IN RE: JAMES P. LONG

NO. BD-2016-086

S.J.C. Judgment of Disbarment entered by Justice Botsford on March 15, 2017.[1]

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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.

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THE COUNTY OF SUFFOLK

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2016-086

IN RE: JAMES P. LONG

MEMORANDUM OF DECISION AND ORDER

The Board of Bar Overseers (board) has filed an information recommending the disbarment of the respondent, James P. Long. For the reasons discussed below, I conclude that a judgment of disbarment should enter.

Background. Bar counsel filed a four-count petition for discipline against the respondent on August 25, 2015. A hearing committee of the board held a hearing on three days in January, 2016, at which the respondent appeared, represented by counsel. The following summarizes the hearing committee's findings and legal conclusions, which were adopted by the board.

Count One: The respondent drafted a will for a friend, Susanne M. Sheil, which she executed in March, 1997; she died of cancer soon thereafter. The will divided the residuary estate into four shares. Two shares were for adult family members of Sheil and two shares were to be held in a residuary trust (Shiel trust) for the benefit of a great niece and a great nephew of Susanne Shiel, until the beneficiary turned eighteen. The will named the respondent as the executor of Shiel's estate and as trustee of the Shiel trust. The will also called for the trustee to

transfer the trust funds into one or more mutual funds, with growth of principal as the primary investment goal.

The respondent was appointed executor of Shiel's estate on June 5, 1997, a little more than two months after Shiel died, and was appointed as trustee of the Shiel trust in October, 1998. Before April, 2000, the respondent opened an individual trust account (Shiel trust account), which included both a checking and a savings account. For reasons that he did not explain, the respondent did not make any distributions to the adult residuary beneficiaries until December, 2006, close to ten years after Shiel's death. The total amount in the Shiel trust account at that time was $52,422.39. After making distributions to the two adult beneficiaries, the respondent established the minors' trust, but did not place the remaining trust funds in a mutual fund or funds. He determined that the "opening balance" for each of the two minor beneficiaries was $11,183.12, so that at all times there should have been at least $22,366.24, plus interest in the Shiel trust account. However, between early 2007 and March 12, 2013, which was before any distribution was made to either minor beneficiary, the hearing committee and the board found that the respondent had knowingly misused $10,855.80 of the Shiel trust funds by, *e.g.*, making cash and ATM withdrawals, writing and cashing checks to himself, and making transfers to a business he controlled. As of March 12, 2013, the balance in the trust account was $14,954.57, substantially less than the $22,366.24 plus interest that should have been there.

One of the minor beneficiaries, Susanne Shiel's great niece, turned eighteen on January 24, 2013. The respondent, however, did not make any distribution to her until April, 2013, and then he did so because the beneficiary's mother demanded it. At the same time, the respondent also made a distribution to Shiel's great nephew, although that beneficiary would not turn eighteen until the following October. There were insufficient funds in the trust account to

cover both distributions. The great niece received a check for $11,183.12 plus two per cent interest which was deposited and paid in April – three months after her eighteenth birthday and therefore three months late. As for the still-minor great nephew, the check sent by the respondent was not presented for payment until July, 2013, and was dishonored because there were insufficient funds to cover it; between the date of the check (April, 2013) and the date of presentment (July, 2013), the respondent wrote fourteen checks to himself on the trust account for a total of $16,250. However, following notice of the dishonored check, in late July, the respondent transferred the remaining Shiel trust funds into his IOLTA account, and added funds from an operating account plus $6,500 drawn from the Long Family Trust bank account (see Count Two below). He then purchased a cashier's check for $12,670.82 – $11,183.12 plus two per cent interest – and presented it to the great nephew beneficiary's father on or about July 24, 2013. The hearing committee and the board found that with respect to both beneficiaries, the respondent had engaged in intentional misuse with intent to deprive – based on allegations deemed admitted, but also supported by evidence presented at the hearing.[1] The hearing committee and the board found as well that with respect to the great niece beneficiary, there was also actual deprivation. They further found that the respondent had intentionally failed to invest the funds in the Shiel trust in a money market fund or funds, contrary to the directive in the will, in order to keep the funds readily available for his own use.

The hearing committee and the board concluded that the respondent's conduct in relation to the minor beneficiaries of the Shiel trust violated Mass. R. Prof. C. 1.3 (diligence); rule 1.2 (a) (seek client's lawful objectives); rules 1.15 (b), 1.15 (c), 1.15 (d) (1), 1.15 (e) (3), 1.15 (f) (1) (c),

[1] One of the hearing committee's findings based on the evidence presented was that between 2009 and 2011, before making any distributions to the minor beneficiaries, the respondent destroyed the records of the Susanne Shiel estate and the Shiel trust.

all relating to different obligations concerning the accounting for, handling, and distribution of trust accounts and trust property; rule 8.4 (c) (dishonesty, fraud, deceit, misrepresentation); and rule 8.4 (h) (conduct adversely reflecting fitness to practice).

