



The Law Society of Saskatchewan

MERVIN CLAYTON PHILLIPS
HEARING DATE: March 16, 2015
DECISION DATE: July 29, 2015

Law Society of Saskatchewan v. Phillips, 2015 SKLSS 8

IN THE MATTER OF *THE LEGAL PROFESSION ACT, 1990*
AND IN THE MATTER OF MERVIN CLAYTON PHILLIPS,
A LAWYER OF REGINA, SASKATCHEWAN

DECISION OF THE HEARING COMMITTEE FOR THE
LAW SOCIETY OF SASKATCHEWAN

Counsel: Timothy Huber for the Investigation Committee of the Law Society
Merrilee Rasmussen, Q.C. for Mervin Phillips

INTRODUCTION

1. Mervin Phillips practices law in Regina, Saskatchewan. Mr. Phillips has been an active member of the Law Society since July 2, 1981.
2. By a Formal Complaint dated July 5, 2012, it is alleged that Mr. Phillips is guilty of conduct unbecoming a lawyer in that he:
 1. did prefer the interest of a third party, A.K., over the interest of his client, E.K.
 2. did breach the duty of loyalty owed to his client, E.K.; and
 3. did after receiving notice of termination of his retainer from his client, E.K., fail to facilitate expeditious transfer of his client's file contents to successor counsel.
3. The hearing began on March 16, 2015 by conference call. An Agreed Statement of Facts and Admissions dated March 4, 2015 was filed and a copy is appended to this decision. Mr. Phillips and the Investigation Committee agreed to the basic facts but Mr. Phillips entered a plea of not guilty to the three charges. As such, the task for this Committee is to determine whether the Investigation Committee has proven on a balance of probabilities that those facts prove the charges and whether those proven facts amount to conduct unbecoming.

4. Counsel filed written submissions including a Reply Brief by the Investigation Committee. On April 14, 2015 the hearing reconvened by conference call with counsel for Mr. Phillips and the Law Society making further oral submissions.

BACKGROUND

5. The facts can be summarized as follows:

- (a) On January 30, 2009, Mr. Phillips was retained by E.K. regarding the administration of the estate of her late husband, P.K. who died intestate on January 23, 2009.
- (b) Letters of Administration were not required because assets and property were either jointly held or had designated beneficiaries. One of those assets was a life insurance policy worth approximately \$172,500.00. E.K. was a designated beneficiary for 60%, a daughter D.K. at 20% and another individual A.K. at 20%. A.K. was the niece of E.K.'s late husband. The niece A.K. lives in Ghana.
- (c) E.K. met with Mr. Phillips on March 19, 2009. Mr. Phillips was advised that A.K. was then 16 years old having a birth date of December 5, 1992. Mr. Phillips exchanged correspondence with the Public Trustee and with E.K.'s instruction, the life insurance proceeds were deposited into an interest bearing trust account with E.K. named as the trustee with the intention that the funds be held until A.K. turned 18.
- (d) A.K. was also the beneficiary of shares with SaskWorks Venture Fund Inc. The value of the shares was approximately \$1,900.00. After an exchange of correspondence between Mr. Phillips and SaskWorks, a cheque representing A.K.'s share proceeds was sent by SaskWorks to the Public Trustee.
- (e) The Public Trustee required an Affidavit of Identity because the SaskWorks share designation identified A.K. by another name. Mr. Phillips advised E.K. of this and prepared an Affidavit of Identity. E.K. met with Mr. Phillips, provided a photocopy of A.K.'s birth certificate and swore the Affidavit of Identity. Mr. Phillips then provided this to the Public Trustee.
- (f) The Public Trustee advised Mr. Phillips' office that a notarial copy of the birth certificate was required which would mean that the original birth certificate would have to be available in order for Mr. Phillips to prepare a notarial certificate.
- (g) Mr. Phillips wrote to A.K. in Ghana requesting her original birth certificate. A.K. sent her original birth certificate to E.K. who then delivered it to Mr. Phillips. Mr. Phillips prepared a notarial copy of the birth certificate and provided that to the Public Trustee under letter dated April 19, 2011.
- (h) E.K. terminated Mr. Phillips' services and engaged a new Regina lawyer. By letter June 7, 2011 to Mr. Phillips, new counsel advised that she was now representing E.K. Initially, the only request made by new counsel was that the original birth certificate for A.K. be provided to her. In her letter, new counsel stated "Ms. K. is most anxious to have this original document returned to her". There was no explanation as to why E.K. required her niece's original birth certificate.
- (i) Following that letter, there was a series of correspondence between Mr. Phillips and new counsel about the release of the original birth certificate with both Mr.

