

IN THE MATTER OF *THE PSYCHOLOGISTS ACT, 1997* AND BYLAWS
AND IN THE MATTER OF A COMPLAINT AGAINST DONNA DARBELLAY,
REGISTERED PSYCHOLOGIST, OF SASKATOON, SASKATCHEWAN

DECISION
Saskatchewan College of Psychologists
DISCIPLINE COMMITTEE

Discipline Committee Members:

Tom Robinson, Registered Doctoral Psychologist, Chair
Daniel Ash, Public Representative
Ruth Wong, Doctoral Psychologist Non-practising, Member
Val Harding, Registered Doctoral Psychologist, Member

Karen Prisciak, Q.C., appearing on behalf of the Professional Conduct Committee
Michelle Oulette, Q.C., appearing on behalf of the Member, Donna Darbellay
Merrilee Rasmussen, Q.C., legal counsel for the Discipline Committee

INTRODUCTION

[1] The Discipline Committee convened on Friday, September 8, 2017, via conference call, as agreed by the parties, to hear and determine the formal complaint concerning the Member's practice dated December 27, 2016, and amended August 30, 2017, in accordance with *The Psychologists Act, 1997* ["the Act"].

[2] As acknowledged in the Agreed Statement of Facts and Admissions filed by legal counsel for Ms. Darbellay and legal counsel for the Professional Conduct Committee, at all times material to the complaints against her, Ms. Darbellay was a member of the Saskatchewan College of Psychologists, licensed to practise in the Province of Saskatchewan subject to the Act, the regulatory bylaws of the College, and the *Canadian Code of Ethics for Psychologists* ("the Code") and related Saskatchewan College of Psychologists Practice Guidelines ("the Guidelines").

THE FORMAL COMPLAINT

[3] The Formal Complaint contains the following charges alleging that Dr. Donna Darbellay is guilty of professional misconduct or professional incompetence, in that:

“Charge 1: In her March 3, 2015 report and critique of the Complainant’s Custody and Access Report dated September 5, 2014, Dr. Darbellay did not limit herself to a critique of the Complainant’s report nor did she carry out a sufficient assessment when providing the services of reviewing the Complainant’s report in order to introduce the additional information in her critique contrary to Professional Practice Guidelines 11.38.

Charge 2: In her March 3, 2015 report and critique of the Complainant’s Custody and Access Report dated September 5, 2014, Dr. Darbellay misstated aspects of the Complainant’s report contrary to Professional Practice Guideline 3.16.

Charge 3: In her March 3, 2015 report and critique of the Complainant’s Custody and Access Report dated September 5, 2014, Dr. Darbellay spoke directly to the impact on the child of her visits with her father without completing an assessment of the father and child sufficient to support her claims contrary to Professional Practice Guideline 3.19.

Charge 4: During her review and critique of the Complainant’s Custody and Access Report dated September 5, 2014, she carried out an observation of the father, the child and the proposed adoptive parents without informing and gaining consent from the father contrary to Professional Practice Guideline 4.10 and in violation of the Canadian Code of Ethics for Psychologists, 3rd ed., 2000, and more specifically Section I.16 and I.19.”

FACTS

[4] As noted above, the parties submitted an Agreed Statement of Facts and Admissions to the Discipline Committee, the relevant text of which (excluding headings and repetition of the charges) is set out below with respect to each of the charges contained in the formal complaint.

Background Facts

10. This matter arises from a custody dispute between the Biological Father of a minor child (“**the Child**”) and the couple who had been planning adoption of the Child (“**the Proposed Adoptive Parents**”).

11. Following the birth of the Child, the birth mother of the Child placed xxxxxx for adoption with Saskatchewan Ministry of Social Services.

12. After being placed in a foster home for several months and one failed placement for adoption, the Child was placed in the home of the Proposed Adoptive Parents in November 2011, at the age of approximately 8 months.