Count Two: The Long Family Trust was a trust established for the benefit of the respondent's mother. The respondent was appointed trustee of this trust in August, 1989. The respondent's mother was the primary beneficiary during her life (she died in June, 2015), and her children, including the respondent, were the contingent remainder beneficiaries. The trust instrument provided in part that no contingent beneficiary "shall have any claim to [trust] income or principal" during the primary beneficiary's life, and also provided that the trustee was to have no power "to enable any person to borrow the corpus or income of the Trust, directly or indirectly, without adequate interest or security." The respondent, however, admitted that over the years he had been taking "advancements" from the trust; he claimed to have no idea how much he had taken or borrowed, and also no idea as to the value of the trust.

The respondent was suspended from the practice of law for a separate disciplinary violation in the fall of 2013 (see Count Three), and at that time his brother, John Long, became trustee of the Long Family Trust. Without telling his brother that he had previously taken or borrowed, or both, money from that trust, the respondent asked his brother whether he might borrow funds from the trust, which his brother allowed as against the respondent's contingent remainder share, up to a ceiling. The hearing committee and the board found that in making the request and obtaining the loan, the respondent engaged in intentional misuse of the trust funds by taking more than his contingent share of the Long Family Trust and making no record of the withdrawals. The committee and board further concluded that the respondent's conduct vis-à-vis

the trust violated Mass. R. Prof. C. 1.15 (b) (trust property to be held separately in trust account, apart from lawyer's own funds, and safeguarded); rule 8.4 (c), and rule 8.4 (h).

Count Three: In August, 2013, the respondent was ordered suspended for a period of nine months, with a requirement that he petition for readmission. Matter of Long, 29 Mass. Att'y Discipline Rep. 401 (2013).[2] The effective date of suspension, at the respondent's request, was set at October 7, 2013, but the respondent nonetheless was ordered to close every fiduciary account and transfer "all client and fiduciary funds in his possession, custody, or control" effective by September 6, 2013. The respondent submitted an affidavit of compliance to this court on September 9, 2013, stating under oath that as of September 6, 2013, he had fully complied with the court's suspension order. Nevertheless, the hearing committee and derivatively the board found that the respondent did not take any steps other than sending a "Notice to Ward, Heir, or Beneficiary of Resignation as Fiduciary" to his mother that stated (1) he was resigning and John Long had accepted an appointment as successor trustee, and (2) the necessary papers were being filed in the "Hudson County Registry of Deeds" to effect the change. The respondent, however, did not file anything with the registry because he was told by its staff that the registry did not accept trustee resignations for recording. The hearing committee (and board) further found that it was not until November 21, 2013, at the earliest, that the respondent actually transferred control over the Long Family Trust's brokerage account, and that one week earlier, he had ordered $10,000 transferred from the trust's brokerage account to its checking account, unbeknownst to his brother John, who was taking over as trustee. The hearing committee (and board) also found, more generally, that the respondent continued to act as trustee of this trust and to exercise authority over its funds "well after the effective date of his

[2] The respondent has not sought readmission since the nine-month suspension.

suspension." In addition, the respondent did not correct the misrepresentation on his linkedin.com page that he was an active, practicing attorney until shortly before the hearing in this matter began in January 2016 (*i.e.*, more than two years after his suspension), despite repeated requests from bar counsel that he correct the information.

In connection with these actions, the hearing committee and the board concluded that the respondent had violated Mass. R. Prof. C. 3.4 (c) (knowingly disobey obligation under rules of tribunal); rule 3.3 (a) (1) (knowing false statement of material fact or law to tribunal); and rule 8.4 (c).

Count Four: The hearing committee, and the board, found that the respondent made three knowingly false statements to bar counsel under oath, and one inaccurate statement under oath. The three knowingly false statements were (1) the respondent's statement that the Sheil trust account did not include a checking account and that he had never written checks from it; (2) the respondent's statement that he had given the checkbook of the Long Family Trust to his brother John Long, the successor trustee, when in fact (as found by the hearing committee) John Long never asked for the checkbook, the respondent never gave it to him, and the respondent continued to write checks from the checkbook until March 12, 2014; and (3) the respondent's statement that he never possessed an ATM card for the Sheil trust, when the evidence persuasively indicated that he or someone with his consent used such a card regularly.