Phillips and new counsel taking different positions as to the basis for the request and the propriety of the release of the original birth certificate.

- (j) E.K. complained to the Law Society in August 2011. E.K.'s complaint was not part of the Agreed Facts. Mr. Phillips asked the Law Society to refer the issue as to whether A.K.'s consent to the release of her original birth certificate was required to the Ethics Committee of the Law Society. For reasons that are not clear, the matter never was referred to the Ethics Committee.
- (k) In September 2011, Mr. Phillips transferred his file contents to the Law Society and to E.K.'s new counsel – with the exception of the original birth certificate. Ultimately A.K. provided instructions and a signed Release that her original birth certificate could be provided to E.K. and her new counsel. Upon receipt of the Release, Mr. Phillips provided the original birth certificate to new counsel. Mr. Phillips also released the life insurance proceeds to A.K. directly.

ANALYSIS

6. The Formal Complaint does not reference any provisions of the Code of Professional Conduct. Given the time frame of these events, the old Code applies. The Formal Complaint alleges “conduct unbecoming”. This is defined as follows in *The Legal Profession Act, 1990*:

2(d) “conduct unbecoming” means any act or conduct, whether or not disgraceful or dishonourable, that:

- (i) is inimical to the best interests of the public or the members; or
- (ii) tends to harm the standing of the legal profession generally; and includes the practice of law in an incompetent manner where it is within the scope of subclause (i) or (ii);

7. In *Law Society of Saskatchewan v Hesje* (2013 SKLSS 13), the Hearing Committee provided some guidance on “conduct unbecoming”:

Similar to other legislation governing professions, what acts or conduct constitutes ‘conduct unbecoming’ is not specified. These ‘acts or conduct’ are determined on a case-by-case basis and evolve with the standards of practice and ethics. As we observed in our ruling on the Demand for Particulars, the obligations of a lawyer are not reducible to a list of ‘dos’ and ‘don’ts,’ and these obligations required of lawyers a consistent and complex process of making choices.

As stated by the Saskatchewan Court of Appeal in *Law Society of Saskatchewan v Merchant*, (2009) SKCA 33, ‘conduct unbecoming’ is the subject of an expansive definition and may be established through intention, conduct, negligent conduct or total insensitivity to the requirements of acceptable practice. Professional misconduct is considered a strict liability offence.

8. E.K. retained Mr. Phillips in late January, 2009 to handle the administration of the estate of her late husband who died intestate. The file became more complicated when it was determined that E.K.'s husband had designated his minor niece, A.K., as beneficiary of a life

insurance fund and certain shares. Circumstances were further complicated because A.K. resided in Ghana. By September 2009, it was clear that E.K. had lost interest in matters relating to her husband's estate. E.K. attended at Mr. Phillips' office on September 2, 2009. Mr. Phillips outlined what was discussed at that meeting in a memo of the same date which is attached at Tab 6 to the Agreed Statement of Facts. In this memo Mr. Phillips wrote:

E.K. was visually (sic) upset when she met us during her appointment at our office i.e. she doesn't want to have anything more to do with P.'s estate i.e. she is upset that P. designated A. as a beneficiary of his estate as she was not legally adopted at the time of his death. A. is an actual niece of P. and she is currently living with her mother . . . (in Ghana).

9. As of this meeting in September 2009, and as stated in paragraph 10 of the Agreed Statement of Facts:

. . . At this point the only outstanding work in relation to the Member's representation of E.K. with respect to her husband's estate was to release the funds held in trust for her to A.K. when she turned 18.

10. Those funds referred to the insurance proceeds in which A.K. was a beneficiary. As the trustee of those funds, E.K. had a legal responsibility to ensure that the insurance proceeds were distributed properly. Mr. Phillips fulfilled his responsibilities to E.K. Given the age of the beneficiary A.K., Mr. Phillips properly worked with the Public Trustee both in reference to the life insurance proceeds and the distribution of the shares.

