**KENNETH L. HARVEY**

**Public Reprimand No. 2015-2**

**Order (public reprimand) entered by the Board on May 1, 2015.**

**SUMMARY**[1]

The respondent, Kenneth L. Harvey, Esq., is an experienced trusts and estates lawyer. In the spring of 2003, the respondent was employed at Holland & Knight, LLP. An elderly client and two of her sons met with the respondent. As a result of their discussions, the respondent drafted a will nominating the respondent as executor and a revocable trust nominating the respondent as trustee. In April 2003, the client executed the will and trust.

The will provided for equal distribution of the client's property to her five children. As to her personal property, the will gave the five beneficiaries six months to agree on a distribution. The will further provided that if the beneficiaries could not agree upon division within six months after her death, the executor "shall divide these items in its discretion among those persons, and that division will be conclusive and binding." The will also directed that the expenses of storage, before distribution, be paid as an expense of administration of the estate.

The trust provided that at the client's death, the trustee was required to distribute the assets of the trust equally to the beneficiaries by right of representation. The trustee was required to give the beneficiaries accountings at least annually. Shortly after execution of the will and the trust, the respondent engaged a real estate broker and sold the client's home and put the proceeds into the trust. The value of the initial assets of the trust was approximately $677,927.27.

The client died on October 23, 2003. Upon the client's death, the respondent directed the removal of her personal property from her apartment and placed her personal property in storage. As early as November 2003, two of the beneficiaries wrote to the respondent and sought a list of their mother's personal property. The respondent provided an incomplete inventory of the personal property in the apartment.

In November 2003, the respondent filed the will with the Middlesex Probate and Family Court for full probate. Full probate was expensive and unnecessary based upon the minimal assets of the estate.

In April 2004, the respondent made his first partial distribution of the trust assets, $25,000 to each the beneficiary. In April 2005, the respondent made a second partial disbursement of $50,000 to each beneficiary.

By April 2004, six months after the client's death, the respondent was required by the will to distribute the personal property in his discretion and such division would have been conclusive and binding. Instead, by letter dated April 22, 2004, the respondent wrote the

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[1] Compiled by the Board of Bar Overseers based on the record of proceedings before the board.

beneficiaries asking them to inform him of any items they wished to have by May 21, 2004. The respondent requested an agreed upon distribution plan or he would distribute the items based upon requests.

By January 2005, three of the beneficiaries sent the respondent letters requesting certain items of their mother's personal property. At that point, there was little or no dispute among the beneficiaries regarding the personal property. However, the respondent failed to make any distributions to the beneficiaries.

In April 2009, the respondent sent a letter to the beneficiaries and demanded a unanimous written agreement with five signatures to the division and distribution of the personal property, or else he would go to the court to seek instruction. By May 2009, all the beneficiaries but one had signed the distribution list. The respondent's insistence upon an agreement signed by all the parties was unnecessary and costly to the estate given his specific authority to make distributions of personal property six months after the client's death.

In May 2009, the respondent filed a complaint for declaratory judgment seeking a declaration confirming distribution of the personal property. In June 2009, one of the beneficiaries filed an answer and counterclaim, and a second beneficiary filed an answer in support of the other beneficiary. The court requested that the proposed plan be presented in a final account. The respondent filed a final account as requested, and in January 2010, the Court allowed the accounts and closed the estate. The respondent distributed the property to the beneficiaries in 2010.

The respondent violated his obligation under the will by failing to divide and distribute the mother's personal property as required by the will. During the seven years that the respondent failed to distribute the property as required by the will, the respondent paid $22,452 for storage of the property. Except for the amount of $1,583.14 charged for the first six months after the client's death, these charges were unreasonable because the respondent was mandated to distribute the property six months after her death.

By letter in May 2010, counsel for the respondent wrote to the beneficiaries and informed them that as the estate was now closed, the respondent was prepared to make a final distribution of the trust's assets and terminate the trust. However, as a condition of distributing the final assets, the respondent's counsel demanded that the beneficiaries sign a "Release, Indemnification and Receipt," which included an agreement to exonerate, indemnify and reimburse the respondent for expenses and attorney's fees without limitation. The beneficiaries were informed that failure to sign the release would "result in further court involvement." Two of the beneficiaries signed the release but crossed out the release and indemnification provision. The other three beneficiaries did not sign the release.

In September 2010, the respondent, as trustee, filed a petition for distribution and termination of the trust. In October 2010, one of the beneficiaries filed a counterclaim requesting that the estate and trust be only charged for the normal and reasonable legal fees in the execution and the amount should be no more than 5% of the total value of the estate. In March 2011, another beneficiary filed an answer and counterclaim and statement of objections in which he objected to the storage and legal fees charged to the estate and trust.

Starting in 2004, the respondent employed legal counsel at Holland & Knight to represent him as executor of the estate and as trustee of the trust. Beginning in May 2004, and for over five years, the beneficiaries repeatedly requested by numerous letters that the respondent provide accountings and copies of the breakdown of fees paid to Holland & Knight from their mother's death going forward. Throughout the proceedings, the respondent failed to respond to numerous letters from the beneficiaries requesting accountings, documentation of the assets of the estate and breakdowns of the fees paid to Holland & Knight.

Through the course of the proceedings, the estate and trust were charged and paid close to $500,000 in legal fees and expenses billed by the respondent and other lawyers at Holland & Knight. These legal fees were unreasonable and clearly excessive. Had the respondent carried out his obligation to distribute the personal property of the estate six months after the client's death, legal fees necessary to finalize the estate and trust at that point would have been less than $50,000. Beyond that amount, the legal fees were unnecessary.

The respondent also charged the estate for fees incurred to defend a complaint filed against him with the Board of Bar Overseers by one of the beneficiaries. These fees were outside the scope of the respondent's work for the estate and trust and should not have been charged to the estate.

On March 24, 2014, after trial on the petition for distribution and the counterclaims, the court issued findings of fact, conclusions of law and a judgment. The court found that the respondent had improperly and in bad faith incurred unreasonable and exorbitant fees that nearly depleted a modest estate. In the judgment, the court ordered the respondent, as trustee, to repay to the trust all legal fees, costs and expenses except $50,000, and upon repayment to disburse the entire res of the trust to the beneficiaries equally. After the court's judgment of March 24, 2014, Holland & Knight reimbursed the trust in accordance with the judgment, in the total amount of $407,077.14.

By failing to act with reasonable diligence in disbursing the deceased's personal property, the respondent breached his fiduciary duties as executor in violation of Mass. R. Prof. C. 1.1, 1.2(a) and 1.3.

By failing to keep the beneficiaries reasonably informed about the status of the estate, the respondent violated Mass. R. Prof. C. 1.3 and 1.4.

By charging the estate and the trust clearly excessive fees, both for his services as executor and trustee and for the services of his counsel, the respondent violated Mass. R. Prof. C. 1.5(a).

By incurring unreasonable storage expenses, the respondent violated Mass. R. Prof. C. 1.1, 1.2(a), 1.3, and 1.5(a).

The matter came before the Board of Bar Overseers on a stipulation of facts and a joint recommendation for discipline. On April 13, 2015, the board voted to accept accepted the parties' recommendation and imposed a public reprimand.