CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC.

ANONYMOUS CASE HISTORIES
NUMBER 30438

This is a summary of a decision issued following the February 2018 hearings of the Disciplinary and Ethics Commission ("Commission") of Certified Financial Planner Board of Standards, Inc. ("CFP Board"). The conduct at issue in this case occurred after January 1, 2009. The Rules in effect at that time under the *Rules of Conduct* were Rules 1.1 through 6.5.

I. Issues Presented

Whether a CFP® professional ("Respondent") violated CFP Board's *Standards of Professional Conduct* when she: (1) failed to provide advice that was in the best interest of her client, who was her mother ("Decedent"), regarding her estate planning; (2) exerted undue influence over the client in order to transfer assets from the client to herself; and (3) filed for bankruptcy in 1995, 2011, and 2017.

II. Findings of Fact

In the Matter of the Estate of Decedent

Decedent immigrated to the United States from an American Territory. Decedent had two children, Son X and Respondent. In 1977, Respondent and Decedent purchased a home together. Respondent lived with Decedent in the home until 1979 when she married and moved into a new home with her husband. In May 1988, Respondent started preparing Decedent's taxes, after earning her bachelor's degree in business administration.

Decedent signed her Last Will and Testament in September 1992. In the will, Decedent devised any interest she had in her home at the time to Son X. Decedent owned the home as a tenant in common with Respondent, which the Will states was required at the time of closing to enable Decedent to purchase the home. The Will further stated that Decedent had repaid Respondent for any monies advanced by Respondent for the purchase of the home. Decedent divided the remainder of her estate equally between Son X and Respondent.

In 1997, Respondent earned her insurance and securities licenses and began providing investing and insurance services for Decedent. Respondent continued providing these services to Decedent until Decedent's death. Decedent was diagnosed with cancer in 2009, moved in to Respondent's home, and lived with Respondent until her death. Respondent indicates that she renovated her home to create a suite for her mother. In June 2010, Respondent became the Power of Attorney for Decedent. During this same time, Respondent served as Decedent's financial advisor and broker of record on all Decedent's investment accounts.

Respondent sought to assist Decedent with putting a new will in place. Responded indicated that Decedent wanted the new will to reflect the loan Decedent made to Son X in 2001 and to place all of his inheritance into a trust for his benefit. Respondent and a cousin would serve as the trustees of the trust. The new will was completed in May 2013. Respondent

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stated that she did not have Decedent sign the Will because Respondent did not believe Decedent should sign the will while she was in a facility. Decedent died testate on May 12, 2013 at age 78. Decedent was survived by Son X and Respondent.

In May 2013, Respondent was qualified to be the Executor of the will. Respondent initially prepared an informal accounting and served Son X with a Refunding Bond in the amount of $17,405.63. Son X declined to execute the Refunding Bond and demanded that Respondent prepare a formal accounting of the estate.

In September 2014, Son X filed a Verified Complaint and Order to Show Cause in which he demanded that Respondent file a formal accounting. Respondent retained an accountant to assist her in preparing a formal accounting. Respondent filed an Answer to the Complaint and a Counterclaim against Son X in which Respondent sought repayment of a debt allegedly owed by Son X to the estate, as well as co-signed student loans for Son X's children. Son X ultimately prevailed on the Counterclaim.

In May 2015, Respondent filed a formal First and Final Accounting. In June 2015, Son X filed 23 exceptions to the First and Final Accounting. The Superior Court of State A held a trial to adjudicate the matter and issued the Final Decision. The Court found that several exceptions raised by Son X were valid. With respect to the inter vivos transfers from Decedent to Respondent, the Court determined that while there is usually a presumption that a transfer from a parent to a child is a gift, that presumption does not apply if the parent is a dependent of the child. The Court further determined that when a confidential relationship and a controlling influence by a dominant party exists, the individual accepting the gift must provide clear proof that the donor understood the nature of the act and was not under the influence of the donee. The Court stated that a confidential relationship exists when the relations between the parties are of such a character as to render it certain that they do not deal in terms of equality, but that one party has superior knowledge or the parties deal on unequal terms.

The Court found that a "confidential relationship" existed between Respondent and Decedent because the parties did not deal on equal terms. The Court based its finding on the fact that Decedent had been stricken by cancer and was being cared for and became dependent on Respondent. Further, the Court determined that Respondent had a background in finance and was Decedent's sole financial advisor. The Decedent did not receive any independent financial counsel. Respondent also testified during the hearing before the Commission that she and the Decedent had a "trusting relationship." For these reasons and as required by State A law, the Court placed the burden on Respondent to prove by clear and convincing evidence that Decedent understood the nature of the acts and their consequences to the planning of her estate and that these transfers were not the result of undue influence.

