STATE OF VERMONT
PROFESSIONAL RESPONSIBILITY PROGRAM

In Re: Paul Kulig
PRB File No. 2020-066

RESPONDENT'S PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW

NOW COMES Paul S. Kulig, the Respondent in this matter, by his attorney, Timothy L. Taylor, and submits these proposed findings of facts and conclusions of law for consideration of the Panel.

A. Introduction

Performing only a superficial examination of the documents in this case might understandably lead to raised eyebrows. Such a cursory evaluation, of course, is not the function of this Panel. Rather, the Panel charged with peeling back the layers of the situation to determine whether there is any substance to that initial impression. When an in-depth evaluation is performed, there is no question that Paul Kulig did not violate any tenets of ethics. His only "transgression" was being overly solicitous of an elderly woman who was stubborn and trusted only him to do the right thing. Indeed, but for that benevolence, he would not be in front of this Panel. There is not a scrap of evidence from which it can be concluded that he benefitted from his actions. Since there simply is no evidence that he violated the Vermont Rules of Professional Conduct, he should not and cannot be punished for his actions.

B. Proposed Findings of Facts[1]

Virtually all of the facts pertinent to the Panel's decision in this case are undisputed.[2] They are:

1. Paul Kulig has practiced law in Rutland for more than 40 years. He has also been involved in various civic and religious organizations over the years including as President of the Rutland Regional Ambulance Service and the Chair of the West Rutland Select Board.

2. Mr. Kulig represented Louise Zygo for more than a decade before her death. Ms. Zygo's sister was married to Mr. Kulig's great-uncle. However, Mr. Kulig considered Ms. Zygo a friend, not a family member. They knew each other from the circles of West Rutland, and from the Catholic community in West Rutland.

3. Mr. Kulig prepared a will for Ms. Zygo in 2006. As was always the case, Mr. Kulig went to Ms. Zygo's house for the execution of the will.

4. In 2011, Ms. Zygo changed her will. The 2011 Will named a number of Ms. Zygo's family members as beneficiaries, including her sister, niece, and grand-nephews.

5. Between 2011 and 2014, Ms. Zygo suffered a substantial fall. She was briefly moved to a nursing home to recover. Ms. Zygo's family and doctor recommended that she permanently move into a nursing home. She vehemently resisted that, and returned to live at her home.

6. In 2014, while still living at home, Ms. Zygo contacted Mr. Kulig about changing her will. Some of the people in her 2011 Will had died, and she also complained that her relatives had been asking her for money, and that seemed to be the only reason they contacted her. She wanted to change her will to keep them from bothering her about her money. Mr. Kulig discussed with Ms.

[1]The facts recited herein are largely taken from testimony at hearing. Where an exhibit is particularly pertinent it may be cited.

[2]The term "undisputed" is perhaps used loosely here. As used here, it means that either the parties agree on a particular fact, or, in the least, the ONLY evidence presented on the proposed fact supports the assertion stated here.

Zygo the high monthly costs of a nursing home. Mr. Kulig advised Ms. Zygo that she should consider a more complex estate planning strategy to avoid potential Medicaid liens on her house after her liquid assets were exhausted and Medicaid would be paying for the nursing home.

7. When Ms. Zygo refused to engage in more complex estate planning, Mr. Kulig advised her that under Vermont law if she were to deed her house to someone with a "Lady Bird Johnson deed," it would avoid recapture from Medicaid. Then the house would be able to be sold after her death clear of any Medicaid claim, and the proceeds could then be passed on to her intended beneficiaries if the recipient of the Lady Bird Johnson deed adhered to her wishes.

8. A traditional trust for the house would not have evaded Medicaid recapture.[3] And a Lady Bird Johnson deed jointly into the names of all of the potential beneficiaries would not have been practicable, nor would it have accomplished Ms. Zygo's purposes. It would not have been practicable because having eight beneficiaries jointly on a deed will almost certain to lead to squabbles and potentially litigation. And it could have led to an uneven and unintended distribution. That is because it would have been impossible to predict how long Ms. Zygo was going to live. Therefore, since each of the beneficiaries had been designated on different non-house assets, those assets would have been dissipated at different times during Ms. Zygo's life, depending on the character of the asset.[4]

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[3]See discussion, *infra*, at fn. 13.

[4]For instance, Mr. Kulig testified that the assets with less tax consequences would have been dissipated first to pay for her ongoing care. Therefore, those beneficiaries who had been designated as recipients of low-tax assets would have had their non-house assets depleted, while the designated assets of other beneficiaries would not have been depleted. If Ms. Zygo died when that was the status of things, then those whose assets had not been dissipated would be receiving more than Ms. Zygo intended because they would still have their non-house assets and still get their share of the house proceeds, while those whose assets had been dissipated would only get their share of the house proceeds. Ultimately this became moot because all of the non-house assets had been depleted by the time Ms. Zygo died. But this, of course, could not be known at the time the estate planning documents were prepared.

