

STATE OF MAINE

SUPREME JUDICIAL COURT

DOCKET NO. Bar-04-8

BOARD OF OVERSEERS OF THE BAR

v.

ORDER

WILLIAM J. SMITH, ESQ.

William J. Smith has petitioned the Court, pursuant to M. Bar R. 7.2(a) to review actions taken by a Grievance Panel of the Board of Overseers of the Bar. Mr. Smith is represented by Kevin M. Cuddy, Esq. and the Board by Assistant Bar Counsel Nora Sosnoff, Esq. The Panel found that Mr. Smith violated M. Bar R. 3.2(f)(4)¹ and M. Bar R. 3.6(a)² and concluded that Smith be reprimanded.

¹ M. Bar R. 3.2(f)(4) provides:

(f) Other Misconduct. A lawyer shall not:

.....

(4) engage in conduct that is prejudicial to the administration of justice.

² M. Bar R. 3.6(a) provides:

3.6 Conduct During Representation

(a) Standards of Care and Judgment. A lawyer must employ reasonable care and skill and apply the lawyer's best judgment in the performance of professional services. A lawyer shall be punctual in all professional commitments. A lawyer shall take reasonable measures to keep the client informed on the status of the clients' affairs.

The Panel's findings can be summarized as follows:

By virtue of a separation agreement incorporated into a divorce decree Rodney L. Devost was ordered to pay the installments due on a debt secured by a mortgage on real property owned by Rodney and his former wife, Rebecca A. Devost. Subsequent to the entry of the divorce decree, Smith was appointed Conservator of the Estate of Rodney L. Devost. In June 2000 Smith learned that Rodney's Veteran's Administration benefits had been substantially reduced retroactively to April 1, 2000. Beginning in October 2002 Smith stopped making the mortgage payments resulting in the foreclosure of the mortgage securing the Devost debt. Smith's decision to stop making the mortgage payments was based upon his conclusion as a Conservator that he was first obligated to contribute to Devost's comfortable maintenance and support, rather than to satisfy Devost's obligations under the divorce decree.

M. Bar R. 7.2(a)(4) provides that the review of a decision by a Grievance Commission disciplinary panel to impose a public reprimand shall be based upon the record of proceedings before the Panel. The Court

reviews a Panel decision to determine whether the Panel exceeded the bounds of its discretion in deciding upon a public reprimand.

The rule authorizes the Court to affirm, vacate, or modify the decision of the Panel and provides that any findings of the Grievance Commission disciplinary panel shall not be set aside unless clearly erroneous.

The ultimate findings of the Panel are contained in paragraph 10 of the Panel's report, which provided:

10. Considering the above facts the Panel finds that Smith (a) violated Maine Bar Rule 3.2(f)(4) in that by failing to seek a modification of the District Court Order or take any other action other than to ignore such Court Order, he engaged in conduct which is prejudicial to the administration of justice, and (b) that Smith violated Rule 3.6(a), in that by the[sic] such inaction he failed to employ reasonable care and skill and to apply his best judgment and the prompt performance of his professional services as a lawyer in his capacity as Conservator of the estate of Rodney.

The Panel posits that Smith in his capacity as Conservator had an obligation to seek a modification of the District Court Order or take any other action other than to ignore such court order. The Order in question incorporates the language of the separation agreement:

IV. DEBTS AND LIABILITIES

1. Part of Defendant's VA Pension, clothing allowance, Social Security and any other benefits and allowances he receives for his own care and living, including nursing home and medical needs, will be paid for his care and living expenses, and Defendant will retain \$100.00 a month for

his discretionary spending. The rest, to be no less than \$1,000.00 a month during the year 2000, \$1,100.00 a month during the year 2001, and continuing to increase annually at the rate of \$100.00 per month increase each year until the balance owed on both the Peoples Heritage Bank first Mortgage, and the Peoples home equity second Mortgage, are paid in full, is to be paid to Plaintiff on a monthly basis, for her to use to pay the presently existing secured and unsecured debts of both Plaintiff and Defendant, and towards her living expenses and her medical care.

The obligation as to the distribution of Rodney's VA pension was an obligation, which Rodney owed to Rebecca. Smith did not assume this obligation when he became Conservator. As Conservator, Smith could only use the funds he was provided. It is conceded that after the reduction in the VA pension, there were insufficient funds available to pay both the installments due on the debt and for the support of Rodney. Smith testified that his failure to seek a modification of the divorce decree was based on his understanding that such action would have been a needless expenditure of the ward's funds. The record would support a conclusion that the funds generated from the reduced pension were insufficient to support Devost and fulfill Smith's obligation to pay the mortgage obligation of Devost and his former wife.

The Panel exceeded the bounds of its discretion when, on the basis of this record, it concluded that Smith engaged in conduct that is prejudicial to the administration of justice.

The Panel concluded that Smith violated M. Bar R. 3.6(a) in that by failing to seek an amendment to the divorce decree he failed to employ reasonable care and skill and to apply his best judgment and prompt performance of his professional services as a lawyer in his capacity as Conservator of the Estate of Rodney. (Emphasis added). The record is, however, devoid of any evidence that Smith failed to employ reasonable care and skill and to apply his best judgment and prompt performance of his professional services as a lawyer. Smith was a Conservator duly appointed by the Aroostook County Probate Court and obligated by virtue of 18-A M.R.S.A. § 5-425(a)(2)

. . . to expend or distribute sums reasonably necessary for the support, education, care or benefit of the protected person with due regard to (i) the size of the estate, the probable duration of the conservatorship and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him; (ii) the accustomed standard of living of the protected person and members of his household; (iii) other funds or sources used for the support of the protected person.

Smith was neither the complainant's lawyer³ nor the ward's lawyer. The evidence is clear that Smith's action as a Conservator were fully in accord with the statute. Though a lawyer, Smith was not acting as a lawyer,

³ The complaint against Smith was brought by Rodney Devost's ex-wife, Rebecca Devost, now Rebecca Cyr.

but a Conservator. The finding of the Panel that Smith failed to fulfill his obligations as a lawyer is clearly erroneous.

The entry is:

Order of reprimand vacated.

Dated: August 5, 2004

A handwritten signature in cursive script, reading "Paul L. Rudman", written in black ink. The signature is positioned above a horizontal line.

Paul L. Rudman
Associate Justice