

GRIEVANCE ADMINISTRATOR

v

ROBERT A. FRYE,
A Member of the State Bar of Michigan,
Respondent-Appellant

File No: DP-141/82

Argued: September 21, 1984

Decided: February 8, 1985

Michael Alan Schwartz, Grievance Administrator, appearing in pro per; Dennis Dettmer, Esq., appearing on behalf of the Respondent; Ronald A. Lustig, Esq., appearing on behalf of Complainant Johanna March.

OPINION OF BOARD MEMBER JOHN L. COTE:

The Formal Complaint in this matter was filed December 27, 1982. The Board, after being made aware of the complexity and potential volume of this matter, assigned the matter for hearing before a Master under GCR 1963, 959.4 (3) and 966. The Hearing Panel adopted the recommendations of the Master and dismissed all charges in the Formal Complaint. The essential facts are summarized as follows:

The Respondent, Robert A. Frye, and his former client, the deceased George March, had a long-standing friendship spanning approximately thirty (30) years. On October 5, 1977, the Respondent handled the sale of Mr. March's business which netted approximately \$187,857. The funds from this sale were initially placed in a non-interest bearing client trust account. Shortly thereafter, however, the client approached Respondent with the prospect of placing the money in an interest bearing account to be kept secret from the client's wife. It was well known to the Respondent and to Respondent's daughters, who were employed by Respondent at the time, that Mr. March was having marital difficulties. It was the client's intent, at least at the time he approached Respondent regarding handling of the funds from the sale of his business, to devise the money to his grandchildren, by-passing his former wife, current wife and the children of his former marriage; however, this posture apparently changed later, as evidenced by the provision of a subsequent will.

The Respondent refused Mr. March's suggestion that they open a joint savings account with Respondent and the client as joint tenants; however, Respondent acquiesced to his client's suggestion that a joint account (with rights of survivorship) be opened with Mr. March and Respondent's two daughters, Pamela Fons and Elizabeth Eib, as the joint tenants. The account was to be temporary, pending the formation of an estate plan for Mr. March. Most of the money was re-invested in U.S. Treasury bills (the interest from which was designated as payable to the joint savings account which remained opened with the Detroit Bank & Trust) in the names of the client and Respondent's two daughters-employees.

In March, June and July 1978, Respondent attempted to establish a trust which required the cooperation and approval of Mr. March's wife. The proposed trust was rejected by Mr. March's wife, Johanna. No other alternative means of handling the funds were considered until August 1979, almost two years after the sale of the client's business. The Respondent was aware that his client had executed a new will, but apparently believed that it was executed under the duress and coercion of his wife, Johanna March. Respondent suggested that the joint account be altered, naming Mr. March's daughter, Sally, as the joint tenant, but the client refused.

In early October 1979, Mr. March was admitted to a hospital in Florida; while hospitalized, he had a conversation with the Respondent in which he was advised of the fact that about \$125,000 of the funds in question were in the form of treasury bills, and in excess of \$125,000 was in the joint account. On October 24, 1979, Mr. March made a request for \$15,000 from the savings account and that amount was forwarded to him shortly thereafter. The clients wife, Johanna March made a request for the entire balance of the funds which was refused by the Respondent. Mr. March died on October 31, 1979.

In January of 1980, when the Treasury bills matured, Respondent's daughters applied for continuation of the Treasury bills; the joint savings account remained the designated recipient of interest payments. However, Respondent's daughters removed the deceased's name from the Treasury bills.

No funds were ever actually withdrawn by Respondent's daughters for their own use; however, they did assert a claim to the funds in excess of \$100,000 requiring an action to recover by the representatives of the estate. A settlement was reached providing for relinquishment of all but \$25,000 of the funds.

It is uncontested that there was never at any time an expressed or implied intent on the part of the client, Mr. March, that Respondent's daughters should benefit from the joint account.

Respondent was appointed counsel and commenced probate proceeding for the estate for George March in April of 1980. Thereafter, in May of 1980, apparently acting upon advice from independent counsel, Respondent's daughters made a claim against the bulk of the funds entrusted to them. Respondent was discharged as attorney for the estate on July 3, 1980. There has been probate and circuit court litigation involving Mrs. Johanna March, the Respondent and his daughters with regard to the funds in question.

The Hearing Panel Report includes more specific and complete factual findings. Our purpose here is to recite those salient facts bearing upon our departure from our brothers who would affirm the conclusions and findings of the Hearing Panel.

Considerable testimony, documentary evidence and Panel fact-finding is related to incidents surrounding Mr. March's death and parts of the complaint alleging a deliberate failure to turn over the funds as requested by the deceased near the time of his death. We agree with the Panel that the record does not support these particular charges.

DISCUSSION

We, however, would reverse the conclusions of the Hearing Panel regarding the propriety of the joint account, Respondent's duty to secure the assets and the conflict of interest allegations, for the following reasons:

The establishment of a joint bank account with rights of survivorship vested in parties who are, constructively at least, trustees for the client, created a potential for controversy, abuse and misunderstanding regarding the rights and duties of the parties involved. In light of all the circumstances reflected in the record, this action smacks of a subterfuge. Fundamental principals of fiduciary responsibility, separation and identification of client funds and the exercise of Independent professional judgment were breached by establishing and handling a "trust" in this fashion. The use of the joint savings account goes beyond bad form and is conduct which simply cannot be sanctioned or encouraged if the public is to maintain confidence and trust in the legal profession.

