

THE LAW SOCIETY OF ALBERTA  
HEARING COMMITTEE REPORT

IN THE MATTER OF THE *Legal Profession Act*, and  
in the matter of a Hearing regarding  
the conduct of NICOLA ALEXANDRA DAVIS  
aka NICKY DAVIS  
a Member of The Law Society of Alberta

## INTRODUCTION AND SUMMARY OF RESULT

1. On May 12, 2010 a Hearing Committee of the Law Society of Alberta (LSA) convened at the Law Society offices in Calgary to inquire into the conduct of the Member, Nicky Davis. The Hearing Committee was comprised of James Glass, Q.C. Chair, Ron Everard, Q.C. and John Higgerty, Q.C. The LSA was represented by Lindsay MacDonald, Q.C.
2. The Member was not present at any time during the proceedings despite being personally served on February 5, 2010 with the following documents:
  - a) a letter dated February 4, 2010 addressed to Ms. Nicola A. Davis from Lindsay MacDonald, Q.C. "Re: Law Society of Alberta Hearing";
  - b) a letter dated February 1, 2010 addressed to Nicky A. Davis from Linda Arksey "Re: Pre-Hearing Conference";
  - c) a Pre-Hearing Conference Report Nicky Davis January 25, 2010 @ 2:15 p.m.;
  - d) a letter dated February 1, 2010 addressed to Nicky Davis from R. Gregory Busch "Re: Nicky Davis-Law Society Hearing-Calgary May 12 & 13, 2010 – 9:30 a.m. each day";
  - e) 2 copies of Notice to Attend;
  - f) 2 copies of Notice to Solicitor;
  - g) Notice to Counsel/Member;
  - h) Pre-Hearing guideline;
  - i) Hearing guide;
  - j) a letter dated January 27, 2010 addressed to Nicky A. Davis and Jakub D. Ksiazek from R. Gregory Busch "Re: Jakub Ksiazek complaint against Nicky Davis";
  - k) a letter dated January 21, 2010 addressed to Nicky A. Davis from Katherine A. Whitburn "Re: Complaint by E. & O. N.";
  - l) a letter dated January 21, 2010 addressed to E. & O. N. from Katherine A. Whitburn "Re: Complaint against Nicky A. Davis"; and
  - m) Complaint about my lawyer.
3. The Member faced five citations:
  1. IT IS ALLEGED THAT you failed to serve your clients in that you failed to render competent and timely services to the clients, and that such conduct is conduct deserving of sanction.

2. IT IS ALLEGED THAT you failed to implement your client's instructions and that you failed to keep your clients informed as to the progress of the file, and that such conduct is conduct deserving of sanction.
  3. IT IS ALLEGED THAT you failed to be punctual in fulfilling commitments made to your clients and you failed to respond on a timely basis to your clients, and that such conduct is conduct deserving of sanction.
  4. IT IS ALLEGED THAT you failed to be candid, and that such conduct is conduct deserving of sanction.
  5. IT IS ALLEGED THAT you failed to provide your clients with written information regarding fees and disbursements, and that such conduct is conduct deserving of sanction.
4. On the basis of the evidence received at the hearing and for the reasons that follow, the Hearing Committee finds that citations 1, 2, 3 and 4 are proven and the Member is guilty of conduct deserving of sanction. The Hearing Committee was of the view that there was insufficient evidence to warrant a Guilty finding on citation 5. The Hearing Committee concluded that the sanctions on the citations should be a suspension of the Member for a period of one year and that the Member pay the actual costs of the hearing.

#### **JURISDICTION AND PRELIMINARY MATTERS**

5. Exhibits 1, 2 and 4, consisting of the Letter of Appointment of the Hearing Committee, the Notice to Solicitor, the Notice to Attend, and the Certificate of Status of the Member, established the jurisdiction of the Hearing Committee. The Certificate of Exercise of Discretion was entered as Exhibit 5.
6. There was no objection by counsel for the LSA regarding the constitution of the Hearing Committee.
7. The entire hearing was conducted in public.
8. The Hearing Committee determined that it would proceed with the hearing in the absence of the Member on being satisfied that the Member was personally served with the Jurisdictional documents in accordance with s.70 of the *Legal Profession Act*.

#### **CITATIONS**

9. The Member faced five citations:

1. IT IS ALLEGED THAT you failed to serve your clients in that you failed to render competent and timely services to the clients, and that such conduct is conduct deserving of sanction.
2. IT IS ALLEGED THAT you failed to implement your client's instructions and that you failed to keep your clients informed as to the progress of the file, and that such conduct is conduct deserving of sanction.
3. IT IS ALLEGED THAT you failed to be punctual in fulfilling commitments made to your clients and you failed to respond on a timely basis to your clients, and that such conduct is conduct deserving of sanction.
4. IT IS ALLEGED THAT you failed to be candid, and that such conduct is conduct deserving of sanction.
5. IT IS ALLEGED THAT you failed to provide your clients with written information regarding fees and disbursements, and that such conduct is conduct deserving of sanction.

