

In the Matter of
Blanche Berenzweig,
Respondent

FINAL DECISION
DHA Case No. OCI-17-0037
OCI Case No. 17-C42002

FINAL DECISION

The Administrative Law Judge (ALJ) issued a Proposed Decision in this case dated February 8, 2018. The Proposed Decision of the ALJ was served on the parties on February 8, 2018 with an opportunity for submitting written objections and response. Respondent submitted her Objections to the Proposed Decision on February 23, 2018. Petitioner, the Office of Commissioner of Insurance (OCI), submitted a Response to Respondent's Objections on March 5, 2018. I have reviewed and considered Respondent's Objections and Petitioner's Response to Respondent's Objections.

I conclude that the ALJ's Proposed Decision is supported by the record and required by state law. I hereby adopt the ALJ's Proposed Decision, including all Proposed Findings of Fact and Proposed Conclusions of Law, which is attached to this Final Decision.

NOTICE OF APPEAL INFORMATION

(Notice of rights for rehearing and judicial review,
the times allowed for each, and the identification
of the party to be named as respondent)

The following notice is served on you as part of the Final Decision:

1. Rehearing.

Any person aggrieved by this Final Decision may petition for a rehearing within 20 days after the service of the decision, as provided in s. 227.49, Wis. Stat. A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

A petition for rehearing must be filed with the Commissioner of Insurance at the address below.

2. Judicial Review.

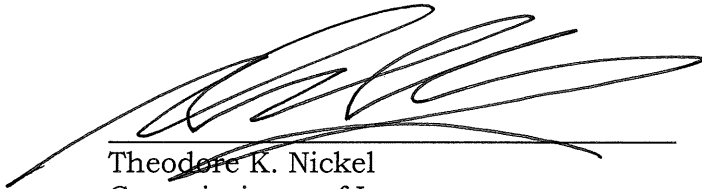
Any person aggrieved by this Final Decision has a right to petition for judicial review of the decision as provided in s. 227.53, Wis. Stat. The petition must be filed in circuit court within 30 days after service of this Final Decision if there has been no petition for rehearing, or within 30 days after service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

A petition for judicial review must be served on, and name as the Respondent:

Commissioner of Insurance
P. O. Box 7873
Madison, Wisconsin 53707-7873

A copy of the relevant statutory provisions is attached.

Dated at Madison, Wisconsin, this 4th day of June 2018.



Theodore K. Nickel
Commissioner of Insurance

WISCONSIN STATUTES

At all times material, the relevant parts of s. 227.49, Wis. Stat., read as follows:

227.49 PETITIONS FOR REHEARING IN CONTESTED CASES. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. . . .

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. . . .

At all times material, the relevant part of s. 227.52, Wis. Stat., read as follows:

227.52 JUDICIAL REVIEW; DECISIONS REVIEWABLE. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter. . . .

At all times material, the relevant parts of s. 227.53, Wis. Stat., read as follows:

227.53 PARTIES AND PROCEEDINGS FOR REVIEW. (1)

Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. . . .

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

. . .

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. . . .

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. . . .

(d) The agency . . . and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. . . .



Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Blanche Berenzweig,
Respondent

DHA Case No. OCI-17-0037
OCI Case No. 17-C42002

PROPOSED DECISION

The PARTIES to this proceeding are:

Blanche Berenzweig, by
Attorney Michael Ganzer
Terschan, Steinle, Hodan & Ganzer, S.C.
309 North Water Street, Suite 215
Milwaukee, WI 53202

Office of the Commissioner of Insurance, by
Attorney Lauren Van Buren
125 South Webster Street
Second Floor
Madison, WI 53703

PRELIMINARY RECITALS

On September 18, 2017, the Office of the Commissioner of Insurance (OCI) issued a Notice of Hearing alleging that Blanche Berenzweig (Respondent) engaged in violations relating to her insurance agent license. The matter was referred to the Division of Hearings and Appeals for hearing and Administrative Law Judge Rachel Pings was appointed to preside over a Class 2 hearing. On October 2, 2017, Respondent timely filed an Answer. On October 23, 2017, Judge Pings conducted a telephone prehearing conference with the parties, at which time witness and exhibit list deadlines were established and a hearing was scheduled.