9. Mr. Kulig discussed with Ms. Zygo a number of possible relatives, as well as whether there were possibly non-relatives close to her, to whom she could convey the property via such a deed, and who would likely adhere to her wishes after her death and sell the property and distribute the proceeds to her intended beneficiaries. Ms. Zygo was hearing nothing of it. She was suspicious that everybody only wanted money from her. In short, she trusted virtually no one.

10. Ms. Zygo instead insisted that the deed be prepared with Mr. Kulig as the recipient. She was sure that he would pass the proceeds of her estate in the way that she wanted. Mr. Kulig also suggested that Ms. Zygo hire another attorney to draft the will and deed if what she wanted to do was convey the property to Mr. Kulig to hold in trust. Again, Ms. Zygo was hearing nothing of it.

11. Because of Mr. Kulig's concerns that Ms. Zygo would simply drop the subject and her estate would be entirely recaptured by Medicaid - something that she definitely did not want - Mr. Kulig reluctantly agreed to Ms. Zygo's wishes. So, in 2014, Mr. Kulig prepared another will for Ms. Zygo. He also prepared a Lady Bird Johnson deed, preserving a life estate to herself, with the balance being conveyed to Mr. Kulig. The intention of Ms. Zygo was that the property was to be held by Mr. Kulig in trust, and that after her death he was to liquidate any assets and distribute them on a *per stirpes* basis to the intended beneficiaries.

12. Mr. Kulig was not present at the execution of the 2014 Will and Lady Bird Johnson deed. Rather, his partner, Christopher Sullivan, went to her house for that. Prior to Mr. Sullivan going there, Mr. Kulig and Mr. Sullivan discussed the contents of the documents, and the unusual nature. Mr. Kulig made clear to Mr. Sullivan the intention of the documents, i.e., that upon Ms. Zygo's death the property was to be held in trust for distribution to Ms. Zygo's intended beneficiaries.

13. Mr. Sullivan went to Ms. Zygo's house for the execution of the documents. Mr. Sullivan discussed with Ms. Zygo that there were potentially other options with respect to the beneficiaries that she should consider. Again, she wasn't interested. She trusted only Mr. Kulig. Among the reasons she cited was that he was a "good Catholic." See Exhibit E. So the documents were executed as prepared.

14. Having known Ms. Zygo for a long time, Mr. Kulig testified that Ms. Zygo clearly had capacity to execute the documents.

15. Not long after this estate planning, Ms. Zygo did indeed have to enter a nursing home. After a couple of years, almost all of her non-homestead assets had been used to pay for that cost. She then qualified for Medicaid to pay for her nursing home.

16. Ms. Zygo died on May 19, 2018. At that point, the legal title to the house passed fully to Mr. Kulig by operation of the deed.

17. Had Ms. Zygo not entered into this trust arrangement with Mr. Kulig, much of the value of her house would have been recaptured by Medicaid, and her intended beneficiaries would have received much less.

18. Ms. Zygo and her husband had no children. Therefore, upon her death, she wanted her estate to be distributed to nieces and nephews, or, if the nieces and nephews were deceased, to their children.

19. The only asset left for distribution was the house, which had gone by deed to Mr. Kulig. Her other assets of any value had been depleted by her nursing home care.[5]

20. There was substantial work to be done in the house prior to it being ready for sale.

[5]There is cash left in Ms. Zygo's bank account of approximately $8,000. That money, however, is of no use to Ms. Zygo's beneficiaries because ultimately it will be paid either to the nursing home or to the State Vermont for Medicaid reimbursement. There was also a vehicle, which sold for $1,000. That money was used to pay for expenses of the house.

21. Mr. Kulig already knew the addresses of some of the beneficiaries. He started seeking the addresses of those he didn't have.

22. Within a few months of Ms. Zygo's death, Mr. Kulig asked Michael Broza for David Broza's address.[6] Mr. Kulig had no reason to acquire David Broza's address other than to distribute to him his share as a beneficiary.

23. On August 13, 2018 (three months after Ms. Zygo's death), Mr. Kulig asked Carl Wener for the addresses for his sons.[7] Exhibit F. Mr. Kulig had no reason to acquire the address of the Wener children other than to distribute to them their share as beneficiaries.

24. Jim Finger is the CEO of the Rutland Regional Ambulance Service. In that capacity, he works regularly with Mr. Kulig, who is President of the Board of Directors. Mr. Finger was going through a divorce, and his wife needed a house to move into. This was in the summer of 2019. After the typical back and forth, Mrs. Finger decided to buy the house. In every conversation Mr. Kulig and Mr. Finger had about the house where the subject of the proceeds of came up, and there were several, Mr. Kulig indicated that the proceeds were to be distributed to Ms. Zygo's "nieces and nephews."