Respondent's explanation for his refusal to open the account in his own name certainly could and should have been provided to the client as an equally-compelling reason for declining to name his daughters-employees as joint tenants. We would find that the Respondent could no more objectively recommend (or acquiesce in his role as counsel to) the appointment of his daughter-employees as joint tenants than he could with respect to himself.

The Respondent argues that Mr. March was a sophisticated client with many years of business experience, who knew full well the implications of establishing a joint account with rights of survivorship. Such an assumption should never be made. Respondent seems to urge also that there was no reason to suspect that his daughters-employees would invade the funds; however, we presume he would make this assertion with respect to himself as a joint tenant as well, yet he properly declined to be named as a joint tenant.

Finally, Respondent repudiates the actions of his daughters-employees in asserting a claim against the funds but rejects the Grievance Administrator's claim that he had a duty to take some action to prevent the taking of the funds.

Certainly, Respondent should have declined to continue to represent Mr. March with respect to the funds if the daughters were to assume the position of joint tenants with rights of survivorship. It should have been clear that this arrangement prevented the exercise of Respondent's "independent professional judgment on behalf of a client . . ." See Canon 5, DR 5-101(A) and DR 5-105(A).

Respondent is a man of many years of experience in the field of probate law. He was, or should have been, aware of alternatives to the joint account, such as an interest bearing escrow or trust account, or a declaration of trust, which mechanisms would have required a minimum of effort and certainly more protection for his client.

Respondent was also aware of his client's marital conflicts and should have been sensitive to the potential for confrontation and challenge by Mr. March's heirs.

The heirs of Mr. March's estate took action in the probate court to secure the funds from invasion by Mr. Frye's daughters, Pamela Fons and Elizabeth Eib. A settlement resulted in abdication of the claims by Respondent's daughters, except for \$25,000. The return of the larger part of the funds to the heirs was not the result of any effort on Respondent's part, and Respondent, by his own testimony, seemed to take the position that he had no duty to marshal the assets of the estate for the benefit of the heirs.

There is an implication, at least, that simply because the daughters were adults, and given the deceased client's extreme difficulty with his wife and his initial intent to deprive his wife and children of the funds, Respondent was in some way equitably justified in standing by, leaving the heirs to the course of action which they were forced to take against Respondent's daughters. Respondent testified that his daughter, Pamela Fons, did not like Mrs. March and that Pamela had suggested that she might turn the funds over to the grandchildren. Of course, Respondent knew Pamela had no such authority and he knew also that his client, George March, had executed a will subsequent to his decision to open the joint savings account with Respondent's daughters; that Will did not exclude Mrs. March or Mr. March's children by his first marriage.

VIOLATIONS OF THE DISCIPLINARY RULES

I.

It would be our finding that Respondent violated GCR 1963, 953 (2-3) and DR 5-101(A) by acting in his capacity as legal counsel to his client George March in the establishment of a joint savings account naming Respondent's daughters as joint tenants with rights of survivorship on that

account. The record reflects that the joint account in question was established on a temporary basis; however, the funds were held jointly by Respondent's daughters for almost two years. Respondent had a continuing duty to exercise his independent professional judgment on behalf of his client and should have taken steps to document in some form that the funds were entrusted to the daughters for the benefit of the client. His failure to do so constituted a violation of GCR 1963, 953 (2 e 3), DR 5-101(A) and DR 7-101(A)(1) [failure to seek the lawful objectives of a client through reasonably available means].

However, we would agree with the Hearing Panel that the proofs do not support a finding of violation of DR 1-102(A)(4) which prohibits dishonesty, deceit, fraud or misrepresentation.

II.

We agree with the Complainant that Respondent violated DR 5-105(A)and(B) by undertaking to represent the estate of George March while acting as the attorney for Mr. March's surviving spouse, Johanna March, and during the period when Respondent's daughters-employees were asserting a claim to the funds. While this conflict of interest did not continue for an extended period, Respondent should have been especially sensitive to it particularly at the point of, and in light of, his knowledge of his daughters' claims, which he admits were unfounded.

III.

We would agree with the Grievance Administrator that the Respondent violated Canon 7, DR 7-101(A)(1-3) by failing to seek the lawful objectives of his client (the estate of George March) by failing to take some action against, or declaring some objection to, the claims of his daughters -- particularly in consideration of his daughter's status as employees over whom he had control as an employer, and through whom he incurs responsibility for any improper handling of client affairs and property.

As indicated, a very large volume of evidence accumulated with regard to the question of the circumstances surrounding Mr. March's death, and the alleged failure of the Respondent to turn over the funds to Mr. March before his death. We would affirm dismissal of Count II and adopt the findings and conclusions of the Hearing Panel with respect to all of the allegations and disciplinary rules addressed by the Hearing Panel, except as otherwise specifically referred to herein.

It is our judgment that Respondent's conduct, when viewed in light of all surrounding circumstances, including Mr. Frye's long, unblemished record, warrants a reprimand with a requirement for payment of the costs of the Attorney Grievance Commission in the investigation and prosecution of this matter, as well as the costs of the hearings and transcripts.

BOARD MEMBER CHARLES VINCENT, M.D., CONCURS.

***** EDITORIAL NOTE: Dismissal upheld because the Board vote was split - 2 to 2. *****