Pursuant to due notice, hearing was held on November 28 and 29, 2017 in Madison, Wisconsin. OCI appeared by Attorney Lauren Van Buren, who offered OCI Exhibits 1 through 12 and 14 through 16. Respondent appeared by Attorney Michael Ganzer, who offered Respondent Exhibits 101 through 110. All exhibits were made part of the record at the close of the hearing. The hearing was audio recorded and transcribed by Gramann Reporting. The parties provided written closing arguments, the last of which was received on January 12, 2018.

APPLICABLE LAW

Wis. Stat. § 628.34 **Unfair marketing practices.**

...

(12) RULES DEFINING UNFAIR TRADE PRACTICES. The commissioner may define specific unfair trade practices by rule, after a finding that they are misleading, deceptive, unfairly discriminatory, provide an unfair inducement, or restrain competition unreasonably.

Wis. Admin. Code Ins § 6.60 **Prohibited business practices.**

(1) In this section:

- (a) "Affiliate" means any person who is under the control of or acts at the direction of the agent.
- (b) "Agent" means an intermediary as defined in s. 628.02, Stats.
- (c) "Customer" means a natural person with whom the agent or affiliate is doing or has, within 3 years from the act or transaction regulated by this section, done an insurance business as that term is defined in s. 618.02 (2) and (3), Stats.
- (d) "Personal financial transaction" includes a transaction in which the agent or an affiliate of the agent borrows money, property or securities from a customer; loans money, property or securities to a customer; acts as custodian for money, property or securities of a customer; obtains power of attorney over money, property or securities of a customer; obtains a guarantee of any loan from a customer; shares directly or indirectly in profits or losses with a customer; or without furnishing equal consideration obtains title to or ownership of any property of a customer. In this section "personal financial transaction" does not include transactions conducted by an agent or affiliate in the normal course of doing an insurance business such as holding an insurance policy for analysis or servicing, or receiving an insurance premium from a customer provided the transaction is properly recorded on the records of the agent or affiliate as required by s. Ins 6.61, including the name of the insurer for whom the premium was received, and the agent or affiliate immediately issues a written receipt to the customer for the policy or premium.

(2) The following are deemed to be unfair trade practices by an agent or affiliate pursuant to s. 628.34 (12), Stats., without limiting those terms to the practices specified in this section:

- (a) Effecting or attempting to effect a personal financial transaction with a customer unless any of the following apply:
 - 1. The customer is a relative of the agent or affiliate as defined in s. 13.62 (12g), Stats.
 - 2. The customer is a person residing in the household of the agent or affiliate at the time of the transaction.
 - 3. The transaction is a bona fide arm's length business transaction where the customer is either qualified to understand and assess the transaction or has been advised or represented in the transaction by a qualified individual who is not the agent or affiliate.
 - 4. The agent or affiliate is acting lawfully pursuant to authority given under federal or state law governing the securities or investment advisory business.
 - (b) Knowingly being listed as a beneficiary of any proceeds of a life insurance policy or annuity issued to a customer unless the agent or affiliate has an insurable interest in the life of the customer.
- ...

(5) A violation of sub. (2) is a cause for denial of an agent license application under s. 628.04 (1), Stats., and a cause for agent license suspension, revocation or limitation under s. 628.10 (2) (b), Stats.