25. Michaline Broza, the wife of a deceased nephew of Ms. Zygo, did not feel like she was getting satisfactory answers from Mr. Kulig regarding the house. So she ultimately hired Rutland attorney Matthew Getty. Mr. Getty contacted Mr. Kulig on October 30, 2019. Exhibit G. According to Mr. Getty, Mr. Kulig told Mr. Getty several things:

- There were a few thousand dollars in Ms. Zygo's bank account, but that would be going to the state or the nursing home;

[6]The Panel will recall that Michael Broza, David Broza, and Daniel Broza are the children of Michaline Broza, the person who registered to grievance with the Professional Responsibility Program. The Broza children were among the intended beneficiaries because their father, John Broza, was a nephew of Ms. Zygo.

[7]The Panel will recall that the Carl Wener's deceased wife, Patricia, was the niece of Ms. Zygo, and therefore the Wener children were intended beneficiaries through Patricia.

- The house was undergoing repairs;
- There had been a Lady Bird Johnson deed to Mr. Kulig;
- Mr. Kulig had a prospective buyer for the house, with an anticipated sale in the Spring, and that there would be an estimated $155,000 for distribution;
- The money was to be distributed *per stirpes* to "a sister and nieces and nephews."

26. After the conversation with Mr. Kulig, Mr. Getty still had some questions, so he sent Mr. Kulig a letter. Exhibit 5. Among the statements in Mr. Getty's letter were:

- Once the closing occurred, Mr. Kulig intended to divide the net proceeds amongst the heirs at law;
- Any asset that became subject to probate would be paid over to the State pursuant to a Medicaid claim;
- Due to Medicaid rules,[8] it was Getty's interpretation that the LBJ deed was drafted in order to carry out Ms. Zygo's plan, as set forth in her will, by way of a trust arrangement.

27. On December 16, 2019, Mr. Kulig responded by letter to Mr. Getty's letter (Exhibit 6), stating:

> At this time, I hope to have the house sold in the spring now that the repairs have been made to the septic and water systems, the electrical systems upgraded, mold removed, and the furnace replaced. The monies received for rent have been used for the taxes, insurance, repairs, etc. **Once the house is sold, the monies will be disbursed to those she had intended to benefit before her declining health required her to use her assets for her end of life care.**

This could hardly be more clear that the money from the sale of the house was going to be distributed to others.

28. At hearing, Mr. Kulig delineated specifically who the beneficiaries were, and what share of the house sale proceeds they were to receive. That would be:

- Ms. Zygo's nephew Peter, who would receive the full one-third share of Ms. Zygo's sister Helen (who signed a disclaimer giving her share to her sole surviving child, Peter);

[8]Mr. Getty is an attorney whose practice emphasizes estate planning. Therefore, it is particularly significant that Mr. Getty testified that the Lady Bird Johnson deed would be an effective and permissible method by which to avoid Medicaid recapture of the proceeds of the house.

- The two Karp children, who would split the one-third share of Ms. Zygo's deceased sister Mary;

- The remaining one-third share attributed to Ms. Zygo's deceased sister Stella would be divided *per stirpes* to the children of Stella's deceased children:
  - One-half each of the one-half of Stella's one-third to the two sons (Erik and Justin Wener) of Patricia Wener (Stella's daughter and Louise Zygo's niece);
  - One-third each of the one-half of Stella's one-third to the three sons (Michael, Daniel, and David Broza) of John Broza (Stella's son, and Louise Zygo's nephew).

29. After the inquiry was made to the Professional Responsibility Program by Ms. Broza, Mr. Kulig was contacted by attorney Michael Kennedy on January 22, 2020. Mr. Kennedy was doing the initial investigation for the Program. Mr. Kennedy does not remember the conversation. His notes, however, reflect that Mr. Kulig told him that he was going to sell the house, and distribute the proceeds. Exhibit I.

30. The house was sold in May 2020, realizing net proceeds of $153,457.39.[9] Exhibit 7.

31. Those monies are still in Mr. Kulig's trust account. Exhibit 8.

32. Other than to care for, manage, or enhance the assets to be distributed (e.g., pay taxes, pay insurance, repair the house, etc.), Mr. Kulig has not used any funds from the sale of Ms. Zygo's assets. He has not personally benefitted from Ms. Zygo's estate planning structure in any way.

33. Mr. Kulig has not yet distributed the proceeds of the sale due to these ongoing proceedings. Specifically, if this Panel were to determine that a trust was not effectively created,

[9]This would be the net proceeds on the closing statement ($143,457.39), plus the $10,000 deposit that was listed on the closing statement as a deduction from the purchase price, since it was already paid. As Mr. Kulig testified, most or all of that $10,000 deposit was used to make repairs on the property that were the responsibility of the seller as part of the house sale.