The hearing committee and the board concluded that these statements violated Mass. R. Prof. C. 8.1 (a) (knowing false statement of material fact in connection with disciplinary matter), and 8.4 (c).

Based on these findings, the board concluded that, as recommended by the hearing committee, disbarment was the appropriate level of discipline, given: (1) the respondent's

intentional misuse of funds held in trust for minors, with resulting deprivation as to at least one of the beneficiaries; (2) the aggravating circumstance of additional acts of "grave misconduct" including misrepresentations in his affidavit of compliance filed with this court, and his knowing falsehoods under oath given to bar counsel; and especially (3) the respondent's prior discipline for similar acts of misconduct with respect to family trusts (including, as here, the Long Family Trust) for which he was serving as trustee.

Discussion. The respondent challenges the board's recommendation of disbarment. He claims that many of the hearing committee's factual findings are clearly erroneous, unsupported by the evidentiary record, or based on the allegedly uncalled-for and unfair decision of the committee chairman to deem certain facts admitted because of the respondent's alleged failure properly to respond to the petition for discipline. The board rejected the respondent's claim, concluding that the respondent "confuse[d] adverse findings – those the committee made against him – with unsupported findings." In the board's view, the findings were all adequately supported by the evidentiary record, and there was no error in the "patient and fair" committee chair's enforcement of procedural rules. On this latter point, the board also pointed out that despite the chair's ruling, the committee's findings detailed other evidence in the record that supported the determination of intentional misuse with deprivation by the respondent. My review of the record supports the board's position, and as the board noted, the hearing committee's findings are entitled to great deference. See, *e.g.*, Matter of Barrett, 447 Mass. 453, 460 (2006).

The board's recommendation on the appropriate level of discipline also is entitled to great weight. See, *e.g.*, Matter of Murray, 455 Mass. 872, 879 (2010). In reviewing it and deciding what is the appropriate level of discipline to impose, I must seek to reach a result that is "not

markedly disparate from what has been ordered in comparable cases." See Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited. Where, as here, there is a supported finding of intentional misuse of client trust funds with intent to deprive or actual deprivation, or both, the presumptive sanction is indefinite suspension or disbarment. *E.g.*, Matter of Schoepfer, 426 Mass. 183, 187 (1997). In determining which of these two sanctions is appropriate, restitution is a significant factor that weighs in favor of indefinite suspension, see, *e.g.*, Matter of LiBassi, 449 Mass. 1014, 1017 (2007), but aggravating factors, such as findings of additional misconduct in violation of the disciplinary rules and prior discipline, point in the opposite direction. Here, although the actual deprivation found was far from enormous – a three-month delay in payment to one of the minor beneficiaries – apart from deprivation itself, the hearing committee and the board also found that the respondent misused the funds held in trust for both minor beneficiaries with intent to deprive, and, more to the immediate point, found as well additional misconduct, both in relation to the Shiel trust and otherwise. In my judgment, the most significant of that additional misconduct unrelated to the Shiel trust was the respondent's actions with respect to the Long Family Trust before and at the point when he was obligated to withdraw as trustee because of his prior disciplinary suspension. As found by the hearing committee and the board, the respondent had been borrowing or taking funds from this truest over the years and then, without disclosing these actions, asked the successor trustee to borrow additional funds – all in violation of the trust's terms – and was permitted to do so.

As the board noted, prior discipline is a significant aggravating conduct, even when the prior discipline is for a different type of misconduct, a statement that implies that the prior discipline indicating that is even more significant when the past misconduct resembles the charged conduct. See, *e.g.*, Matter of Gross, 435 Mass. 445, 453 (2001); Matter of Kerlinsky,

428 Mass. 656, 665 (1999); Matter of Dawkins, 412 Mass. 90, 97 (1992), and cases cited. The respondent was disciplined in 2013, receiving a nine-month suspension for conduct that similarly involved misuse of trust funds held in a trust for a family member who was a minor, and also involved the Long Family Trust – one of the trusts involved again in this matter. See Matter of Long, 29 Mass. Att'y Discipline Rep. 401 (2013). The respondent also was disciplined in 2008, for other conduct, see Matter of Long, 24 Mass. Att'y Discipline Rep. 435 (2008). From all that has transpired, it is impossible not to conclude that the respondent appears to have learned very little from the prior discipline he has received. See Matter of Kerlinsky, 428 Mass. at 665. In all the circumstances, I conclude that disbarment is the appropriate discipline to impose.

ORDER

For the foregoing reasons, it is **ordered** that a judgment of disbarment enter.

Margot Botsford
Associate Justice

Dated: March 15, 2017