Wis. Stat. § 618.02 **Definitions.** For the purposes of this chapter, unless the context indicates otherwise:

- (1) "Directly procured insurance" means insurance procured under s. 618.42.
- (2) "Doing an insurance business" includes:
 - (a) Soliciting, making, or proposing to make an insurance contract;
 - (b) Taking or receiving an application for insurance;
 - (c) Collecting or receiving, in full or in part, an insurance premium;
 - (d) Issuing or delivering an insurance policy except as a messenger not employed by the insurer or by an insurance agent or broker;
 - (e) Inspecting risks, setting rates, disseminating information or advising on risk management in connection with the solicitation, negotiating, procuring or effectuation of insurance coverage;
 - (f) Investigating, settling, adjusting or litigating claims;
 - (g) In any way representing or assisting any person to do an insurance business or to procure insurance; and
 - (h) Any other act generally regarded as doing an insurance business.
- (3) "Doing an insurance business" does not include:
 - (a) Acting as an attorney for a client; and
 - (b) Acting as a full-time salaried employee of an insured in the capacity of an insurance buyer or manager.

Wis. Stat. § 628.10 **Termination of license.**

...
(2) REVOCATION, SUSPENSION, AND LIMITATION OF LICENSES.

...
(b) *For other reasons.* ...the commissioner may revoke, suspend, or limit in whole or in part the license of any intermediary or individual navigator if the commissioner finds that the licensee is unqualified as an intermediary or navigator, is not of good character, or has repeatedly or knowingly violated an insurance statute or rule or a valid order of the commissioner under s. 601.41 (4), or if the intermediary's or navigator's methods and practices in the conduct of business endanger, or financial resources are inadequate to safeguard, the legitimate interests of customers and the public. Nothing in this paragraph limits the authority of the commissioner to suspend summarily an intermediary's or individual navigator's license under s. 227.51 (3).

Wis. Stat. § 601.64 **Enforcement procedure.**

...
(3) FORFEITURES AND CIVIL PENALTIES.

(a) *Restitutory forfeiture.* Whoever violates an effective order issued under s. 601.41 (4), any insurance statute or rule, or s. 149.13, 2011 stats., shall forfeit to the state twice the amount of any profit gained from the violation, in addition to any other forfeiture or penalty imposed.

...
(c) *Forfeiture for violation of statute or rule.* Whoever violates an insurance statute or rule or s. 149.13, 2011 stats., intentionally aids a person in violating an insurance statute or rule or s. 149.13, 2011 stats., or knowingly permits a person over whom he or she has authority to violate an insurance statute or rule or s. 149.13, 2011 stats., shall forfeit to the state not more than \$1,000 for each violation. If the statute or rule imposes a duty to make a report to the commissioner, each week of delay in complying with the duty is a new violation.

(d) *Procedure.* The commissioner may order any person to pay a forfeiture imposed under this subsection or s. 601.65, which shall be paid into the common school fund. If the order is issued without a hearing, the affected person may demand a hearing under s. 601.62 (3) (a). If the person fails to request a hearing, the order is conclusive as to the person's liability. The scope of review for forfeitures ordered is that specified under s. 227.57. The commissioner may cause action to be commenced to recover the forfeiture. Before an action is commenced, the commissioner may compromise the forfeiture.

Wis. Stat. § 601.41 **General duties and powers.**

(1) **DUTIES.** The commissioner shall administer and enforce chs. 600 to 655 and ss. 59.52 (11) (c), 66.0137 (4) and (4m), 100.203, and 120.13 (2) (b) to (g) and shall act as promptly as possible under the circumstances on all matters placed before the commissioner.

(2) **POWERS.** The commissioner shall have all powers specifically granted to the commissioner, or reasonably implied in order to enable the commissioner to perform the duties imposed by sub. (1).

(4) **ENFORCEMENT PROCEEDINGS.**

(a) The commissioner shall issue such prohibitory, mandatory, and other orders as are necessary to secure compliance with the law...

Wis. Admin. Code § Ins 6.59 **Licensing of individuals as agents...**

(5) **COMPETENCE AND TRUSTWORTHINESS.** The following criteria may be used in assessing trustworthiness and competence:

(d) *Other criteria.* Other criteria which the commissioner considers evidence of untrustworthiness or incompetence, including but not limited to:

2. Violating any insurance laws, or violating any regulation, subpoena or order of the insurance commissioner or of another state's insurance commissioner.

4. Improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business.

7. Having admitted or been found to have committed any insurance unfair trade practice or fraud.

8. Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere.

ISSUES

Did Respondent violate Wisconsin insurance law by: (1) obtaining a power of attorney over LeRoy Ern's property and finances within three years of conducting insurance business as his agent, and/or (2) knowingly being listed as the beneficiary of Mr. Ern's annuity contracts? If so, do the violations constitute sufficient grounds to revoke her intermediary license, order remedial remedies, and impose monetary penalties?

FINDINGS OF FACT

1. Since 1983 and at all material times, Blanche Berenzweig ("Respondent") was a resident and licensed insurance intermediary in Wisconsin. (OCI Ex. 1 p. 1) Her license is therefore subject to the jurisdiction and control of the Wisconsin Commissioner of Insurance.
2. From 1993 to 2009, Respondent provided the following services to LeRoy Ern as his insurance agent with respect to two annuity contracts:
 - a. Lincoln Benefit annuity contract no. 01F0079636 ("Lincoln Benefit annuity")
 - i. In 1993, Respondent and another agent helped Ern apply for and purchase a Lincoln Benefit annuity with \$99,637.17 in total initial deposits. Ern named his estate as the beneficiary. (OCI Exs. 2 and 3 at ¶¶ 6 and 7; OCI Ex. 8 at pp. 2-37) The agents of record were listed as Respondent and Leah Morley (50% each). (OCI Ex. 8 at pp. 99-103) On March 7, 1996, the agent of record was changed to Susan Pytynia (100%) because Respondent left the financial institution where she had been working when she helped initiate the Lincoln Benefit annuity. (OCI Ex. 8 at pp. 102-103)
 - ii. On November 6, 2008, Ern asked Respondent to help him with the Lincoln Benefit annuity. Respondent and Ern together called Lincoln Benefit to request written documentation of the annuity's current interest rate and balance, which Lincoln Benefit provided on November 20, 2008. (OCI Exs. 2 and 3 at ¶¶ 10 and 11; OCI Ex. 8 at pp. 154-155; 11/28/17 Tr. at pp. 148-150) The policy value was \$213,982.95 at that time.
 - iii. On November 10, 2009, Respondent faxed documentation to Lincoln Benefit to make herself the agent of record for the Lincoln Benefit annuity. (OCI Exs. 2 and 3 at ¶ 12; OCI Ex. 8 at p. 95) She explained to Lincoln Benefit that she had "tried repeatedly to become the agent on this contract" and provided a copy of her insurance license. (OCI Ex. 6 at pp. 9-13)
 - b. Integrity annuity contract no. 2100108593 ("Integrity annuity")
 - i. On May 24, 2006, Respondent was the agent who helped Ern apply for and purchase an Integrity annuity with an initial premium of \$166,404.92.

Ern named his sister, Carole Carter, as the beneficiary. (OCI Exs. 2 and 3 at ¶¶ 8 and 9; OCI Ex. 7 at pp. 4-7)