The house price was set by both the value put on it by taxing authorities, and by Mr. Kulig getting feedback from people who are in the business of buying, selling, and valuing houses. Disciplinary Counsel went into a digression seemingly designed to determine whether Mr. Kulig receive a fair price for the property. That, of course, has no bearing on this Panel's decision. It does make one wonder whether she was tacitly acknowledging this was a trust situation, and she was looking out for the interests of the beneficiaries. This is not particularly surprising when all of the evidence presented screamed "trust."

then Mr. Kulig would have to consider whether that would govern his treatment of the money. In other words, the money might have to be put into probate court, and the heirs at law might have to hash it out there.[10]

C. The Claims against Mr. Kulig

The Petition of Misconduct raises three claims against Mr. Kulig:

- That Mr. Kulig solicited a substantial testamentary gift from Ms. Zygo in violation of Vermont Rules of Professional Conduct Rule 1.8(c);
- That Mr. Kulig prepared a will in which Ms. Zygo bequeathed and devised to him her entire estate in violation of Vermont Rules of Professional Conduct Rule 1.8(c);
- That Mr. Kulig failed to obtain written informed consent from Ms. Zygo informing her that there was a significant risk that the client would be materially limited by the lawyer's personal interest in violation of Vermont Rules of Professional Conduct Rule 1.7(a)(2); 1.7(b)(4).

Mr. Kulig denies each of these three claims. Each of these claims is based on the premise that the attorney has or will benefit from the transaction with the client. Hence, inasmuch as the unrefuted evidence is that Mr. Kulig did not intend to, and did not, benefit personally from Ms. Zygo's estate planning structure, that should end the inquiry. Nevertheless, the legal issues raised will be further explored.

D. Legal Discussion

1. Burden of Proof

The burden of proof in this proceeding is on the Petitioner. Administrative Order No. 9, Rule 16(D). Burden of proof, of course, means the obligation to establish the truth of the claim upon which the Petitioner rests its case. See, e.g., Town of Manchester v. Town of Townshend, 110 Vt. 136; 2 A.2d 207 (1938). The standard the Petitioner must demonstrate to meet that burden of proof

[10]This obviously would be contrary to Ms. Zygo's wishes, since she set up this structure so Mr. Kulig could distribute the money according to her wishes.

in this case is "clear and convincing evidence." Administrative Order No. 9, Rules 11(D)(5)(b) and 16(D). The Vermont Supreme Court has defined this standard as follows:

> "Clear and convincing evidence is a 'very demanding' standard, requiring somewhat less than evidence beyond a reasonable doubt, but more than a preponderance of the evidence. [It] does not require that evidence in support of a fact be uncontradicted, but does require that the fact's existence be 'highly probable.'"

In re Kane, 2017 VT 48; 204 Vt. 635, 637; 169 A.3d 180 (2017). The Petitioner has not met its burden that it is "highly probable" that Mr. Kulig violated any of the ethical canons upon which this Petition was brought.

2. Medicaid Considerations

The overarching motivation of the estate planning structure on which Ms. Zygo settled was the risk of her estate being entirely depleted by Medicaid recapture in the event she did nothing, and she went into a nursing home. The concern, of course, was that the house would ultimately have to be sold to pay for those expenses, and her intended beneficiaries would receive nothing.

While Medicaid is a federal program, it is administered by the states. See, e.g., 42 U.S.C. §§ 1396-1 *et seq.* Each state operates its own Medicaid program within federal guidelines. Id. Because the federal guidelines are broad, states have a great deal of flexibility in designing and administering their programs.

A device has arisen called an "Enhanced Life Estate Deed" or a "Ladybird Johnson Deed" to avoid recovery by Medicaid.[11] These deeds transfer real property to others but reserve to the owners all present ownership rights, including the right to sell, lease, mortgage or convey the property during their lifetimes. This keeps control of the property with the original owners during their lives, but passes the property outside probate on their deaths. It is not considered a penalized

[11]These deeds are now expressly permitted by statute (27 V.S.A. §§ 651 *et seq.*), although adoption of that statute does not affect the validity of such deeds previously executed. 27 V.S.A. § 659.

transfer for Medicaid purposes, and it avoids Medicaid recovery, because it avoids probate. See Medicaid Covered Services Rules, Rule 7108.3.3.[12] Both Mr. Kulig and Mr. Getty agreed that this was a legitimate and effective way through estate planning to avoid Medicaid recapture.