13. The Biological Father learned of the proposed adoption and asserted parentage; after confirmation by DNA testing, he asked for custody of the Child. The Ministry advised the Proposed Adoptive Parents that the proposed adoption was invalid since the committal to adoption was entered into fraudulently by the partner of the birth mother rather than the Biological Father. The Ministry recommended that there should be a transition from the Proposed Adoptive Parents to the Biological Father.

14. The Proposed Adoptive Parents refused to return the Child to the Biological Father, who commenced legal proceedings seeking custody of the Child.

15. Beginning in July 2012 the Biological Father was granted access visits with the Child. The Proposed Adoptive Parents retained custody during this period, and the Child continued to reside with them.

16. In April of 2013, the Complainant was jointly retained by both the Biological Father's Counsel and the Proposed Adoptive Parents' Counsel to provide a custody assessment, with the Court's agreement, which was prepared on September 5, 2014. Attached at **Tab 4** is a redacted copy of The Complainant's Custody and Access Assessment. The Court of Queen's Bench asked the Complainant to address the following issues when creating his report:

- i. Attachment of the child to the Parties and the impact of said attachment on the child;
- ii. How various First Nations Cultural issues may impact the child;
- iii. Provision of a transition plan for the child, for consideration by the Court in making its decision;
- iv. Any other issue normally contained in such assessment and/or considered necessary and appropriate.

17. The Complainant concluded that the Child should be transitioned over a period of two to three months to the custody of the Biological Father, with the Proposed Adoptive Parents having monthly access once the transition was completed.

18. The Proposed Adoptive Parents' legal counsel retained Dr. Darbellay to advise as to attachment between the child and the Proposed Adoptive Parents and the possible detriment to the child if the attachment is disrupted – this was an issue the lawyer believed was lacking in the Complainant's report.

19. In completing her report, Dr. Darbellay reviewed several documents relating to the Child including:

- v. Early Childhood Mental Health Consultation (ECMH) Reports;
- vi. Letters from the Child's teachers and social workers;
- vii. Letters from the Child's doctor; and
- viii. The Complainant's Custody and Access Assessment dated September 5, 2014.

20. Dr. Darbellay was asked and agreed to observe the Child immediately after a visit with the Biological Father, in order to observe the Child's behavior and gauge the impact of the separation from the Proposed Adoptive Parents on [REDACTED]. She was asked to comment on the Child's reaction to the separation as manifested by [REDACTED] behaviour after the exchanges between parents, and did so with the permission of and at the request of the Proposed Adoptive Parents.

21. On February 17, 2015 Dr. Darbellay observed from a distance as the sleeping Child was taken by the Biological Father from his vehicle and passed to the Proposed Adoptive Mother. The Biological Father then left in his vehicle and Dr. Darbellay went on to observe the Child with the Proposed Adoptive Parents when [REDACTED] woke up. The Proposed Adoptive Parents later provided Dr. Darbellay with a video of the Child's behaviour, which they advised was taken shortly after the exchange of the Child, after Dr. Darbellay had left. Dr. Darbellay made observations and conclusions regarding the Child's parental attachment based, in part, on her observation and the video.

22. Dr. Darbellay did not obtain the Biological Father's consent to observe the exchange of the Child. The Biological Father was unaware of Dr. Darbellay's observations and did not know her observations would be used in her report as a basis for her recommendations. At no time did Dr. Darbellay speak with or interview the Biological Father, nor did she observe him in any interaction with the Child.

23. Dr. Darbellay did not conduct a full Custody and Access Assessment. She was not asked to do so by the Court or by the Proposed Adoptive Parents' lawyer.

24. Dr. Darbellay did not conduct an interview or psychological assessment of the Biological Father, the Child, or the Proposed Adoptive Parents.