The Court concluded that Decedent did not receive independent, disinterested and competent counsel regarding any of the inter vivos transfers. The Court also concluded that Respondent did not meet her burden to demonstrate that Decedent understood the nature of these inter vivos transfers and the consequence the transfers would have on her estate planning. As a result, the Court determined that Respondent exerted undue influence on Decedent to execute the inter vivos transfers that preceded the Decedent's death. The Court found Respondent liable to the estate for $305,721.33. That total represents $23,600 in fees and charges after Decedent's death and $282,121.33 in inter vivos transfers prior to Decedent's death. The transactions at issue included a transfer of nine holdings totaling $133,670.69 from Decedent's Financial Investment Account to Respondent's personal Financial account, outstanding debt for the car loan totaling

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$15,500, proceeds of the IRA totaling $105,088.39, $27,131 in unsanctioned checks, $10,331.25 of disbursements not related to estate expenses, and $14,000 of attorney's fees not related to the administration of the estate.

In May 2016, the Court issued a judgment against Respondent. The Court affirmed the findings in the Final Decision. The Court ordered that the following judgment be entered into favor of the Decedent's estate against:

1. Respondent as executor of Decedent's estate and individually in the amount of $23,600;
2. Respondent individually in the amount of $282,296.99;
3. Respondent as executor of Decedent's estate and individually for prejudgment interest in the amount of $2,287.50; and
4. Respondent individually for counsel fees in the amount of $50,521.79.

Respondent, Son X, and the other parties to the estate litigation eventually entered into a settlement agreement in June 2016 in which the parties resolved their dispute over Decedent's estate. The settlement agreement required Respondent to:

1. Pay to Son X $115,000;
2. Pay to Litigant Y $50,000; and
3. Execute a refunding bond and release in the amount of $193,184.49.

The settlement agreement also required Son X to:

1. Execute a warrant to satisfy the Judgment; and
2. Execute a refunding bond and release in the amount of $115,000.

Prior Investigations and Bankruptcies

After receiving Respondent's Initial Application for CFP® Certification, CFP Board conducted a background check and discovered several matters for investigation. CFP Board investigated a 1994 lawsuit, a 1995 Chapter 7 bankruptcy, a 1996 judgment lien, a 2001 lawsuit, and a 2005 customer complaint. In July 2009, CFP Board closed the investigation but cautioned Respondent against engaging in conduct that reflects adversely on her integrity or fitness as a certificant, upon the CFP® marks, or upon the profession. CFP Board notified Respondent that the cautionary letter would be taken into consideration by the Disciplinary and Ethics Commission ("Commission") in determining any appropriate action should disciplinary violations occur in the future.

In 2011, Respondent disclosed to CFP Board that she was the subject of a tax lien and filed for Chapter 13 bankruptcy. In 2012, CFP Board filed a complaint against Respondent. After a hearing, the DEC found that, by filing for bankruptcy a second time, Respondent demonstrated a repeated inability to manage her personal finances and engaged in conduct that reflected adversely on her integrity and fitness as a CFP® professional, upon the CFP® marks, and the profession. The DEC issued Respondent a Public Letter of Admonition.

On May 22, 2017, Respondent filed Chapter 7 bankruptcy in the U.S. Bankruptcy Court for the District of State A. She listed $275,040 of assets, $366,584 of liabilities, and a monthly net income of $0. According to Respondent, the Chapter

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7 filing was made to finalize the bankruptcy process started with the Chapter 13 filing in 2011. Respondent asserts that she listed no debts in the Chapter 7 filing that were not already included in the Chapter 13 filing, other than attorney fees stemming from the dispute over Decedent's estate.

III. Grounds for Discipline

First Ground for Discipline

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 1.4 of the *Rules of Conduct*, which provides that a certificant shall at all times place the interest of the client ahead of his or her own. When the certificant provides financial planning or material elements of financial planning, the certificant owes to the client the duty of care of a fiduciary as defined by CFP Board. CFP Board defines "fiduciary" as "one who acts in utmost good faith, in a manner he or she reasonably believes to be in the best interest of the client."

Respondent provided financial planning and/or material elements of financial planning to Decedent. In making the determination of whether a CFP® professional provided financial planning the Commission looks to the four factors cited in the definition of financial planning. First, the Commission determined that Decedent's understanding and intent in engaging Respondent was for Respondent to provide financial planning services. Respondent's own statement during the hearing supports this conclusion. For example, Respondent testified during the hearing that she was trying to do financial planning and that she and Decedent had "special financial planning for us." The evidence of Decedent's interaction with Respondent also indicates that Decedent relied on Respondent to manage all of her financial affairs.

