NO. BD-2011-018

S.J.C. Order of Term Suspension entered by Justice Duffly on March 16, 2011, with an effective date of April 15, 2011.[1]

SUMMARY[2]

This matter was before the Court on a stipulated recommendation for suspension with conditions on reinstatement. The respondent was admitted to the Massachusetts bar in 2001 and was never a member of the New Hampshire bar. The respondent had no history of discipline.

In 2003, the respondent practiced law as sole principal of a professional corporation (PC). The father of a severely disabled child asked the respondent, through his PC, to become the successor corporate co-trustee of a trust established many years earlier for the child's sole benefit. The father was the individual trustee. The respondent agreed to have his PC appointed as corporate co-trustee and to perform attendant legal work for the trust. The respondent had never acted as a fiduciary, lacked experience and expertise in trust administration, and failed to associate himself with competent counsel.

The trust declaration conferred equal powers on the corporate and individual trustees, except that the individual trustee's decision controlled in any dispute between them. The trustees were authorized to pay themselves compensation, acquire a residence for the child, invest in any other real and personal property, operate any kind of business, borrow money and encumber the trust property to secure a loan, and act notwithstanding their self-interest. The trustees were required to account for the trust assets and were authorized to obtain court instructions to carry out the trust purposes.

When the respondent undertook his duties, the trust had assets of about $543,000. The respondent knew that he and the father had equal fiduciary powers and that, through his PC, he had an independent obligation as trustee to assure that the trust funds were applied for the child's benefit. The respondent also knew that the child required care and services and that the father then had no income apart from the trust. The respondent and the father agreed that the father would receive stipends to cover the child's needs and the father's trustee compensation.

During the summer of 2003, the respondent received trust funds and made disbursements to buy a house for the child in New Hampshire, pay the father's stipend, and cover other expenses. The remaining funds of about $226,000 were held in an investment account established by the father for the trust with the father and the respondent as signatories. Over the next two years, all of those funds were depleted. Among other problems, the father made withdrawals from the investment account totaling over $120,000. The respondent did not take adequate steps to monitor the account and was unaware of the

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[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

[2] Complied by the Board of Bar Overseers based on the record filed with the Supreme Judicial Court.

withdrawals when made. Despite later demands by the respondent, the father never accounted for all of those funds.

In addition, the respondent acquiesced in the father's decision in 2004 to buy with trust funds a food service business in New Hampshire that the father intended to manage. The acquisition was financed in part by a mortgage on the child's house. A few weeks before the closing, however, the father was arrested on out-of-state probation violations and released on bail pending extradition. At this point, the respondent became aware that the father had a criminal history. He should have appreciated that the father was not a good candidate to manage the business and that the proposed business deal was likely to deplete the remaining trust assets and leave the child without adequate provision. Nevertheless, the respondent went forward with the closing. Shortly after, the father was incarcerated for several months, during which time the business was run by employees with assistance from the respondent.

The business never generated sufficient revenues to pay the business and house expenses. Further, although the sellers had represented that they were aware of no code violations, the premises were in violation of environmental regulations and building and health codes requiring remediation. To raise funds, the respondent and the father obtained private loans secured by mortgages on the business property, and they sold the child's house in the summer of 2005 under threat of foreclosure.

The business was closed in September 2005. In 2006, the holder of the business mortgage foreclosed and sold the business property at auction, with the excess proceeds applied to business debts and the child's expenses. The trust assets were then exhausted. The respondent subsequently asked the father to replace the PC as corporate trustee but failed to seek court approval of the PC's resignation or instructions as to the PC's further duties.

The business sellers had disclosed that there was an underground gasoline storage tank on the business property, but the respondent and the father had not adequately investigated its condition before acquiring the property for the trust. The business was cited in 2005 for failure to remediate the tank, after which the respondent sought the sellers' agreement to pay the remediation costs. Unbeknownst to the respondent, the father agreed to release the sellers from liability on his receipt of a payment of less than half those costs. The father did not disclose the release or the payment to the respondent.

In the summer of 2006, the respondent obtained *pro hac vice* admission in New Hampshire and began representing the trust in a lawsuit against the business sellers. The suit, brought in the father's name as trustee, sought rescission and damages for claimed breach of contract, fraud, and misrepresentation. The trust also had at least a potential claim against the respondent for lack of diligence in investigating the business before the purchase. The respondent did not appreciate the conflict of interest and, under the circumstances, could not request consent to it.

The defendants moved to dismiss the New Hampshire lawsuit. The respondent filed an opposition, but it was not timely, and the motion to dismiss was granted. The respondent subsequently failed to take timely and effective action to revive the suit. The dismissal was affirmed on appeal in 2008.

By enabling the trust's acquisition of the business when he should have known of the unsuitability of the acquisition, failing to investigate adequately the father's disposition of trust funds, and allowing the exhaustion of the trust assets without taking action of substance to protect the trust beneficiary, the respondent violated Mass. R. Prof. C. 1.1, 1.3, and 8.4(h).

By failing to provide competent and diligent representation in the New Hampshire litigation, the respondent violated Mass. R. Prof. C. 1.1 and 1.3 and Rules 1.1 and 1.3 of New Hampshire Rules of Professional Conduct. By representing the trust against the business sellers when his representation was or reasonably might have been affected by his own interests, the respondent violated Mass. R. Prof. C. 1.7(b) and Rule 1.7(b) of the New Hampshire Rules of Professional Conduct as then in effect.

The respondent failed to make and maintain required records for his trust accounts in violation of Mass. R. Prof. C. 1.15(a), as in effect through June 30, 2004, and Mass. R. Prof. C. 1.15(f)(1)(B), (D) and (e), as in effect from and after July 1, 2004. From July 1, 2004, through the fall of 2006, the respondent violated Mass. R. Prof. C. 1.15(b)(2), as in effect on and after July 1, 2004, by failing promptly to withdraw all his earned fees from his IOLTA accounts.

In aggravation, the respondent's misconduct contributed to the depletion of the trust assets and ensuing financial harm. In addition, the respondent had been cautioned about inadequate trust account records and attended training in proper trust account recordkeeping but failed to maintain all required records thereafter.

In mitigation, the respondent's relative inexperience was considered, along with the unusually broad powers conferred on the individual trustee as well as on both trustees to invest and engage in business enterprises. The respondent knew that the father had previously undertaken other business ventures funded by the trust with the approval or acquiescence of predecessor corporate trustees. Further, the father had exclusive authority over the child's care and, so far as the respondent was aware, exercised that authority without jeopardizing the child's wellbeing.

The matter came before the Board of Bar Overseers on a stipulated recommendation for a ninety–day suspension, with conditions on reinstatement, and the respondent's acknowledgement that the facts and rule violations alleged could be proved by a preponderance of the evidence. The board voted to accept the stipulation and recommendation. On March 16, 2011, the Supreme Judicial Court ordered the respondent's suspension for ninety days, with his reinstatement conditioned on financial monitoring and maintenance of professional liability coverage for two years after his resumption of practice.

IN RE: CHAZ ROBERT FISHER

NO. BD-2011-018

S.J.C. Judgment of Reinstatement entered by Justice Duffly on August 1, 2011.[1]

[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.