25. Dr. Darbellay prepared a report dated March 3, 2015 (**Tab 5**) in which she critiqued the Complainant's report. Of Dr. Darbellay's eight recommendations the first was "that [the Biological Father] visits with [the child] be terminated immediately" and the second was "that [the Child] be allowed a period of time to re-stabilize [REDACTED] and that, since the time [REDACTED] needs to recover cannot be predicted, the date for resumption of visits should not be set by the Court."

26. Ultimately, a Court of Queen's Bench trial was held and a decision of Mr. Justice Brown dated March 15, 2016 agreed with the Complainant's assessment and awarded custody of the Child to the Biological Father and specified access to the Proposed Adoptive Parents [reported at 2016 SKQB 92 (CanLII)]. The Court of Appeal confirmed the decision on October 7, 2016 [reported at 2016 SKCA 148 (CanLII)].

27. In particular, the Court of Appeal stated the following in affirming the Trial Judge's decision to accept the Complainant's assessment in preference to Dr. Darbellay's assessment:

[112] In preferring Mr. Stewart's assessment of matters, the trial judge emphasized the assessor's greater expertise in the area of custody and access assessments. He contrasted this with Dr. Darbellay's lack of direct involvement with both parties and her inability to conduct an extensive investigation given the constraints of her limited retainer, which was to simply provide a critique of the Stewart Report. He noted the inherent frailties in her report and the one-sided perspective adopted. The trial judge found Mr. Stewart's opinion had weight and cogency that the opinions of the appellants' expert lacked.

28. Dr. Darbellay's assessment had a significant impact on the Biological Father in that it elevated the level of stress in an already stressful situation and caused him and his extended family significant emotional and psychological distress.

Agreed Facts relating to Charge 1 in the Formal Complaint:

29. Dr. Darbellay pleads guilty to Charges 1, 2, 3 and 4 and acknowledges she did not fully comply with Professional Practice Guidelines 11.38, 3.16 and 3.19 or with Section I.16 and I.19 of the Code.

30. In particular, Dr. Darbellay's report was not limited to critiquing the Complainant's report regarding "methods, procedures and process" and commenting on attachment theory and its implications in general but rather included her own conclusions and recommendations when she had not conducted an assessment in accordance with the standards practiced by Custody and Access Assessors.

31. Dr. Darbellay acknowledges that the following statements in her report went beyond a critique of the Complainant's report, and that an assessment conducted in accordance with standards practised by Custody and Access Assessors was required to make the following statements:

- a) Page 1, paragraph 1: "When I initially assessed this case, I did not consider the conclusions of Mr. Francis Stewart's assessment to be in [the child's] best interests ...";
- b) Page 4, paragraph 6(b); Page 7, paragraph 6(k): Referring to the potential adoptive parents as the child's "current primary attachment.
- c) Page 14, paragraph 3: "In my professional opinion, [the child] is likely suffering psychological damage that research tells us can have long term consequences if this course of visits continues";
- d) Page 16, paragraph 12(1) and (2): An unequivocal statement that the child's visits with [REDACTED] biological father "be terminated immediately" and that the "date for resumption of visits should not be set by the Court"; and
- e) Page 5, paragraph (c): describing the biological father as a "virtually unfamiliar person".

Agreed Facts relating to Charge 2 in the Formal Complaint:

29. Dr. Darbellay pleads guilty to Charges 1, 2, 3 and 4 and acknowledges she did not fully comply with Professional Practice Guidelines 11.38, 3.16 and 3.19 or with Section I.16 and I.19 of the Code.

...

32. With respect to the comment on Pages 9-10 of her report, referred to in Charge 2, Dr. Darbellay acknowledges that she misstated aspects of the Complainant's report. She posited her own referral questions rather than those directed by the Court and, on that basis, concluded that several aspects of the Complainant's report were "secondary", e.g. Dr. Darbellay did not address the Court ordered cultural component of the assessment because it is "secondary to healthy psychological adjustment. She critiqued the Complainant's assessment on this basis, among others, thereby misstating the Complainant's compliance with the Court Order. Dr. Darbellay stated the Complainant acknowledged that a lot of the information collected in his report was not relevant when in fact the Complainant describes certain questionnaires and checklists used as "limited in their usefulness". Dr. Darbellay's report misquoted and misrepresented the Complainant's report and in doing so altered the Complainant's meaning and suggested he was not acting in a competent manner.