Second, the degree to which multiple financial planning subject areas are involved weighs in favor of the conclusion that Respondent provided financial planning or material elements of financial planning to Decedent. Respondent served as the broker of record and financial advisor on Decedent's accounts. As an example of this, Respondent provided advice to Decedent on her investments, including the purchase of an annuity, the subsequent redemption of the annuity and the transfer of the proceeds of the annuity to into an individual retirement account ("IRA"). Decedent also had investment accounts for which Respondent served as the representative of record. These accounts held securities that were presumably purchased at the direction of Respondent. Respondent had a power of attorney for a checking account and assisted Decedent with paying bills. Respondent was also involved in the estate planning for Respondent by working to address her inheritance needs and a revised will. Thus, Respondent's work with Decedent spanned several financial planning subject areas, including investment planning, budgeting, and estate planning.

Third, the Commission determined there was little, if any, information in the record regarding the comprehensiveness of the data gathering performed by Respondent. The Commission did not give significant weight to the factor given this lack of information in the record.

Finally, the Commission determined that Respondent's recommendations were of significant depth and breadth. While Respondent did not appear to make recommendations in the typical sense, she took several actions that had a substantial effect on Decedent's finances. For example, Respondent made multiple journal transfers of Decedent's

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accounts that covered almost all of her investable assets. Respondent also made significant changes to Decedent's investments when she recommended the annuity and subsequently redeemed the annuity and placed the proceeds in an IRA. When viewing these four factors as a whole, the weight of the factors leads the Commission to conclude that Respondent provided financial planning or material elements of financial planning.

Respondent, a certificant, failed to act with the duty of care of a fiduciary when she exerted undue influence on a client in order to transfer assets from the client to herself. The Commission agreed with the conclusion of the Court that Respondent's relationship with Decedent indicated she had a level of influence over her Decedent. The Commission determined that Respondent failed to provide advice that was in the best interest of Decedent regarding her estate planning. Respondent's transfer of money back and forth between her account and Decedent was confusing and did not make sense in the context of estate planning. Respondent testified that she initially transferred the money in the form of securities to her account so she would have access to her money and to pay her bills. Respondent then stated that once Decedent signed the power of attorney, she transferred all of the assets back to her since Respondent didn't have a will. A reasonable CFP® professional would not recommend these as estate planning solutions. There were other solutions available to Respondent that would have been preferable. When Respondent engaged in estate planning, she failed to ensure Decedent's revised will was prepared in a timely fashion, with the result that Decedent was unable to execute the will prior to her passing.

Respondent also failed to act as a fiduciary with respect to charging rent to Decedent's estate in the same amount as she had when her mother was alive. The rent Decedent paid was apparently so that Respondent could provide Decedent with a comfortable place to live, to enable Respondent to care for Decedent and to store Decedent's belongings. Therefore, it is unreasonable that the rent would remain the same after Decedent's death as it would prior to her death. This is yet another way Respondent transferred Decedent's assets to herself. Therefore, Respondent violated Rule 1.4 of the *Rules of Conduct*.

Second Ground for Discipline

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 4.1 of the *Rules of Conduct*, which provides that a certificant shall treat prospective clients and clients fairly and provide professional services with integrity and objectivity.

Respondent is a certificant. As mentioned above in the first ground for discipline, Respondent failed to act in the best interests of Decedent. The Commission determined that the failure to act as a fiduciary also resulted in an inability to treat Decedent fairly and to provide professional services with integrity and objectivity. Respondent exerted undue influence on a client in order to transfer assets from the client to herself. Therefore, Respondent violated Rule 4.1 of the *Rules of Conduct*.

Third Ground for Discipline

Pursuant to Article 3(a) of the *Disciplinary Rules*, there are grounds to discipline Respondent for acts or omissions that violate Rule 6.5 of the *Rules of Conduct*, which provides a certificant shall not engage in conduct which reflects adversely on his or her integrity or fitness as a certificant, upon the CFP® marks, or upon the profession.

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Respondent is a certificant. Respondent exerted undue influence on a client in order to transfer assets from the client to herself. For the reasons discussed in the first ground for discipline, the Commission determined that Respondent's exertion of undue influence over Decedent, and the Court's finding indicating such, reflect adversely on her integrity and fitness as a CFP® professional and the CFP® marks. Respondent's actions and the public determination made by the Court regarding those actions reflect adversely on her fitness and integrity and that of the certification.

The Commission did not agree that the Chapter 7 filing was Respondent's third bankruptcy filing. Respondent's first bankruptcy filing occurred in 1995 and her second filing occurred in 2011. Respondent never completed the 2011 Chapter 13 filing. Respondent dismissed the 2011 Chapter 13 bankruptcy and refiled that bankruptcy as a Chapter 7 bankruptcy in 2017. The need for the 2017 filing stemmed from the legal fees Respondent incurred in the dispute with Son X over Decedent's estate and claims raised in a defamation suit. The Commission elected to treat the 2011 filing and the 2017 filing as based on essentially the same set of facts in that many of the debts discharged in the 2017 bankruptcy were the same as the debts involved in the 2011 filing. Therefore, Respondent violated Rule 6.5 of the *Rules of Conduct*.

