IN THE MATTER OF
THE SECURITIES ACT, 1988, S.S. 1988, c. S-42.2

AND

IN THE MATTER OF

GERALD HENRY TURCOTTE

D E C I S I O N

Hearing Held August 21, 1996.

Before:	Marcel de la Gorgendiere, Q.C., Chairman Rand Flynn, Commission Member
Appearances:	Patti Pacholek, representing Commission staff Gerald Henry Turcotte, representing himself

Decision dated October 9, 1996.

DECISION

In brief, the Notice of Hearing in this matter requests the Commission to determine if the registration of Gerald Henry Turcotte (the Respondent) should be suspended or terminated. The principal allegations of fact made on which to justify such action were that the Respondent, a mutual fund salesperson:

1. drew a will for a customer in which he was the residuary beneficiary and executor; and

2. in his explanation of assets of the testatrix of which he himself had detailed knowledge as her tax advisor "overlooked" an investment of $55,000. which under the will would fall into the residue.

The Respondent acknowledged in the Agreed Statement of Facts that "Since 1982 the Respondent has handled Boroway's financial matters and also since approximately 1990, the Respondent has completed Boroway's income tax. The business relationship between the Respondent and Boroway is a fiduciary relationship which gives rise to fiduciary duties and responsibilities".

T'he Respondent’s customer is a 75 year old spinster who has worked hard maintaining herself in a frugal fashion. She was completely dependent on others for advice on anything that involved writing and finance. The Respondent had handled her investments in a competent fashion from 1982 and her income tax from 1990. One would be hard pressed to find a better example of a fiduciary relationship. How do we assess his conduct as a registrant in this relationship?

The conservative blend of fixed income and mutual funds couldn't be faulted. The problem arises in evaluating his conduct in his fiduciary capacity where his primary responsibility is to act in the best interests of the person who is the object of that relationship.

The Respondent asks us to believe that all he did was accidentally overlook one investment that totalled approximately one-half the value of the assets he had been handling for some time. If we accept that suggestion, so strongly advanced by the Respondent, it still leaves us with other major problems. As a professional financial advisor, one cannot be expected to know everything, but one should know not to act in areas where lacking expertise. The Respondent apparently knew very little about drafting wills and administration of estates. The one he prepared was copied from other wills he

had seen or had in his possession from acting as executor in family estates. Even if he was correct about the amount of the assets at the time of execution of the will, he was allowing himself approximately $20,000, as he stated, "to pay debts and funeral expenses, etc". Given that the only expense would be a burial and as the administration of liquid assets would be negligible, he would end up much better compensated than any professional could expect.

Thomas Fulcher, a nephew of the customer, had been in a discussion about a will with his aunt and the Respondent. He gave evidence that his aunt had said that he should be executor. The specific bequests to be set out in the will were based on a number of assets that were described by the Respondent. Fulcher received a copy of the executed will from her when she underwent surgery and he noticed that the Respondent and not himself was executor. Verifying that his aunt still wanted him as an executor he then investigated the extent of the assets and found out the full extent of the assets deposited in the institution overlooked by the Respondent. He also complained to the Respondent's manager. The Respondent prepared what he called a "Supplementary" to the will of his customer which he stated his executor fees would be 3.5% of total assets and the balance would be given to charity. He says that he completed this in August when the will was prepared. The document signed by the Respondent is dated August 9, 1995, but is not witnessed by the individuals who signed as witnesses of the will. He showed it to the manager after the complaint was made by Fulcher. As there is not other direct evidence on the documents prepared, one cannot say that it was prepared to put the Respondent in a better light after the complaint was made.

The Respondent admits to making a mistake in forgetting the significant investment. He agrees that "an implication of impropriety" is "warranted". He apologizes, but advances the idea that he had no malicious intent. He didn't need the money, was well off, and wouldn't jeopardize his position to get someone else's money. Finally, he advised that if he had wanted assets from his customer he could have simply transferred it to himself by using one of the blank Application for Investment forms signed by her that he held in his file. He advised a will is a stupid way to take money as it can be cancelled.

The Commission having considered the Respondent's explanations notes in the Respondent's favour that no money was lost in this matter and that there has been no other complaints made about his performance. The Commission is highly skeptical of the Respondent's's forgetfulness, but in the circumstances finds that it is not necessary to determine whether the course of conduct was a deliberate one motivated for his own benefit. The admitted conduct is found by the Commission to be extremely negligent. The Respondent only reluctantly acknowledged that the impropriety could be implied. To us it was direct and obvious. A fiduciary advisor has no justification for continuing to act in a situation where he might become the recipient of a benefit not in line with normal

expected compensation for properly qualified service. The fiduciary advisor is obligated to ensure that the individual he is acting for has independent advice before extending any benefit. Failure to do so establishes that the advisor does not meet the basic requirements of a registrant.

Almost equally as damming as negligence in carrying out advisor functions is the giving of advice in areas where you have insufficient knowledge. In this particular situation, the Respondent was doing a good service in getting his customer to attend to making a will. In no circumstances should he have done anything more than facilitate getting it done by a lawyer. Once he started to meddle in the matter of drafting he showed that he did not have the correct concept of his function as a registrant. We think a period of suspension will allow time to ensure that these points have been comprehended.

The Commission therefore orders that for a period of one year commencing from August 21, 1996 that the Respondent be suspended and that he pay the Commission staff costs with respect to this hearing, which we set at $1,787.50, including disbursements.

This situation raises an ancillary matter on which the Commission should comment. The circumstances which came out in evidence raise questions about supervision which should be inquired into by staff of the Commission. Does the supervisor inquire into whether registrants employed provide services for which they might not be qualified, such as income tax, wills and estate planning, and what conflict of interest provisions are in place. One also questions the practice of a salesperson retaining blank client executed account forms on file when the salesperson is not qualified for discretionary management. These files are supposed to be reviewed frequently by a supervisor. This may have been a unique circumstance, but some effort should be made to confirm that it is the case.

DATED at the City of Regina, in the Province of Saskatchewan, this 9th day of October, 1996.

Marcel de la Gorgendière, Q.C.
Chairman