



# DISCIPLINE CASE *DIGEST*

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Case 09-10

<b>Member</b>	Henry Nelson Carroll, Q.C.
<b>Jurisdiction</b>	Brandon, Manitoba
<b>Called to the Bar:</b>	May 25, 1964
<b>Particulars of Charges:</b>	Professional Misconduct (4 counts): <ul style="list-style-type: none"><li>▪ While preparing a Will for a client, included a clause naming himself as the Executor and providing himself with discretion to distribute the residue of the Estate in circumstances where either he or an associate could receive a substantial gift or benefit and in doing so, acted contrary to the following provisions of the <i>Code of Professional Conduct</i> ("the Code"):<ul style="list-style-type: none"><li>- Chapter 1 [failed to act with integrity]</li><li>- Rule (d) of Chapter 6 [failed to insist that client either be independently represented or have independent legal advice]; and</li><li>- Rule (c) of Chapter 6 [conflict of interest]</li></ul></li><li>▪ Breach of Chapter 1 of the Code [integrity – after receiving additional assets of the Estate, failed to file a Revised Inventory and Valuation of the Property of the Estate within a reasonable period of time, thereby undervaluing the Estate by over \$95,000.00]</li><li>▪ Breach of Chapter 1 of the Code [integrity – arranged for the Estate proceeds to be distributed in a manner that resulted in a substantial payment being made to his spouse and attempted to conceal such payment]</li><li>▪ Breach of Chapter 1 of the Code [integrity – signed the name of his daughter on an authorization that he had drafted for her signature and in doing so, falsified a document]</li></ul>
<b>Date of Hearing:</b>	March 26, 27, 2008 and August 13, 2008 (Sentencing)
<b>Date of Sentencing Decision:</b>	December 12, 2008
<b>Appeal Information:</b>	The member has filed an appeal to the Manitoba Court of Appeal from the Panel's decision with respect to conviction and sentence.
<b>Panel:</b>	<ul style="list-style-type: none"><li>▪ David J. Kroft, Chair</li><li>▪ Roger B. King, Q.C.</li><li>▪ Therese M. Koturbash</li></ul>

- Counsel:**
- Darcia A.C. Senft for The Law Society of Manitoba
  - Gavin M. Wood for the Member
- Disposition:**
- Disbarment
  - Payment into Court in the amount of \$108,484.99 to the benefit of the Estate that was the subject of the hearing
  - Costs of \$12,124.69
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## **Breach of Integrity**

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### **Facts**

Mr. Carroll drafted a will for a testator in 1999 in which he was appointed as the sole executor and trustee and was given the absolute discretion to distribute the residue. The client died on February 12, 2005. In support of the application for probate, Mr. Carroll filed a sworn affidavit declaring that the value of the estate was \$116,934.46. Probate was granted on March 22, 2005. When Mr. Carroll received the proceeds of the estate in April of 2005, however, the total exceeded the declared value of the estate by \$95,235.84. At no time, up to the date of the hearing, did Mr. Carroll submit a revised Inventory to the court.

Mr. Carroll distributed virtually all of the estate by May 6, 2005, including five specific bequests made by the testator. With respect to the distribution of the estate's residue, he exercised the discretion he purported to have as executor and made a gift of \$108,000 to his daughter, even though she was not a friend of the testator and had never met him. Mr. Carroll told her in a brief telephone call that he was the executor of an estate and that she would be receiving some money, but that for tax reasons, it should be given to his wife. Mr. Carroll then transferred funds from the estate's trust ledger to a separate internal trust ledger opened for his daughter. He also created a letter on file to her with respect to the gift, but did not send a copy to her. Mr. Carroll drafted and signed an authorization from his daughter to deposit the funds into a bank account which belonged to his wife. Neither the letter nor the authorization specified the amount of the bequest or the fact that the monies were being transferred to Mr. Carroll's wife. His daughter did not receive a copy of the authorization. On December 6, 2005, Mr. Carroll's wife also received a discretionary gift from the estate in the amount of \$484.99. She used the funds to pay off a mortgage on the family home, purchase furnishings for a new residence in the United States and to pay off some credit card debts.

These gifts came to the attention of the Law Society through a spot audit of Mr. Carroll's trust accounts and formed the basis of the four charges against Mr. Carroll.

### **Plea**

Mr. Carroll entered a plea of not guilty to the charges.

### **Decision and Comments**

The panel found Mr. Carroll guilty of professional misconduct with respect to all four counts in the citation. The panel noted that throughout the hearing of the matter, Mr. Carroll maintained his position that the discretion granted by the will was sufficiently broad to encompass the gift of \$108,000 to his daughter. The panel found that material aspects of the evidence called into question the credibility of Mr. Carroll's evidence as to what he knew, believed, and intended to achieve throughout the matter. Specifically, the panel determined that the paper trail created by Mr. Carroll was not to leave an accurate record, but rather, to obscure what he knew or ought to

have known in the circumstances, was an inappropriate exercise of discretion and use of estate funds. The panel determined that Mr. Carroll's conduct in disbursing the monies as he did in these circumstances was of a nature that would impair both his client's and the public's trust in him and the legal profession generally. With respect to Mr. Carroll's failure to file a revised inventory, the panel noted that the failure must be considered in the context of what the panel found to be a conscious attempt by Mr. Carroll to cloak in legitimacy an otherwise inappropriate bequest to his wife and himself. Therefore, his conduct took on greater significance.

### **Penalty**

The panel ordered that Mr. Carroll be disbarred. They found that his professional misconduct was sufficiently grave to warrant disbarment and that it was not an appropriate case to permit a voluntary withdrawal from practice in light of the sentencing objectives, and in the absence of exceptional or mitigating factors.

The panel also ordered that Mr. Carroll pay \$108,484.00 into court for the benefit of the estate that was the subject of the hearing, and directed that the sum remain in trust for the estate pending the Court's determination of the appropriate distribution of the residue under the provisions of the will. It ordered the Society to give notice to the Public Trustee by serving the Trustee with copies of the Panel's decisions, and to take reasonable steps to provide sufficient notice to family members of the deceased (or their heirs) who received specific bequests under the will.

The panel ordered that Mr. Carroll pay costs to the Society in the amount of \$12,124.69.

### **Appeal**

The member has filed an appeal to Manitoba Court of Appeal from the Panel's decision with respect to both conviction and sentence.