



# Civil Resolution Tribunal

Date Issued: December 3, 2018

File: SC-2018-005380

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Beardsley v. L. Finkelstein Law Corporation doing business as Finkelsteins*,  
2018 BCCRT 796

B E T W E E N :

Jan Beardsley

**APPLICANT**

A N D :

L. Tom Finkelstein Law Corporation doing business as Finkelsteins

**RESPONDENT**

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## REASONS FOR DECISION

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Tribunal Member:

Megan Volk

## INTRODUCTION

1. The applicant, Jan Beardsley, hired the respondent, L. Tom Finkelstein Law Corporation doing business as Finkelsteins, to represent her in a legal action regarding her mother's estate. The applicant says that a Notice of Civil Claim

(pleading) prepared by the respondent was unsatisfactory. The applicant asks for the return of all legal fees paid to the respondent totaling \$4,250.

2. The applicant represented herself. A lawyer, Joe Marrie, represented the respondent.

## **JURISDICTION AND PROCEDURE**

3. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over small claims brought under section 3.1 of the *Civil Resolution Tribunal Act (Act)*. The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize relationships between parties that may continue after the dispute resolution process has ended.
4. The tribunal may decide the format of the hearing, including by writing, telephone, videoconferencing, or a combination of these. I find that I can fairly resolve this dispute by writing based on the documents and written positions before me because there are no significant issues of credibility or other reasons that might require an oral hearing.
5. The tribunal may accept as evidence information that it considers relevant, necessary, and appropriate, whether the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
6. Under tribunal rule 126, in resolving this dispute, the tribunal may order a party to do or stop doing something; order a party to pay money; or order any other terms or conditions the tribunal considers appropriate.

## **ISSUE**

7. Was the respondent negligent in preparing the pleading?

## EVIDENCE AND ANALYSIS

8. The applicant bears the burden of proof on a balance of probabilities. I have commented upon the evidence and submissions only to the extent necessary to give context to these reasons.
9. In late July 2017 the applicant hired the respondent to start a legal action on her behalf regarding her mother's estate. The parties signed a retainer agreement setting out the understanding between them.
10. As a part of the retainer agreement the applicant promised to pay the respondent \$340 per hour as well as taxes for work done by associate counsel. The applicant also agreed to reimburse the respondent for disbursements paid on her behalf.
11. The retainer agreement set out the purpose of the legal action. Specifically, according to the agreement the applicant was seeking an order that:
  - a. her brothers hold their interest in a strata lot in trust for her mother's estate,
  - b. wills made by her mother in 2006 and 2011 are invalid, and
  - c. a will made by her mother in 2001 is the valid last will and testament governing the distribution of her mother's estate.
12. In September 2017 the pleading prepared by the respondent was filed in the Supreme Court of British Columbia. That claim asked for the remedies set out in the retainer agreement. Additionally, related orders were also requested, such as an order of pending litigation to preserve the property in issue.
13. I accept that after January 2, 2018 the relationship between the applicant and respondent began to break down.
14. As a part of the retainer agreement the respondent was permitted to withdraw as counsel in certain circumstances. Following that withdrawal, the respondent was entitled to the fees, disbursements and taxes billed to that date. I accept that the

respondent withdrew as counsel on or about January 19, 2018. No claim is made regarding that withdrawal.

15. The applicant's claim is one of professional negligence. She says that the respondent prepared an unsatisfactory pleading. Specifically, she says that the pleading did not include all facts, that she has had to amend the pleading to include an additional party and that the pleading did not plead mutual wills. Further, she says that after receiving the reply to the pleading she told the respondent that there was something wrong with the 2011 will provided. It is unclear what the applicant believes that the respondent did not do in relation to this new information about the 2011 will. Despite the lack of information about the result, I infer that the applicant and respondent disagreed regarding how to proceed on this new issue. All of which lead the applicant to say that the pleading is faulty.
16. The applicant says that because of the negligently prepared pleading, she feels harassed, and has incurred considerable time and expenses correcting the pleading. The applicant also says that she has been unable to find other counsel to work for her but acknowledges that she does not know what is causing those counsel to refuse. She does admit that other counsel may be refusing because of identified people other than the respondent. The applicant asks for the return of all legal fees she paid to the respondent.
17. Proving negligence requires the applicant to show that: the respondent owed her a duty of care, a reasonable standard of care was not met, it was reasonably foreseeable that failing to meet the standard of care would cause damages, and the failure caused the applicant's damages. It is undisputed that the respondent owes a duty of care to the applicant.
18. Generally, in claims of professional negligence, it is necessary for the applicant to show a breach of the standard of care through expert opinion evidence. An expert can explain the relevant standard of care and demonstrate how the conduct in the dispute fell below that standard. I find that expert evidence would be necessary in order for the applicant to prove her claims. Such evidence is required to determine

whether or not the lawyer exercised the care and skill of a reasonably competent solicitor in accordance with the standards of the profession.

19. Without expert evidence regarding the pleading, I find that I am unable to assess whether the respondent met the required standard of care in this case. It is not unusual to amend pleadings after they have been filed. Having to amend pleadings does not show that the original pleadings were prepared negligently. Given that finding, I find that the applicant has not proven that the preparation of the pleading was negligent.

20. The applicant was unsuccessful. In accordance with the Act and the tribunal's rules, I find the applicant is not entitled to reimbursement of tribunal fees.

## **ORDERS**

21. I order the applicant's claim and this dispute dismissed.

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Megan Volk, Tribunal Member