Agreed Facts relating to Charge 3 in the Formal Complaint:

29. Dr. Darbellay pleads guilty to Charges 1, 2, 3 and 4 and acknowledges she did not fully comply with Professional Practice Guidelines 11.38, 3.16 and 3.19 or with Section I.16 and I.19 of the Code.

...

31. Dr. Darbellay acknowledges that the following statements in her report went beyond a critique of the Complainant's report, and that an assessment conducted in accordance with standards practised by Custody and Access Assessors was required to make the following statements:

- a) Page 1, paragraph 1: "When I initially assessed this case, I did not consider the conclusions of Mr. Francis Stewart's assessment to be in [the child's] best interests ...";
- b) Page 4, paragraph 6(b); Page 7, paragraph 6(k): Referring to the potential adoptive parents as the child's "current primary attachment.
- c) Page 14, paragraph 3: "In my professional opinion, [the child] is likely suffering psychological damage that research tells us can have long term consequences if this course of visits continues";
- d) Page 16, paragraph 12(1) and (2): An unequivocal statement that the child's visits with **xxxxx** biological father "be terminated immediately" and that the "date for resumption of visits should not be set by the Court"; and
- e) Page 5, paragraph (c): describing the biological father as a "virtually unfamiliar person".

Agreed Facts relating to Charge 4 in the Formal Complaint:

29. Dr. Darbellay pleads guilty to Charges 1, 2, 3 and 4 and acknowledges she did not fully comply with Professional Practice Guidelines 11.38, 3.16 and 3.19 or with Section I.16 and I.19 of the Code.

...

33. Dr. Darbellay acknowledges that she ought to have obtained the consent of the Biological Father prior to observing the exchange of the Child between the Biological Father and the Proposed Adoptive Parents and using this observation in part as a basis for her conclusions and recommendations.

LEGISLATION

[5] The Act defines professional misconduct and professional incompetence as follows:

Professional misconduct

25 Professional misconduct is a question of fact, but any matter, conduct or thing, whether or not disgraceful or dishonourable, that:

- (a) is harmful to the best interests of the public or the members of the college;
- (b) tends to harm the standing of the profession;
- (c) is a breach of this Act or the bylaws; or
- (d) is a failure to comply with an order of the professional conduct committee, the discipline committee or the council;

is professional misconduct within the meaning of this Act.

Professional incompetence

26 Professional incompetence is a question of fact, but the display by a member of a lack of knowledge, skill or judgment, or a disregard for the welfare of a member of the public served by the profession of a nature or to an extent that demonstrates that the member is unfit to:

- (a) continue in the practice of the profession; or
- (b) provide one or more services ordinarily provided as a part of the practice of the profession;

is professional incompetence within the meaning of this Act.

[6] Section 14 of *The Saskatchewan College of Psychologists Regulatory Bylaws, 2004* requires members to comply with the Code of Ethics of the College and also contains provisions relating to what constitutes professional misconduct and professional incompetence:

6(2) For the purposes of sections 25 and 26 of the Act, the committee may find a psychologist guilty of professional incompetence and/or professional misconduct where the member:

- (a) abused a client physically, sexually, verbally, or psychologically;
- (b) wilfully endangered the safety of a client;
- (c) influenced a client to change the client's last will and testament;
- (d) wrongfully abandoned a client;