3. From 2007 to 2009, Respondent learned from Ern that he wanted to make her the beneficiary of his estate. (11/29/17 Tr. at pp. 9, 22). She initially protested but eventually acquiesced, claiming she did not know there was anything wrong with it. (11/29/17 Tr. at p. 22)
4. On November 20, 2009, Ern executed a Last Will and Testament, Durable Power of Attorney (POA) for Property and Finances, and Durable Power of Attorney for Health Care, naming Respondent as his personal representative, beneficiary, attorney-in-fact, and primary health care agent. (OCI Exs. 2 and 3 at ¶¶ 13, 16-18) Susan Drewitz was the attorney who drafted, witnessed, and notarized Ern's estate planning documents. Respondent shared office space with Attorney Drewitz, referred Ern to her, and accompanied him to his meeting with her. (OCI Exs. 2 and 3 at ¶¶ 14, 15) Respondent signed the estate planning documents acknowledging her immediately-effective duties as his power of attorney. (OCI Exs. 2 and 3 at ¶ 20)
5. On May 14 and 17, 2010, respectively, Respondent continued to assist Ern as his insurance agent by changing the beneficiary of his annuities (to herself):
 - a. For the Integrity annuity, she presented the form to Ern, completed it in her handwriting, and submitted it to Integrity to be processed. (OCI Ex. 7 at pp. 80-81; 11/29/17 Tr. at pp. 25-26)
 - b. For the Lincoln Benefit annuity, she requested the change of beneficiary form, presented it to Ern, completed the form in her handwriting, and submitted it to Lincoln Benefit to be processed. (OCI Ex. 8 at pp. 108-109; 11/29/17 Tr. at pp. 24-25)
6. On April 26, 2010, when Ern was 86-years-old, he paid an additional \$315,041.62 to the Lincoln Benefit contract, increasing its value to \$544,629.96. (OCI Ex. 8 at pp. 41-45)
7. From 1993 until 2013, the only interactions Ern had with Respondent were at her place of business. (11/29/17 Tr. at p. 29)
8. In October 2013, Ern was in a motor vehicle accident that totaled his vehicle. (11/29/17 Tr. at pp. 30-31) This prompted Respondent to visit his personal residence for the first time out of concern for how he would meet his daily needs without transportation. (11/29/17 Tr. at p. 33) The poor and potentially unsafe state of his residence caused further concern, and on November 1, 2013, Respondent as Ern's POA hired Stowell Associates to manage his living situation, daily needs, and medical needs. (OCI Ex. 14 at p. 69; 11/28/17 Tr. at pp. 37-38, 65; Tr. 11/29/17 at pp. 32-33) In the years that followed, Respondent continued as his POA to arrange for his care and was apparently the only person to do so.
9. On April 13, 2016, Ern died at the age of 92. (OCI Exs. 2 and 3 at ¶ 28)

10. Soon after Ern's death, Respondent made death claims on the Integrity and Lincoln Benefit annuities and received the following proceeds as beneficiary:
 - a. On May 27, 2016, Integrity issued her a check in the amount of \$276,648.66. (OCI Ex. 6 at p. 31)
 - b. On June 15, 2016, Lincoln Benefits issued her a check in the amount of \$734,467.65. (OCI Ex. 6 at p. 18)
11. A third-party complained to OCI about Respondent's transactions with Ern and OCI therefore began an investigation to determine if Respondent's conduct violated insurance law. On August 17, 2017, OCI filed a parallel action in circuit court against Respondent for an order restraining her from spending or disposing of the annuity proceeds and requiring her to freeze the funds pending resolution of this action. (OCI Ex. 6 at pp. 1-8; 11/29/17 Tr. at p. 72) In response, Respondent agreed to those terms and has maintained the funds in approved accounts. (11/29/17 Tr. at pp. 72-73)

PROPOSED CONCLUSIONS OF LAW

12. OCI bears the burden to prove by a preponderance of the evidence that Respondent engaged in insurance law violations as alleged. Wis. Admin. Code § Ins 5.39(3)(b).
13. When Respondent became Ern's power of attorney, she engaged in a prohibited unfair trade practice by effecting a personal financial transaction with a customer in violation of Wis. Stat. § 628.34(12) and Wis. Admin. Code Ins § 6.60(2)(a).
14. When Respondent was knowingly listed as the beneficiary of Ern's Lincoln Benefit and Integrity annuities, she engaged in two prohibited unfair trade practices in violation of Wis. Stat. § 628.34(12) and Wis. Admin. Code Ins § 6.60(2)(b).
15. Pursuant to Wis. Stat. § 601.64(3)(c), whoever violates an insurance law shall forfeit to the state up to \$1,000 for each violation. The seriousness of each of Respondent's three violations warrants the maximum possible forfeiture, for a total of \$3,000.
16. Pursuant to Wis. Stat. § 601.41(4)(a), it is necessary and appropriate for the Commissioner to issue the following orders to enforce and secure compliance with the law:
 - a. Respondent shall not receive, retain, or benefit in any way from the proceeds of the Integrity Life or Lincoln Benefit annuities;
 - b. Respondent shall immediately repay \$276,648.66 to insurer Integrity Life;
 - c. Respondent shall immediately repay \$734,467.65 to insurer Lincoln Benefit;
 - d. Insurer Integrity Life shall immediately void the May 12, 2010 change of beneficiary form for annuity contract no. 2100108593; and
 - e. Insurer Lincoln Benefit shall immediately void the May 14, 2010 change of beneficiary form for annuity contract no. 01F0079636;