#### **EVIDENCE**

10. As noted above, Exhibits 1-5 (the jurisdictional exhibits) were entered into evidence.
11. Exhibits 6-30, all relevant to the citations, were entered into evidence.

#### **FACTS**

12. The key Exhibits with regard to the citations are Exhibits 8, 10, 15, 16 and 28.
13. Counsel for the Law Society called S.B. and L.B.
14. The Member was retained by S.B. and L.B. for the purposes of obtaining a guardianship and trusteeship Order in relation to L.B.'s grandmother, who was hospitalized and suffering from Alzheimer's. The previous guardian and trustee had passed away and S.B./L.B. wanted to look after grandmother's affairs.
15. There was some urgency in the application as the long-term care facility was not being paid for grandmother's care as no one was able to authorize payments from the account until L.B. was appointed as Guardian and Trustee.
16. S.B./L.B. met with the Member in January 2005 to discuss this matter. At the meeting, the Member explained the process of applying for a guardianship/trusteeship Order and directed L.B. to complete some forms and return them to the Member. Two of these forms were critical to the application:
  - i) Form 1 – Report of Physician

## ii) Functional Assessment.

17. The Member advised S.B./L.B. at the meeting in January 2005 that the fees to complete the application were estimated to be between \$2,000.00-\$3,000.00. They were advised that the Member's hourly rate was \$225.00 and that the application would take approximately 3-4 months. The Member provided S.B./L.B. with her notes from that meeting. (Exhibit 15, Tab A, Page 2).
18. S.B./L.B. paid the retainer of \$2,500.00 to the Member by way of bank draft on February 9, 2005 from their own account. No retainer agreement was signed.
19. L.B. completed the forms provided to her at the first meeting to the Member on April 19, 2005. This included the completed Form 1-Report of Physician and the Functional Assessment. S.B./L.B. were advised to wait and the Member would be in touch.
20. S.B./L.B. waited until September 2005 as the Member had indicated at their initial meeting that the application could take 3-4 months. In September 2005, S.B. and L.B. left numerous phone messages for the Member and the Member failed to return any of their calls.
21. On October 5, 2005, L.B. emailed the Member referring to the unreturned phone calls and asking for a status report as the hospital was phoning regularly due to the unpaid account for L.B.'s grandmother's care. (Exhibit 15, Tab A, Page 14).
22. On October 7, 2005, the Member responded to the email indicating that the Member had been away for a few days with a leg injury and that she would get back to L.B. by email the following Monday. (Exhibit 15, Tab A, Page 14).
23. No email was ever received by L.B. from the Member as promised. S.B./L.B. left numerous phone messages with the Member throughout October 2005 and were finally successful in securing a meeting with the Member on October 31, 2005.
24. At the meeting on October 31, 2005 S.B./L.B. were provided with a draft of the application. The Member asked for some further clarification on the names and dates of birth of some of L.B.'s siblings. Both L.B. and S.B. testified that there was no discussion regarding the need for an updated functional assessment at this meeting. Indeed, both testified that there had been no deterioration in L.B.'s grandmother's condition between April to October 2005.
25. The additional information was returned to the Member within five days of the October 31, 2005 meeting.
26. Between November 2005 and March 2006 S.B./L.B. continued to receive monthly collection calls from the nursing home. After each of these calls, LB. called the Member's office to inquire as to the status of the application. In March 2006 L.B. was finally able to speak with the Member, who indicated that the nursing home could call her directly and that she would explain the situation to them.

27. On May 5, 2006 the nursing home called L.B. and informed her that her grandmother had suffered a stroke and would not likely survive more than a few days. L.B. called the Member's office to inform her of this development.
28. On May 8, 2006 the Member contacted L.B. and informed her that the original application would have to be withdrawn and a new one, containing an up-to-date functional assessment submitted; alternately, a Probate application could be made after her grandmother's death. The Member was prepared to discount her fees on the probate application in light of her pre-existing knowledge of the matter.
29. On May 9, 2006, L.B.'s grandmother passed away. S.B./L.B. made arrangements to pick up the file from the Member's office.
30. On May 10, 2006, S.B. contacted the Member and informed her that they no longer required her services. At that time a detailed accounting was requested so that the balance of their retainer could be returned.
31. A final Statement of Account from the Member was not forwarded to S.B./L.B. until September 2006. The account indicated that there was, in fact, an additional amount due and owing to the Member of \$635.48.
32. S.B./L.B. paid the outstanding balance on the Member's Statement of Account and then proceeded to have it taxed. The account was taxed down to \$2,000.00 from the \$3,135.48 billed by the Member. (Exhibit 16)
33. L.B./S.B. deny having telephone conversations with the Member on August 8, 2005, October 28, 2005, November 23, 2005 and March 2, 2006 as reflected in the Member's Statement of Account. (Exhibit 8)
34. L.B./S.B. deny giving instructions to the Member to proceed with a Probate application on May 8, 2006 as reflected in the Member's Statement of Account. (Exhibit 8)
35. L.B./S.B. categorically deny the following statements of the Member made to the LSA in her letter of September 27, 2006 (Exhibit 10):
  - That she never dealt with S.B. in relation to the matter;
  - That she requested an updated functional assessment; and
  - That she was told to hold off on taking steps on the application.