- (e) misappropriated property belonging to a client, employer or fellow employee;
- (f) failed to exercise discretion with respect to the disclosure of confidential information about a client;
- (g) failed to maintain or falsified any client record;
- (h) failed to inform any employer or any client of the psychologist's inability to accept specific responsibility in areas where special training is required or where the psychologist does not feel competent to function without supervision;
- (i) failed to report the incompetence or misconduct of a member or colleague;
- (j) failed to comply with the Code of Ethics of the college or failed to comply with established standards of practice;**
- (k) failed without reasonable cause to respond to inquiries from the college regarding alleged professional misconduct or professional incompetence;
- (l) conspired to participate in any act of misconduct or counselled a participant in any act of misconduct;
- (m) obtained registration by misrepresentation or fraud; or
- (n) contravened any provision of the Act or these bylaws. [*emphasis added*]

[7] Where a member is found to be guilty of professional misconduct, the Discipline Committee is authorized to make orders directed at improving the conduct or competence. Section 32 of the Act provides the Discipline Committee with the following authority:

Disciplinary powers

32(1) Where the discipline committee finds a member guilty of professional incompetence or professional misconduct, it may make one or more of the following orders:

- (a) an order that the member be expelled from the college and that the member's name be struck from the register;
- (b) an order that the member be suspended from the college for a specified period;
- (c) an order that the member be suspended from the college pending the satisfaction and completion of any conditions specified in the order;
- (d) an order that the member may continue to practise only under conditions specified in the order, which may include, but are not restricted to, an order that the member:

- (i) not do specified types of work;
 - (ii) successfully complete specified classes or courses of instruction;
 - (iii) obtain treatment, counselling or both;
 - (e) an order that reprimands the member; or
 - (f) any other order that to it seems just.
- (2) In addition to any order made pursuant to subsection (1), the discipline committee may order:
- (a) that the member pay to the college within a fixed period:
 - (i) a fine in a specified amount not to exceed \$5,000; and
 - (ii) the costs of the investigation and hearing into the member's conduct and related costs, including the expenses of the professional conduct committee and the discipline committee and the costs of legal services and witnesses; and
 - (b) where a member fails to make payment in accordance with an order pursuant to clause (a), that the member be suspended from the college.

ANALYSIS AND DECISION

[8] The Discipline Committee accepts the guilty pleas provided by Dr. Darbellay in the Agreed Statement of Facts in relation to the charges contained in the Formal Complaint. She has acknowledged that the conduct occurred and that the conduct constitutes failures to comply with the Code of Ethics of the College. A failure to comply with the Code is a breach of section 14 of the Regulatory Bylaws, which requires all members to comply with the Code. A breach of a bylaw is professional misconduct, as set out in clause 25(c) of the Act. The Discipline Committee therefore finds that Dr. Darbellay is guilty of professional misconduct as a result of the guilty plea contained in the Agreed Statement of Facts and Admissions.

[9] The Discipline Committee must therefore determine the appropriate consequence to follow as a result of its findings. Section 32 of the Act sets out the powers of the Discipline Committee where it finds a member guilty of professional incompetence or professional misconduct. This provision establishes, first, that the Discipline Committee has no power to do anything unless there is a finding of guilt and, second, that the powers it does have are those enumerated in the list

contained in the provision. The range of powers available to the Discipline Committee runs from reprimand to expulsion. The list is apparently designed to give the Discipline Committee as broad a discretion as possible to tailor its order to the needs of the situation, so as to ensure that the disposition of the complaint will accomplish the goal of protecting the public while respecting the interests of members. The list concludes with a broad power to make any order that the Discipline Committee thinks is “just”.

[10] The parties have also presented the Discipline Committee with Joint Submissions – Proposed Penalty, which states as follows:

Dr. Darbellay pleads guilty to the charges against her and accepts the following Penalty:

1. A reprimand.
2. An Order that she cease practicing in the area of Custody and Access Assessments, Parenting Assessments and the critique of these assessments.
3. An Order precluding her from supervising any members of the profession for a period of five (5) years from the date of the Order.
4. An Order publishing the Discipline Committee’s report and sentence on the website of the College.
5. Costs payable to the College in the amount of \$10,000.00 representing the costs of the Professional Conduct Committee and the Discipline Committee, such costs to be paid within one year of the date of the Order failing which she shall be removed from the College of Psychologists’ register.