11. The three charges come down to the narrow issue as to whether Mr. Phillips' refusal to deliver A.K.'s original birth certificate to E.K. constituted conduct unbecoming. The Hearing Committee agrees with counsel for Mr. Phillips in concluding that the events that are the subject of the Formal Complaint occurred once E.K. obtained new counsel on June 7, 2011. There was a difference of opinion about Mr. Phillips' obligations regarding the original birth certificate. It is not for this Hearing Committee to weigh in on the merits of the arguments or debate about the handling of the original birth certificate. Simply because there was a debate does not prove or mean that there was a breach of any duty of loyalty nor does the debate prove or mean that the interests of one person over another was preferred by Mr. Phillips. Charges 1 and 2 are not sustained based on the facts.

12. The dispute over the birth certificate led to the Law Society complaint in August, 2011. A month later on September 2, 2011, Mr. Phillips provided E.K.'s file to new counsel and to the Law Society (para. 26, Agreed Statement of Facts). In those circumstances, the Hearing Committee finds that the file contents were transferred on a timely basis and charge 3 is not sustained either.

13. Mr. Phillips asked that the issue of delivery of the original birth certificate be referred to the Ethics Committee of the Law Society. In the view of the Hearing Committee, that was a reasonable proposal as the Ethics Committee would have likely provided helpful directions which may have avoided these entire proceedings.

14. The Hearing Committee concludes that the facts as set out in the Agreed Statement of Facts and Admissions do not bear out a finding of conduct unbecoming and all three charges are dismissed.

DATED this "29" day of July, 2015.

"Robert R. Heinrichs, Q.C."
Hearing Committee Chair

DATED this "28" day of July, 2015.

"Darcia G. Schirr, Q.C."
Hearing Committee Member

DATED this "29" day of July, 2015.

"Lorne Mysko"
Hearing Committee Member

AGREED STATEMENT OF FACTS AND ADMISSIONS

In relation to the Formal Complaint dated July 5, 2012 alleging that he:

- 1. did prefer the interest of a third party, A.K., over the interest of his client, E.K.**
- 2. did breach the duty of loyalty owed to his client, E.K.; and**
- 3. did after receiving notice of termination of his retainer from his client, E.K., fail to facilitate expeditious transfer of his client's file contents to successor counsel.**

JURISDICTION

15. Mervin Clayton Phillips ("the Member") is, and was at all times material to this proceeding, a practising member of the Law Society of Saskatchewan (the "Law Society"), and accordingly is subject to the provisions of *The Legal Profession Act, 1990* (the "Act") as well as the Rules of the Law Society of Saskatchewan (the "Rules"). Attached at Tab 1 is a Certificate of the Executive Director of the Law Society of Saskatchewan pursuant to section 83 of the Act confirming the Member's practising status.

16. The Member is currently the subject of a Formal Complaint dated July 5, 2012 and consisting of the three allegations above. The original Formal Complaint was served upon the Member on July 5, 2012. Attached at Tab 2 is a copy of the original Formal Complaint and proof of service in the form of an Acknowledgement of Service.

BACKGROUND OF COMPLAINT

17. These matters came to the attention of the Law Society as a result of a complaint from a member of the public (E.K.).

PARTICULARS OF THE CONDUCT

18. E.K. retained the Member in relation to the administration of the estate of her late husband, P.K., who died intestate on January 23, 2009. Letters of Administration were not required because all of P.K.'s assets either were jointly held or had designated beneficiaries.

19. One of the primary assets in the estate was a life insurance policy worth approximately \$172,500.00. P.K. had designated E.K. as a 60% beneficiary, his daughter D.K. as 20% beneficiary, and A.K. as 20% beneficiary. The distributions to E.K. and D.K. were completed promptly and without any difficulty.