17. Pursuant to Wis. Stat. § 628.10(2)(b) and Wis. Admin. Code Ins § 6.60(5), permanent revocation of Respondent's intermediary license is warranted because she violated Ins § 6.60(2) and lacks good character, repeatedly and knowingly violated insurance statutes and rules, and her methods and practices in the conduct of insurance business endanger the legitimate interests of customers and the public. Furthermore, she lacks sufficient competency and trustworthiness for licensure as set forth in Wis. Admin. Code §§ Ins 6.59(5)(d)2 (violating insurance laws and regulations), Ins 6.59(5)(d)4 (improperly withholding, misappropriating or converting any monies or properties received in the course of doing insurance business), Ins 6.59(5)(d)7 (having been found to have committed insurance unfair trade practices and fraud), and Ins 6.59(5)(d)8 (using fraudulent, coercive, and dishonest practices, and demonstrating incompetence, untrustworthiness and financial irresponsibility in the conduct of business).
18. The Division of Hearings and Appeals has authority to issue this proposed decision and order pursuant to Wis. Admin. Code § Ins 5.43 and Wis. Stats. § 227.47.

OPINION

The parties offer widely divergent views of the nature of Respondent's relationship with Leroy Ern, a reclusive man who died at the age of 92 with no connection to family or friends. Respondent characterizes herself as his trusted confidante and only friend, who magnanimously took on his care as he aged when no one else could or would, such that she is deserving of any money he wanted to reward her with. OCI considers her an unethical insurance agent who took advantage of her position of trust with a lonely old man so she could benefit from his sizeable estate when he died. Indeed, the stakes were high – she received over \$1 million as the beneficiary of his two annuities.

It is important at the outset to define what this case is and is not. This case is limited to consideration of whether Respondent violated insurance law and, if so, what actions the Commissioner should take as a result. OCI contends that Respondent engaged in three instances of unfair trade practices involving Ern. One was becoming his POA, and two were knowingly being listed as the beneficiary of his annuities. If proven by a preponderance of the evidence, either of these violations can result in an order revoking her insurance agent license, requiring forfeitures, and necessitating remedial orders by the Commissioner. This case is not about who deserves or is entitled to Ern's estate. His family has apparently initiated an action in probate court to contest his will (of which she was also named beneficiary). That court will make those determinations.

The facts are largely undisputed,¹ including that Respondent became Ern's POA and was knowingly named the beneficiary of his annuities. She contends, however, that the applicable insurance law is nuanced regarding prohibited business practices between agents and their customers and several exceptions apply here. First, she maintains that Ern was not her customer under the law because she had not done insurance business for him within three years of becoming his POA and being named as beneficiary of his annuities. Ins § 6.60(1)(c). Second, she

¹ OCI offered 34 paragraphs of factual allegations. (OCI Ex. 2) Respondent answered with admissions to nearly all of them. (OCI Ex. 3)

claims the POA transaction itself was one of bona fide arm's length, and therefore permissible. Ins § 6.60(2)(a)3. Finally, she claims she had an insurable interest in Ern's life such that she was permitted to be named a beneficiary on his annuities. Ins § 6.60(2)(b). For the reasons that follow, I find that Respondent's conduct was not made permissible by any of these stated exceptions to the law.