So for Ms. Zygo the Ladybird Johnson Deed was a useful tool. Indeed, it may have been the only tool available given her refusal to engage in other forms of estate planning that may have accomplished the same purpose.[13]

3. The Trust

a. The Oral Trust Statute

The ultimate consideration for this Panel will be whether Ms. Zygo intended to create a trust (with Mr. Kulig as the trustee) to administer any remaining assets for the benefit of any beneficiaries. In Vermont, a trust is created if:

(1) the settlor has capacity to create a trust;
(2) the settlor indicates an intention to create the trust;
(3) the trust has a definite beneficiary;
(4) the trustee has duties to perform; and,
(5) the same person is not the sole trustee and sole beneficiary of all beneficial interests.

14A V.S.A. § 402. The Vermont Legislature in 2009 recognized that oral trusts are permissible:

> . . . a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

14A V.S.A. § 407 (in pertinent part). There is no case law interpreting this recent oral trust statute. Of interest is the pre-statute case law is Mahoney v. Leddy, 126 Vt. 98; 223 A.2d 456 (1966).

[12]These are the rules of the Vermont Agency of Human Services, Department of Vermont Health Access.

[13]Exhibit 1 attached hereto are the Medicaid rules which demonstrate that a traditional trust would not have exempted any of Ms. Zygo's from Medicaid recapture. Specifically, Section 25.03(d) describes the permissible trusts that do not invoke Medicaid recapture. Ms. Zygo could not have formed a trust to fit within any of those scenarios.

Mahoney indicates that the declaration of the trustee is sufficient to establish an oral trust.[14] 126 Vt. at 101. In addition to Mahoney, we also have the plain language of the trust statutes. When the language of a statute is plain and unambiguous, it is to be construed in conformity with that language. Stockwell v. District Court, 143 Vt. 45, 49; 460 A.2d 466 (1983). It is presumed that the "Legislature meant what it said and said what it meant." Burl. Elec. Dept. v. VDT, 154 Vt. 332, 336; 576 A.2d 450 (1990). Therefore, the inquiry involves the five factors in 14A V.S.A. § 402, and whether it is shown by clear and convincing evidence whether an oral trust was created (14A V.S.A. § 402).

The only evidence presented showed the creation of an oral trust by Ms. Zygo. That evidence was unrefuted. Tracking the language of the statute, this evidence included:

(1) "The settlor has capacity to create a trust" - **Mr. Kulig, who had known her for years, testified that she had capacity to trust. Mr. Sullivan also testified that he discussed the issues with Ms. Zygo and he registered no concerns in his testimony about her capacity**;

(2) "The settlor indicates an intention to create the trust" - **Testimony from Mr. Kulig and Mr. Sullivan established that Ms. Zygo specifically wanted Mr. Kulig to control, liquidate, and convey the proceeds to beneficiaries after her death. Testimony from Mr. Kulig also established that he beseeched Ms. Zygo on several occasions to use a more formal structure, or to use another lawyer, but that she declined. Testimony from Mr. Kulig also established that he discussed with Ms. Zygo on several occasions a number of possible relatives she could use as a trustee, as well as whether there were possibly non-relatives close to her, to whom she could convey the property via such a deed, and who would likely adhere to her wishes after her death and sell the property and distribute the proceeds to her intended beneficiaries, but that Ms. Zygo did not want to do this**;

(3) "The trust has a definite beneficiary" - **Mr. Kulig provided at hearing the identities beneficiaries of the trust, their respective shares, and how those respective shares were determined (see, supra, at pp. 7-8)**;

[14]Other cases may have discussed oral trusts, but would not have any bearing on this case. See, e.g., Frogate v. Kissell, 138 Vt. 167; 412 A.2d 1138 (1980)(the Vermont Supreme Court deferred to trial court because the trial court's finding of fact that there was no oral trust was not clearly erroneous).

(4) "The trustee has duties to perform" - **The testimony was uniform that Mr. Kulig's duties were to prepare the asset(s) for liquidation, and to distribute the proceeds to the intended beneficiaries. That this was the case was underscored by:**

- **By Mr. Kulig contacting Michael Broza in 2018 to acquire David Broza's address to be able to distribute to David's share to him;**
- **By Mr. Kulig asking Carl Wener in 2018 for the addresses of his sons so that their shares could be distributed to them;**
- **By Mr. Kulig his telling Jim Finger a number of times in 2019 that he needed to sell the house so that he could distribute the proceeds;**
- **By Mr. Kulig telling Mr. Getty on October 30, 2019 that the house was going to be sold, and that the assets were to be distributed *per stirpes*[15];**
- **By Mr. Kulig confirming by letter of December 16, 2019 to Mr. Getty that:**

  > **Once the house is sold, the monies will be disbursed to those she had intended to benefit before her declining health required her to use her assets for her end of life care.**

- **By, in his conversation with Michael Kennedy on January 22, 2020, Mr. Kulig unequivocally indicated that he was going to sell the house, and distribute the proceeds;**

(5) "The same person is not the sole trustee and sole beneficiary of all beneficial interests" - **Mr. Kulig is the trustee, and is not a beneficiary. He has only indicated that he is going to distribute the proceeds to Ms. Zygo's beneficiaries (i.e., various family members).**

In short, evidence was presented to the Panel meeting each of the factors about the formation of creation of an oral trust. In fact, there was no countervailing evidence.