20. Under cover of a letter dated March 12, 2009, the Public Employees Benefits Agency sent two benefit cheques payable by Great-West Life in the amounts of \$23,007.25 and \$11,503.62 and made out to E.K. in trust for A.K. [Tab 3]

21. When E.K. and D.K. attended at his office on March 19, 2009, the Member discovered that A.K. was legally an "infant", being under the age of 18 years at that time. Her birthdate was December 5, 1992. Distribution to A.K. could therefore not occur immediately. By letter dated March 19, 2009, the Member notified the Public Guardian and Trustee of Saskatchewan ("Public Trustee") of this fact and asked for advice on how to handle the matter [Tab 4]. The matter was further complicated by the fact that A.K. lived in Ghana.

22. By letter dated March 25, 2009 [Tab 5], the Public Trustee responded, "we would expect that [E.K.] would hold these funds in trust for [A.K.] until she turns eighteen". The Member then obtained instructions from E.K. and deposited the life insurance funds into an interest-bearing trust investment with E.K. named as the trustee.

23. P.K. had also named "M.K." as the beneficiary of shares held with SaskWorks Venture Fund Inc. ("SWVF"). "M.K." was in fact A.K. On July 20, 2009, E.K. completed a share transmission form, which was submitted to SWVF. On August 17, the Member received a fax from SWVF implying that E.K.'s share transmission form was rejected because E.K. was not A.K.'s legal guardian and requesting a form signed by A.K.'s parents. The Member in turn requested instructions from E.K.

24. It turned out that P.K. and E.K. had been in the process of legally adopting P.K.'s niece A.K., but the adoption had not yet been completed on the date of P.K.'s death. On September 2, 2009, E.K. met with the Member and expressed that she was upset that P.K. had named A.K. as a beneficiary because she had not yet been legally adopted. E.K. further indicated that, for this reason, she did not want to have anything further to do with the matter. A memo to file documenting this meeting is attached [Tab 6]. At this point the only outstanding work in relation to the Member's representation of E.K. with respect to her husband's estate was to release the funds held in trust for her to A.K. when she turned 18.

25. On September 14, 2009, the Member advised SWVF that they should deal directly with A.K. and her parents and provided the necessary contact information [Tab 7]. After a further exchange of correspondence between the Member and SWVF, SWVF sent a cheque for \$1,923.86 to the Public Trustee on behalf of A.K.

26. By letter dated July 15, 2010 [Tab 8], the Public Trustee requested the Member's assistance to establish that "M.K." and A.K. were the same person in relation to the funds received by the Public Trustee from SWVF. The Member then wrote to E.K. about preparing an affidavit of identity and received a written response from her on September 21, 2010 [Tab 9]. Staff in the Member's office called E.K. on September 23, 2010 and asked her to bring A.K.'s birth certificate with her when she came to sign the affidavit of identity [Tab 10] as it was an exhibit to the affidavit.

27. On September 24, 2010, E.K. attended at the Member's office, provided a copy of the birth certificate and swore the affidavit of identity. A copy of the birth certificate and the original affidavit of identity were forwarded to the Public Trustee under cover of a letter from the Member dated September 24, 2010 [Tab 11].

28. The Public Trustee asked the Member to confirm A.K.'s mailing address to permit them to make arrangements for release of the SWVF funds held by the Public Trustee to her [Tab 12]. By letter dated November 30, 2010, the Member provided the updated address to the Public Trustee [Tab 13].

29. The Public Trustee wrote to A.K. on two occasions after she turned 18 on December 5, 2010, but received no response. In a telephone conversation with a staff person in the Member's office on March 24, 2011, the Public Trustee advised that a notarial copy of the birth certificate was required and asked the Member to supply a notarial copy. A copy of the file memo from the staff person containing the Member's notes on March 24, 2011 is attached [Tab 14]. Since an original document is necessary in order to prepare a notarial copy of it, the Member wrote directly to A.K. in Ghana on April 5, 2011, the Member wrote to A.K. in Ghana and requested that she provide him with her original birth certificate, since he only had a copy [Tab 15]. On April 7, 2011, EK called the Member's office to tell him that A.K. had put the birth certificate in the mail to her [Tab 16].

30. By letter dated April 19, 2011 [Tab 17], the Member advised the Public Trustee that E.K. had delivered A.K.'s original birth certificate to him. The Member enclosed a notarial copy of the birth certificate to facilitate the release of SWVF funds held by the Public Trustee directly to A.K.