## **SUBMISSIONS ON CITATIONS**

### Citations #1 and #2

36. Counsel for the LSA submits that the uncontradicted evidence of S.B./L.B. and the other evidence referred to in the hearing clearly confirms that the Member is Guilty of citations #1 and #2. There was a retainer in place, representations made by the Member as to the time to complete the application and then a complete lack of activity by the Member to move the matter along. In fact, during the entirety of the retainer, no documents were ever filed at the Court.

### Citation #3

37. Counsel for the LSA submits that the evidence clearly indicates that the Member was not punctual in dealing with the application and in responding to her clients and therefore is Guilty of citation #3.

### Citation #4

38. Counsel for the LSA submitted that the evidence supports a finding of Guilt on this citation as well. Counsel for the LSA submits that the Member was far from candid with the clients, that the Member's Statement of Account was, at best, inaccurate or, at worst, untrue and that the Member's position that further documents were required simply is not borne out by the facts. In addition, the Member's position that S.B. was not involved in this matter in any way is clearly in direct contrast to the evidence given by S.B. and L.B.

### Citation #5

39. Counsel for the LSA concedes that the evidence does not support a conviction of the Member and encourages the Hearing Committee to dismiss this citation.

## **CONCLUSIONS ON CITATIONS**

40. The Hearing Committee agrees with the submissions of Counsel for the LSA and finds the Member Guilty on citations 1-4 and that such conduct is deserving of sanction.
41. The Hearing Committee agrees that the evidence does not support a conviction on citation #5 and, accordingly, the same is dismissed.

## **SUBMISSIONS ON SANCTION**

42. Counsel for the LSA entered an estimated statement of costs as Exhibit 31.
43. Counsel for the LSA indicated that the Member had no disciplinary record.

44. Counsel for the LSA indicated that the Member had previously stated that she had been suffering from severe illness; however, had never provided any evidence of same upon being invited to do so.
45. Counsel for the LSA submitted that the citations are serious. The Member took a retainer and didn't do the work. The Member created a fictitious Statement of Account to try to justify her inaction. She misled her clients and was not candid or punctual in any way.
46. Counsel for the LSA also invited the Hearing Committee to draw an adverse interest against the Member as a result of her failure to attend the hearing despite being personally served.
47. Counsel for the LSA submitted that disbarment of the Member was not called for in this matter; however, that a lengthy suspension of the Member was in order. He suggested a one-year suspension would be appropriate.
48. Counsel for the LSA submitted that the Member should pay the actual costs of the Hearing.

#### **DECISION AS TO SANCTION**

49. In determining an appropriate sanction, the Hearing Committee is guided by the public interest, which seeks to protect the public from acts of professional misconduct.
50. In *McKee v. College of Psychologists (British Columbia)*, [1994] 9 W.W.R. 374 at page 376, the British Columbia Court of Appeal articulated the following principles, which are equally applicable to the disciplinary process for the legal profession:

“In cases of professional discipline there is an aspect of punishment to any penalty which may be imposed and in some ways the proceedings resemble sentencing in a criminal case. However, where the legislature has entrusted the disciplinary process to a self-governing professional body, the legislative purpose is regulation of the profession in the public interest. The emphasis must clearly be upon the protection of the public interest, and to that end, an assessment of the degree or risk, if any, in permitting a practitioner to hold himself out as legally authorized to practice his profession. The steps necessary to protect the public, and the risk that an individual may represent if permitted to practice, are matters that the professional's peers are better able to assess than a person untrained in the particular professional art or science.”

51. Taking into account all of the foregoing factors and evidence, the Hearing Committee concluded that the appropriate sanction be suspension of the Member for a period of one year.
52. In addition, the Member is directed to pay the actual costs of the hearing.

## CONCLUDING MATTERS

53. A separate notice to the profession of the Member's suspension is required in respect of this matter.
55. The decision and transcript in this hearing are to be made available to the public with the names of the complainants, clients and third parties to be redacted. All of the Exhibits, apart from the jurisdictional Exhibits (Exhibits 1-5) shall not be available to the public on the basis that the production of same would breach solicitor-client privilege.

Dated this 31st day of May, 2010.

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James Glass, Q.C., Bencher  
Chair

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Ron Everard, Q.C., Bencher

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John Higgerty, Q.C., Bencher