[15]Note that Mr. Kulig's use of the term "*per stirpes*" when talking to Mr. Getty underscores that the assets were not being kept by Mr. Kulig, but would be distributed to others. The legal precept of *per stirpes* would never have been discussed but for the fact that the assets were going to be distributed to others.

b. Interpretation of 27 V.S.A. § 303

Disciplinary Counsel will raise 27 V.S.A. § 303 for a claim that Ms. Zygo could not have created a trust because the house is real estate. The statute reads:

> A trust concerning lands, excepting such as may arise or result by implication of law, shall not be created or declared, unless by an instrument in writing signed by the party creating or declaring the same, or by his or her attorney.

Reading this language in isolation may support Disciplinary Counsel's argument. But when the case law that has developed around the statute is consulted, the statute does not, in fact, bolster the Disciplinary Counsel's argument.[16]

The Vermont Supreme Court has made clear that no specific form or instrument is necessary to meet the standard under the statute of there being a writing to establish a trust relative to real estate. For instance, in the seminal case of Straw v. Mower, 99 Vt. 56; 130 A. 687 (1925),[17] the court stated that the statute does not require that it be created **and** declared in writing, but that it be created **or** declared in writing. 99 Vt. at 63. Nor does the statute require that the writing be formal in character. Id. Any instrument which sufficiently defines the object and terms of the trust, signed by either the person who creates the trust, **by the person who declares it, or by his attorney**, meets the requirements of the statute. Id. And the writing can be informal - a letter, a receipt, a legal answer to a complaint, a deposition, a recital in a deed, a memorandum of almost any kind - so long

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[16]It is an unusual use of the statute by Disciplinary Counsel. Almost always (and perhaps always) such statutes are invoked as a tool to discredit those who are trying to shield property from creditors or other claimants by claiming that it is in a trust. The requirement of some written memorandum for an oral trust involving real estate devolves from the old English Statute of Frauds, and the policy considerations were the same as those underlying that Statute. Restatement (Third) of the Law of Trusts §§ 20 and 22. The purpose of the Statute of Frauds is to prevent a party from being compelled, by oral and perhaps false testimony, to be held responsible for an agreement he or she claims was never made. Mason v. Anderson, 146 Vt. 242, 244; 499 A.2d 783 (1985). It is imposed as a shield against possible fraud. Chomicky v. Buttolph, 147 Vt. 128, 130; 513 A.2d 1174 (1986)

See, e.g., [citation]. Quite the opposite is true here, where Mr. Kulig has consistently declared that the trust is a tool for the property to be distributed to others.

[17]Straw dealt with the predecessor statute to 27 V.S.A. § 303, G.L. 2745, but the language of the statutes is identical.

as the objects and nature of a trust appear in the document with sufficient certainty. Id. There are a number of cases that are in accord with Straw.[18] In his letter to Mr. Getty of December 16, 2019 (Exhibit 6), Mr. Kulig sufficiently defined the object and terms of the trust:

> **Once the house is sold, the monies will be disbursed to those she had intended to benefit before her declining health required her to use her assets for her end of life care.**

And there is no question that Mr. Getty understood it to be a trust situation. Exhibit 5.

This is not the only way in which there was a writing evidencing the trust. In his response to the **Petition of Misconduct**, Mr. Kulig stated repeatedly that the assets of Ms. Zygo were conveyed to him in trust.[19] This would be equivalent to the passage in Straw where the Court included language from other cases indicating that one of the things that would satisfy the "writing" requirement of the statute would be an "answer in chancery."[20] Straw, *supra*, 99 Vt. at 63.

E. Interplay Between the Existence of the Trust and the Claim of Ethical Violations

The panel will recall that the three claimed ethical violations by Mr. Kulig were:

- That Mr. Kulig solicited a substantial testamentary gift from Ms. Zygo in violation of Vermont Rules of Professional Conduct Rule 1.8(c);
- That Mr. Kulig prepared a will in which Ms. Zygo bequeathed and devised to him her entire estate in violation of Vermont Rules of Professional Conduct Rule 1.8(c);
- That Mr. Kulig failed to obtain written informed consent from Ms. Zygo informing her that there was a significant risk that the client would be materially limited by the lawyer's personal interest in violation of Vermont Rules of Professional Conduct Rule 1.7(a)(2); 1.7(b)(4).

