjustments for sale of the Estate's real property (the Property). Under this document, the purchaser (City of Kelowna) had to reimburse the Estate's reasonable legal fees up to $5,000.

(e) The Respondent prepared Invoice #18973, dated February 6, 2020, for $4,698.11 in legal fees and disbursements, with tax, for the sale of the Property.

(f) On January 31, 2020, the Respondent received $626,632.51 from the City of Kelowna for the sale of the Property. The Respondent's Trust Statement says $4,698.11 of the total was disbursed to the Firm's trust account for payment on account for the Property sale and the remainder ($621,934.40) was deposited into trust for the Estate.

(g) On January 31, 2020, the Respondent issued trust cheque #3147 for $4,698.11, payable to Leonard H. Marriott Law Corporation for Invoice #18973 and deposited this cheque into the Firm's general account.

(h) On March 25, 2020 or August 10, 2020, the Respondent prepared Invoice #19042 for $6,720 (tax inclusive) for legal fees in relation to the Estate. The work description reads:

Mar-25-20	Multiple Meetings with Law Society & Service Fees – 20 Hours
Aug-10-20	Service Fees, Legal Services, Multiple Meetings with The Law Society

(i) On August 10, 2020, the Respondent issued trust cheque #2663 for $6,720, payable to Leonard H. Marriott Law Corporation for Invoice #19042 and deposited it into his Firm's general account.

(j) The March 25, 2020 entry related to meetings between the Respondent and the Law Society arising from a (now closed) complaint by MH submitted to the Law Society concerning the Respondent's handling of AB's Will.

(k) On March 9, 2021, the Respondent prepared Invoice #19620 for $840 for preparation of Speculation Property Tax ($150 + GST/PST) and for legal advice about the Tax, including communications with the Association's counsel ($600 + GST/PST).

(l) On March 9, 2021, the Respondent issued trust cheque #4236 for $840, payable to North Valley Law for Invoice #19620 and deposited the cheque into this firm's general account.

(m) The Respondent admitted the legal services in Invoice #19620 were provided in his capacity as executor.

[188] The Law Society says the Respondent misappropriated funds when he paid himself the above legal fees because there was no valid charging clause.

[189] The Panel disagrees with this argument. We find paragraph 7 of the Will, which allowed the Respondent to employ advisers, including lawyers, to be a charging clause.

[190] However, for other reasons we find that some of the Legal Fees were unauthorized, improper, or an unlawful use of client funds. A lawyer may only take funds out of their trust account if the funds are properly required for payment to or on behalf of a client or to satisfy a court order (Rule 3-64(1)(a)).

[191] We find no issue with how the Respondent handled payment of Invoice #18973. The amount owing was paid by the City, as agreed to by the terms of sale. This money went into his trust account as a credit to the Estate and was paid out to the Respondent, but he was justified in paying it out to himself for services to the Estate under Rule 3-64(1)(a) and under paragraph 7 of the Will.

[192] While we find the Association did not approve Invoice #18424 and the Respondent took payment for this amount from the Estate without the knowledge of the Association, this conduct was not misappropriation because under the Will, the Respondent was allowed to hire legal services and he was allowed to take funds from his trust account if required for payment on behalf of a client (Rule 3-64(1)(a)).

[193] Although the Law Society notes in its closing submissions that section 69 of the *Act* requires lawyers to deliver a bill to the person charged, which did not happen, the Law Society did not rely on section 69 in the Citation and led no evidence about it. Therefore, we do not consider this submission.

[194] On Invoice #18424, the Respondent charged 1% in legal fees. We note there is no Rule that allows a lawyer to charge what is essentially a contingency fee without a written contingency or flat fee agreement. However, the Law Society did not raise this issue in the Citation, led no evidence about it, and does not address it in its submissions.

[195] While the Law Society says the amount of Invoice #18424 was unjustified because it was arbitrarily fixed by the Respondent and not based on specific legal work performed for the Estate, it did not establish this was the case. The Respondent said it was for legal services and the Invoice indicates the same.

[196] The Respondent's conduct was not like in *Lyons*, where there was a serious intentional breach, persisting for months (*Lyons* at paras. 42, 44).

[197] With respect to Invoice #19042, we find the Respondent was not entitled to bill the Association $6,720 for time he spent responding to the Law Society complaint by MH.

This was not time spent on behalf of the Association or even its individual members. Thus, it was not payment for client services (*Law Society of Ontario v. Comartin*, 2019 ONLSTH 160, at paras. 45 to 49).

[198] Concerning Invoice #19620 of $840 for preparation of Speculation Property Tax and for legal advice about the Tax ($150 + GST/PST), the Respondent admitted this was work he did in his capacity as executor. Therefore, he was not entitled to bill the Association for it. He breached Rule 3-64. A lawyer should not charge fees for services that are executor work, that duplicate executor work, or are unnecessary for an estate solicitor to do (*Le Gallais Estate (Re)*, 2018 BCSC 388, at para. 29).

[199] The Panel concludes the Respondent's breach of Rule 3-64 with respect to Invoices #19042 and #19620 was a marked departure from conduct expected from a lawyer and thus was professional misconduct. A breach of trust accounting rules is a serious matter because trust accounting obligations go to the heart of confidence in the integrity of the legal profession (*Law Society of BC v. Lail*, 2012 LSBC 32; *Law Society of BC v. Atmore*, 2020 LSBC 4, at paras. 11 to 12).

[200] The Panel rejects the Law Society's allegation that the Respondent's conduct was misappropriation. As explained above, misappropriation must be done knowingly or by negligence or incompetence so gross as to prove a sufficient element of wrongdoing (*Harder*, at para. 55 and 56; *Edwards*, at para. 42). The evidence did not establish the Respondent withdrew the Legal Fees knowing it was wrong or that he was grossly negligent or incompetent when he did so.

Conclusion

[201] With respect to Allegation 3, we find it is made out in part. $7,560 of the Legal Fees was improperly withdrawn from trust, breached Rule 3-64, and was professional misconduct.

DECISION AND ORDER

[202] The Panel finds:

1. Allegations 1(a), 1(b), 1(d), 1(e) and 1(f) are established and the Respondent's conduct was professional misconduct when he:

    (a) failed to obtain, confirm, and/or correctly document instructions from AB on all necessary matters;

(b) failed to determine the status of the "society" as a legal entity or its correct legal name, or both, when he drafted the will naming the "society" as a beneficiary;

(d) failed to review the final draft of the Will with AB before it was signed;

(e) failed to ensure the Will was properly executed; and

(f) failed to take all appropriate steps to deal with matters affecting the validity of the Will, including, but not limited to, bringing the above matters to the attention of the court prior to the granting of probate.

2. Allegation 1(c), that the Respondent failed to provide competent service and committed professional misconduct by providing AB's unsigned Will to a named beneficiary or representative is not established.

3. Allegation 2 about the Respondent's pre-taking of the Executor Fees without receiving a signed release from the beneficiary or a court order is established with respect to Rule 3-64. The Respondent's conduct amounted to a marked departure from the expected standard of conduct.

4. Allegation 3 is established with respect to $7,560 of the Legal Fees. The Respondent's conduct was a marked departure from the expected standard of conduct and was professional misconduct. However, the allegation of misappropriation was not established.

5. The Panel orders the Respondent return the $71,149.12 in Executor Fees to his trust account by December 31, 2024 and not withdraw the funds until he obtains consent of the Association or a court order.