31. In a telephone conversation on April 20, 2011, the Member had advised the Public Trustee that he represented A.K. regarding the matter of releasing PEBA/Great-West funds to her. By letter dated April 21, 2011, the Public Trustee provided the Member with a Release that A.K. would have to sign before the Public Trustee would release the SWVF funds to her.

32. On April 27, 2011, A.K.'s mother M.M.K. called the Member's office from Ghana. Telephone reception was very poor so M.M.K. provided the Member's office with her email address for communication purposes.

33. The Member sent an email to M.M.K.'s email address on May 2, 2011 [Tab 18] asking for contact information of a solicitor in Ghana to arrange for execution of the required Release.

In an email sent on May 24, 2011, M.M.K. stated that “we” had forwarded an original birth certificate to E.K. [Tab 19]. In addition, M.M.K. asked for the money to be released to A.K. and asked if there was anything else they needed to do to facilitate the release of the funds.

34. By letter dated June 7, 2011, Maureen Dumonceaux advised the Member that E.K. had hired her, and requested that the original birth certificate of A.K. be returned to E.K. [Tab 20].

21. By letter dated June 15, 2011, the Member advised that, on the basis that A.K. was an adult, he would release the original birth certificate to E.K. when he received written consent from A.K. to do so [Tab 21].

35. By letter dated June 17, 2011, Ms. Dumonceaux asked for the birth certificate on the basis of her position that, since E.K. had provided the document to the Member in her capacity as “Executor for the estate” of P.K., the birth certificate was properly part of the estate file and releasable to her. Ms. Dumonceaux provided a formal Release Request signed by E.K. in relation to E.K.’s files, requested confirmation of any outstanding accounts owed by E.K., and confirmed that she would make arrangements to have those accounts paid [Tab 22].

36. By letter dated July 4, 2011, the Member again advised that E.K. was not an executor and that, on the basis that A.K. was an adult, he would release the original birth certificate to E.K. when he received written consent from A.K. to do so [Tab 23].

37. By letter dated July 15, 2011, Ms. Dumonceaux advised that E.K. had stated that she had obtained and paid for the birth certificate. As a result, Ms. Dumonceaux took the position that the birth certificate was part of E.K.’s file. Ms. Dumonceaux made a further written request to the Member for the entire file contents, including the birth certificate [Tab 24].

38. By letter dated July 22, 2011, the Member clarified his position that because A.K. was an adult, the birth certificate belonged to A.K. personally. He again stated that he would release the original birth certificate to E.K. when he received written consent from A.K. to do so [Tab 25].

39. On September 2, 2011, the Member transferred all of E.K.’s file material to the Law Society and to Ms. Dumonceaux, except for the original birth certificate. In a conversation with Jody Martin, then complaints counsel for the Law Society, the Member requested that the issue of whether or not A.K.’s consent to the release of her birth certificate was required be referred to the Ethics Committee for a determination [Tab 26] to resolve the issue of whether in the circumstances A.K.’s consent was required to release her original birth certificate to E.K. The matter was not referred to the Ethics Committee.

40. A.K. ultimately found a lawyer in Ghana to assist her with the formal execution of the release documents. The lawyer, S.P.D., first made contact with the Member by email on February 8, 2013, and the necessary arrangements were subsequently made.

41. Part of the arrangements involved correspondence between the Member and Ms. Dumonceaux to determine A.K.’s instructions as to the birth certificate. At this time, A.K. gave instructions that the birth certificate could be given to E.K. By letter dated April 8, 2013, Ms. Dumonceaux confirmed that E.K. would accept the birth certificate [Tab 27].

42. On June 3, 2013 in Ghana, A.K. executed a Release [Tab 28] that instructed the Member to release the trust funds to her, and to release the original birth certificate to E.K. The Member received a copy of the signed Release by email the same day.

43. The Member immediately released the trust cheque to A.K. (under cover of a letter dated June 2, 2013) and couriered the original birth certificate to Ms. Dumonceaux [Tab 29]. A.K. received the cheque in Ghana on June 11, 2013. The cheque cleared the Member's bank on June 26, 2013 [Tab 30].

PRIOR HISTORY

31. The Member has no prior findings of conduct unbecoming but is currently the subject of one other pending discipline proceeding.