I. *Ern was Respondent's insurance customer when she became his POA and beneficiary of his annuities.*

The offending transactions occurred in November 2009 and in May 2010, respectively, when Respondent became Ern's POA and the beneficiary of his annuities. If Respondent did insurance business for Ern at the time or in the preceding three years, then he was her customer and she was prohibited from the transactions.

The record established by a preponderance of the evidence that Ern was Respondent's customer in the three years preceding her becoming his POA on November 20, 2009. On November 6, 2008, he came to her financial planning office for help regarding his interest rate on the Lincoln Benefits contract. He suspected that Lincoln Benefits was inappropriately lowering the interest rate on the annuity she had helped him purchase back in 1993. She assisted him anew in 2008 by reviewing the contract, concluding the insurer could not lower the interest rate beyond 5%, and calling the insurer with Ern present to relay this and request written documentation of the correct interest rate and his current balance. This incident was documented in writing by the insurer, Lincoln Benefits, and Respondent herself testified in detail about it. (OCI Ex. 8 at pp. 154-155; 11/28/17 Tr. at pp. 148-150, 153) Respondent was not the insurance agent of record on the contract at the time because, although she initiated it with Ern many years prior, she had since left the bank where she worked when it was initiated. Nevertheless, Ern did not seek out help from the bank or agent of record. Rather, he went to Respondent's new financial planning and insurance agent office and sought her expertise. And indeed, that is what he got. She inspected the contract and advised him (and Lincoln Benefits) of what it required regarding the interest rate in connection with the continued effectuation of his coverage. This constituted doing insurance business under the law. Wis. Stat. §§ 618.02(2)(e) and (h). She also engaged in insurance business under the law on November 10, 2009, when she filed documentation with Lincoln Benefits to change the agent of record on the annuity back to herself. She provided a copy of her insurance agent license as support for the transaction and made clear that Ern was her insurance customer. There would have been no reason to provide her insurance agent license had she not been working in her capacity as an agent. That conduct therefore also constituted insurance business. Wis. Stat. §§ 618.02(2)(e) and (h).

These same insurance business incidences support a finding that Ern was also Respondent's customer when she became the beneficiary of his annuities in May 2010. Furthermore, she was explicitly conducting insurance business for him during the offending beneficiary transactions themselves. She was the insurance agent who requested the change of beneficiary forms, presented them to Ern, used her own handwriting to complete the forms, and submitted them to Integrity and Lincoln Benefits to be processed.

Having established that Ern was Respondent's customer at the time of the POA and annuity beneficiary transactions, the transactions themselves determine whether other exceptions may have applied to render them legal. Examining the nature of the transactions *when they occurred* in 2009 and 2010 is necessary; not with the benefit of hindsight, knowing now how events unfolded in the years that followed. The offending transactions occurred in 2009 and 2010, years before Ern became infirm and Respondent started actively managing his financial affairs. The record established that in 2009 and 2010, Ern, though advanced in age, was lucid and able to competently make financial decisions. The nature of Respondent and Ern's relationship at the time was an emerging platonic friendship. Respondent's 2009 and 2010 calendar records indicate that their contact consisted exclusively of him visiting her at her office a bit more than one time per month, on average. (Resp. Ex. 107 at p. 1)

II. *When Respondent became Ern's power of attorney, it was not a bona fide arm's length transaction.*

On November 20, 2009, Respondent became Ern's POA² when he signed numerous estate planning documents prepared by the attorney Respondent connected him with. Because Ern was Respondent's insurance customer, this was prohibited unless it was a bona fide arm's length transaction. Ins § 6.60(2)(a)3. "Bona fide" is defined as a transaction made in good faith, without fraud or deceit, and sincere or genuine. *Black's Law Dictionary*, 7th Ed., p. 168 (1999). "Arm's length" means dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; notably, it does not involve confidential or fiduciary duties. *Id.* at p. 103. Although the record shows that Respondent and Ern were not related or on particularly close terms at the time he executed his estate planning documents, the POA was nevertheless not a bona fide arm's length transaction.