[11] In its decision in the case of *Rault v. Law Society of Saskatchewan*¹, the Saskatchewan Court of Appeal made it clear that a discipline committee must give serious consideration to a joint submission on sentencing that has been agreed to unless the sentence is unfit or unreasonable, or contrary to the public interest, and it should not be departed from unless there are good or cogent reasons for doing so.² The Court went on to say, in relation to the discipline process applicable to

¹ 2009 SKCA 81.

² *Ibid*, at paragraph 13.

members of the Law Society of Saskatchewan (which is similar to the process applicable to psychologists):

The discipline process in the Act has many similarities to the criminal process and as such the bargaining process is undermined if a joint submission, the product of compromise, is readily rejected by the Discipline Committee. There is a formal process for the handling of complaints, including the appointment of an Investigation Committee, which may set out a Formal Complaint outlining the allegations which may constitute a finding of guilt as to conduct unbecoming a lawyer. This can lead to the appointment of a Hearing Committee, which determines if the allegations in the Formal Complaint are well-founded and, if so, the matter is referred to the Discipline Committee for sentencing on the charges.

This process can be time-consuming for Benchers involved in the various stages leading to the final penalty imposed by the Discipline Committee and can involve significant costs for both the member and the Law Society. Therefore, all members and the Law Society have a vested interest in ensuring that matters proceed expeditiously. If the member co-operates with the investigation and hearing process and, as happened in the instant case, pleads guilty, and puts an Agreed Statement of Facts before the Hearing Committee, the Law Society is relieved of the burden of proving the allegations in what could, in some instances, be a complicated and protracted hearing with the usual risks and vagaries that may occur in the course of such hearings. If the parties negotiating compromise agreements cannot expect their efforts will be respected, there is little incentive to attempt to negotiate a resolution. For this reason, joint submissions on sentence should be considered by the Discipline Committee in a principled way similar to the jurisprudence in criminal matters and as applied by discipline committees in the provinces noted above.

[12] As a result, it is only in a situation where the Discipline Committee is persuaded that the sentence agreed to in a joint submission is unfit or unreasonable or contrary to the public interest that the Discipline Committee would not accept the joint submission. The Discipline Committee is also mindful of the fact that the objective of professional discipline proceedings is not punishment, but correction or improvement of conduct or competence to ensure, to the extent that it is reasonably practicable to do so, that the public is protected from substandard conduct or competence on the part of psychologists who are members of the College. The Discipline Committee found no good or cogent reason to depart in substance from the sentence agreed to in the joint submissions provided by the parties.

ORDER

[13] For all of the reasons set out above, the Discipline Committee of the Saskatchewan College of Psychologists therefore finds Dr. Donna Darbellay guilty of professional misconduct and, pursuant to section 32 of *The Psychologists Act, 1997*, orders that:

1. Dr. Darbellay is hereby reprimanded;
2. Dr. Darbellay shall cease practicing in the area of Custody and Access Assessments, Parenting Assessments and the critique of these assessments;
3. Dr. Darbellay is precluded from supervising any members of the profession for a period of five (5) years from the date of the Order;
4. The Discipline Committee's report and sentence shall be published on the website of the College; and
5. Dr. Darbellay shall pay costs to the College in the amount of \$10,000.00 representing the costs of the Professional Conduct Committee and Discipline Committee

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within one year of the date of this Order, and, if payment is not received by the College on or before that date, the Member shall be removed from the register of the College of Psychologists until payment is received in full.

Dated at Regina, Saskatchewan this 10 day of October 2017.

SASKATCHEWAN COLLEGE OF PSYCHOLOGISTS,
DISCIPLINE COMMITTEE

signed by Tom Robinson

Tom Robinson
Registered Doctoral Psychologist, Chair