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[18]See, e.g., Miele v. Miele, 124 Vt. 110, 114; 197 A.2d 787 (1964).

[19]See, e.g., Response to Count 2, Response to Count 3, and ¶¶ 7, 9, 10, 11, 13, and 14 of Mr. Kulig's **Answer of Respondent to Petition of Misconduct**.

[20]In Vermont, of course, chancery courts no longer exist. The duties have been subsumed within the other courts in the state. See 4 V.S.A. § 219. That does not change the substance of the passage from Straw - that a declaration when answering a complaint in court is sufficient to meet the "writing" requirement of 27 V.S.A. § 303.

The evidence shows clearly, and indeed unequivocally, that the estate planning by Ms. Zygo through Mr. Kulig was, in fact, a trust. He did not seek, nor did he receive, any assets from Ms. Zygo other than in a trustee capacity. If that is the case, none of the claimed ethical violations existed. The claimed violations are all rooted in the notion of an attorney financially benefitting from a transfer from a client. Mr. Kulig did not. The claimed violations are not well-founded.

F. Sanctions

Mr. Kulig, of course, finds the notion of sanctions repugnant when his motives were purely altruistic. Not only was he not enriched, but his actions prevented the dissipation of assets from Ms. Zygo's estate.

In light of this, should the Panel decide a violation occurred, he would ask for the mildest sanction of those available to the Panel. This request is underscored by his 43 years of practice in Vermont without any ethical violation on his record.

G. Conclusion

Paul Kulig has been a member of the Vermont Bar for more than 40 years. He was trying to help a stubborn 90-year-old woman accomplish what she wanted. She rejected suggestion after suggestion. He ultimately relented and did what she wanted so that her intended beneficiaries wouldn't be left with nothing. There is not a speck of evidence that he was going to, or did, personally benefit from his actions. Indeed, there is a mountain of evidence to the contrary. Only the beneficiaries benefitted from it. Mr. Kulig should not be ethically punished for his benevolent actions.

Dated: September 3, 2021

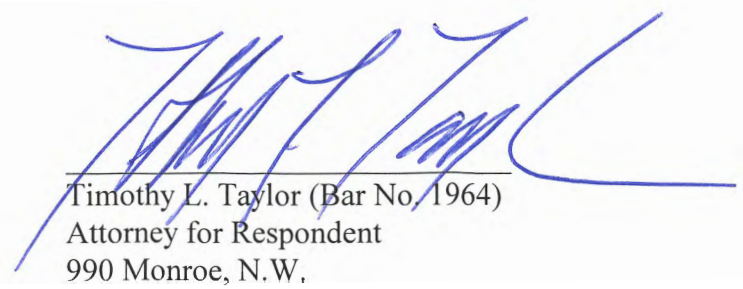

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Exhibit

1

Health Benefits Eligibility and Enrollment Rule

(HBEE)

Department for Children and Families
Economic Services Division
Current rule, effective July 15, 2015
Related to DCF/ESD Bulletin 15-02

25.03 Allowable transfers (07/15/2015, 15-02)	
(a) Transfers for fair-market value – in general	No penalty period is applied to income or resources transferred for fair market value.
	AHS determines whether the individual requesting Medicaid coverage of long-term care services and supports, or the spouse of such individual, as the case may be, received fair market value for a transfer of income or resources by determining the difference, if any, between the fair market value of the income or resource reduced by any applicable deductions at the time of the transfer and the amount received for the income or resource. Any of the following deductions may be used to reduce fair market value: (1) The amount of any legally enforceable liens or debts against the transferred income or resource at the time of transfer that reduced the transferor's equity in the income or resource; (2) The reasonable and necessary costs of making the sale or transfer; (3) The value of income or resources received by the transferor in exchange for the transferred income or resources; (4) The value of income or resources returned to the transferor; and (5) The following verified payments or in-kind support given to or on behalf of the transferor as compensation for receipt of the income or resources by the person who received the income or resources: (i) Personal services; (ii) Payments for medical care; (iii) Funeral expenses of the individual's deceased spouse; (iv) Taxes, mortgage payments, property insurance, or normal repairs, maintenance and upkeep on the transferred property; or (v) Support and maintenance (*e.g.*, food, clothing, incidentals, fuel and utilities) provided in the transferor's own home or in the home of the person who received the income or resources from the transferor.
(b) Receipt of fair market value after the date of the transfer	If the value of a transferred resource is scheduled for receipt after the date of transfer, it is considered a transfer for fair market value only if the transferor can expect to receive the full fair-market value of the resource within their expected lifetime. Expected lifetime is determined as follows:
(1) When institutionalized individual is transferor	Expected lifetime of the institutionalized individual is measured at the time of the transfer as determined in accordance with actuarial publications of the Office of the Chief Actuary of the SSA (http://socialsecurity.gov/OACT/STATS/table4c6.html) and set forth in Vermont's Medicaid Procedures Manual.
(2) When spouse of institutionalized individual is	Expected lifetime of the spouse of the institutionalized individual is measured at the time of the transfer as determined in accordance with actuarial publications of the Office of the Chief Actuary of the SSA) (http://socialsecurity.gov/OACT/STATS/table4c6.html) and set forth in Vermont's