IV. Discipline Imposed

The Commission found that Respondent’s conduct violated Rules 1.4, 4.1, and 6.5 of the *Rules of Conduct*, providing grounds for discipline under Article 3(a) of the *Disciplinary Rules*.

Pursuant to Article 4 of the *Disciplinary Rules*, the Commission must establish grounds for discipline to impose discipline or sanctions. Once the Commission has established grounds for discipline, it has wide discretion to impose any sanction under Article 4 of the *Disciplinary Rules*.

After careful consideration of the evidence in Respondent's matter, the Commission has decided to issue Respondent a suspension for two years pursuant to Article 4.3 of the *Disciplinary Rules*.

In arriving at its decision, the Commission determined that the applicable Sanction Guidelines recommended:

1. A revocation for Conduct 1: Two or More Personal or Business Bankruptcies; and
2. A suspension for at least one year and one day for Conduct 5: Breach of Fiduciary Duty.

The Commission did not rely on Conduct 1 since it had determined to treat the 2011 and 2017 bankruptcy as one event and since it had already imposed discipline on Respondent related to the 1995 and 2011 bankruptcies. Thus, the Commission relied primarily on Conduct 5.

The Commission then consulted Anonymous Case Histories ("ACHs") to determine if any ACHs contained precedent that warranted a deviation from the Sanction Guidelines. The Commission focused on two ACHs: 28932 and 28993. In ACH 28932, the CFP® professional forged an in-law's signature to transfer money from the in-law's account to his own. The Commission issued a revocation in that case. The Commission recognized that Respondent did not engage in forgery, but nonetheless read the ACH to indicate that the improper transfer of money from a relative’s account should be addressed by a significant sanction.

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In ACH 28993, a CFP® professional submitted personal expenses on a corporate expense report over a five-year period. The CFP® professional's actions resulted in smaller profit-sharing payouts to his partners. The DEC issued a four-year suspension in the ACH. The Commission found this ACH to be instructive since Respondent actions in transferring money from Decedent's account to her own deprived Son X of his share of that money.

Both ACHs involved more severe conduct than at issue in this case, but allowed the Commission to determine the appropriate sanction range was a suspension spanning between one year and one day and four years. The Commission then reviewed the aggravating and mitigating factors to determine whether there were any material factors, and if so, what weight those factors might have in its decision. The Commission considered in aggravation that:

1. Respondent's breach of her fiduciary duty was intentional, which was evidenced by her intentional actions to move holdings from Decedent's estate;
2. While Decedent was not harmed during her life, Respondent harmed Decedent's estate, which was her client after Decedent's death, by transferring assets from the estate. In fact, the Court required Respondent to reimburse the estate for some of the transferred assets;
3. Respondent failed to provide appropriate estate planning advice to Decedent;
4. Respondent failed to document the conversations surrounding Decedent's financial life and enlist the help of other professionals to ensure her interaction with Decedent's affairs were handled at an arms-length and fair basis. Respondent testified that she had in fact taken notes at her old firm regarding Decedent, but the Commission did not find these statements to be credible. First, these notes would have been very valuable to Respondent, yet she did not produce these notes at any point when her actions were questioned, and she provided no credible evidence that she attempted to obtain them. Last, the Commission observed that Respondent's reaction to the Commission's questioning regarding the possibility of her keeping notes was one of surprise. Her reaction was not of someone who had taken notes and was unable to obtain them.

In mitigation the Commission considered that Respondent provided care and comfort to Decedent to the detriment of her professional and financial life. In weighing these factors, the Commission determined that the aggravating factors outweighed the mitigating factor and warranted an upward deviation from a one-year and one-day suspension. The Commission determined that a two-year suspension was appropriate because it would provide Respondent the ability to establish a solid financial footing and to demonstrate a history of proper conduct with financial planning clients, especially those involved in estate planning. The Commission also requests that upon her reinstatement, Respondent should provide a letter from her supervisor attesting to the quality of her work with clients and an assessment of respondent's use of estate planning techniques with her clients. In the event Respondent is unable to obtain such a letter, she should describe her efforts to obtain the letter, provide documentation supporting her description of her efforts, and provide an explanation of the reasons why she was unable to obtain the letter.

V. Appeals Committee Decision

The Appeals Committee determined that Respondent did not successfully initiate an appeal of the Decision pursuant to Article 11 of the *Disciplinary Rules*. Therefore, the Appeals Committee affirmed the Decision.

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