transferor	Medicaid Procedures Manual.
(3)	Pursuant to the authority granted in Vermont Act 71 § 303(7)(2005), AHS may develop alternate actuarial tables that will be consistent with federal law and adopted by rule.
(c) Transfers for less than fair-market value – in general	A penalty period is not imposed for a transfer for less than fair market value that meets one or more of the following criteria:
(1) Time of transfer – beyond look-back period	The date of the transfer was more than 60 calendar months prior to the first month in which the individual both requests eligibility for Medicaid coverage of long-term care services and supports and meets all other requirements for eligibility.
(2) Transferred income or resources are returned	The transferred income or resources have been returned or otherwise remain available to the individual or the individual's spouse.
(3) Property transferred of a person other than the individual or their spouse	The action that constituted the transfer was the removal of the individual's (or spouse's) name from a joint account in a financial institution, and the individual (or spouse) has demonstrated, to AHS's satisfaction, that the funds in the account accumulated from the income and resources of another owner who is not the individual (or their spouse).
(4) Transfer of resource for a purpose other than creation or maintenance of eligibility for Medicaid coverage of long-term care services and supports	The transferor has documented to AHS's satisfaction convincing evidence that the resources were transferred exclusively for a purpose other than for the individual to become or remain eligible for Medicaid coverage of long-term care services and supports. A signed statement by the transferor is not, by itself, convincing evidence. Examples of convincing evidence are documents showing that: (i) The transfer was not within the transferor's control (e.g., was ordered by a court); (ii) The transferor could not have anticipated the individual's eligibility for Medicaid coverage of long-term care services and supports on the date of the transfer (e.g., the individual became disabled due to a traumatic accident after the date of transfer); or (iii) A diagnosis of a previously undetected disabling condition leading to the individual's eligibility for Medicaid coverage of long-term care services and supports was made after the date of the transfer.
(5) Transfers of specified property for the benefit of certain family members	The transfer meets the criteria specified below for transfers involving trusts (see paragraph (d)), transfers of homes (see paragraph (e)), and transfers for the benefit of certain family members (see paragraph (g)).
(6) Intent to transfer for fair market value	The transferor has demonstrated to AHS's satisfaction that they intended to dispose of the income or resources either at fair market value, or for other valuable consideration.
(7) Transfer of excluded	(i) The transferor transferred excluded income or resources.

income or resources	(ii) Penalties are imposed for the transfer for less than fair market value of any asset considered by the SSA's SSI program to be countable or excluded. For example, transfer of a home or of the proceeds of a loan are both subject to penalty.
(d) Allowable transfers involving trusts	A penalty period is not imposed for transfers involving trusts that meet one or more of the following criteria: (1) The action that constituted the transfer was the establishment of an irrevocable trust that does not under any circumstances allow disbursements to or for the benefit of the individual, and the date of the transfer was more than 60 calendar months prior to the first month in which the individual requests Medicaid coverage of long-term care services and supports. (2) The action that constituted the transfer was the establishment of a trust solely for the benefit of the individual if the individual was under age 65 when the trust was established and the trust meets all of the criteria at § 29.08(e)(1)(F). (3) The action that constituted the transfer was the establishment of a pooled trust, as specified at § 29.08(e)(1)(G), unless the individual was age 65 or older when they established the trust. If so, the transfer is not exempted from the imposition of a transfer penalty period. (4) The action that constituted the transfer was the establishment of a revocable trust. However, AHS considers any payment from the revocable trust to anyone other than the individual a transfer for less than fair-market value subject to penalty unless the payment is for their benefit.
(e) Allowable transfers of homes to family members	A penalty period is not imposed for the transfer of a home that meets the definition at § 29.08(a)(1) provided that title was transferred to one or more of the following persons: (1) The spouse of the individual requesting Medicaid coverage of long-term care services and supports; (2) The individual's child who was under age 21 on the date of the transfer; (3) The individual's son or daughter who is blind or permanently and totally disabled, regardless of age; (4) The brother or sister of the individual when: (i) The brother or sister had an equity interest in the home on the date of the transfer; and (ii) Was residing in the home continuously for at least one year immediately prior to the date the individualbegan to receive Medicaid coverage of long-term care services and supports, including services in a home and community-based setting; or (5) The son or daughter of the individual provided that the son or