Respondent provided no reasoning for her contention that the POA transaction was one of bona fide arm's length other than to point out that Ern knew what he was doing and was adamant about her being named. But Ern was not the agent subject to ethical and legal obligations as they related to her customers; the Respondent was. She therefore should not have agreed to become his POA. It gave full discretion to manage her customer's financial affairs. This presented a conflict of interest given her role as his insurance agent because it authorized her to purchase insurance on his behalf, thereby tempting her to exercise her powers to her own benefit based on commissions or other considerations. Making matters worse, other estate planning transactions that Ern executed at the exact same time as the POA made Respondent the sole beneficiary of his entire estate and gave her control of his health care decisions. She would therefore have been motivated as his POA to spend as little of his money as possible (for his care or otherwise) because every penny she spent was one less penny she would receive upon his death. The parties did not have equal bargaining power and the transaction was not truly one of bona fide arm's length. Therefore, it does not matter whether Ern was qualified to understand and assess the transaction or had been independently advised about the transaction by a qualified person. It was a prohibited transaction in the first place.

² The POA became effective the day it was signed. Resp. Ex. 102 at p. 6.

III. *When Respondent became the beneficiary of Ern's annuities, she did not have an insurable interest in his life.*

I turn next to the propriety of the annuity beneficiary transactions. There were two separate transactions; they occurred on May 14 and 17, 2010, respectively, when she was knowingly named as beneficiary of the Integrity and Lincoln Benefit annuities. She contends this was permissible because she had an insurable interest in his life. An insurable interest is a legal interest in another person's life. *Black's Law Dictionary*, 7th Ed., p. 816 (1999). If a policy lacks an insurable interest as its basis, it will usually be unenforceable as a form of wagering. *Id.* Insurable interest exists "only if the beneficiary has a reasonable expectation of advantage from the continuance of the insured's life, or would lose by his death." See *OCI Reply Br.* at p. 16 citing the treatise *Appleman on Insurance Law and Practice*, Vol. 2, Ch. 45, Insurable Interest, s. 762. The courts have described insurable interest as follows:

"But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy." *Albrent v. Spencer*, 275 Wis. 127, 138, 81 N.W.2d 555, 561 (1957) citing *Warnock v. Davis*, 104 U.S. 775, 780, 26 L. Ed. 924 (1881).

The record does not support Respondent's claimed insurable interest in Ern's life. She concedes that she was not related by blood and had no pecuniary interest in the continuation of his life, but she clings to the term "affinity" in *Albrent* to claim her relationship with Ern should nevertheless serve as evidence of an insurable interest. In other words, she argues she had a legally protected interest in Ern's continued life because it provided her with his friendship. I disagree. Ern knew Respondent first and foremost as his insurance agent; that is where his trust of her stemmed from. Although he may have begun to consider her his friend, it was not reciprocal, especially in 2010 when the beneficiary transactions occurred. Respondent had her own personal life, many close friends (several of whom testified at the hearing), children, and a husband with whom she lived on a part-time basis in another state. At the time Ern named Respondent the beneficiary of his sizable annuities (which is the only time that matters), the depth of their relationship was thin and entirely one-sided. Ern visited her exclusively at her place of business where they discussed topics that interested him. She had no idea that he was living in utter squalor despite his impressive bank account. Had he one day simply stopped coming to her office in 2010 prior to her becoming the beneficiary of his annuities, it would have caused no meaningful loss to her whatsoever. Nor did she have anything to gain – pecuniary or otherwise – from the continuation of his life. She only stood to gain from his death. Knowingly being named as the beneficiary of his annuities therefore violated the law.

IV. *Penalties and remedial action must be ordered to remedy Respondent's violations of insurance law.*

Having concluded that Respondent committed three distinct violations of insurance law, I now consider what remedy is necessary as a result. Respondent engaged in unfair trade practices, which OCI regulates because they are inherently misleading, deceptive, and unfairly discriminatory, and they can provide an unfair inducement or restrain competition unreasonably. Wis. Stat. § 628.34(12). The insurance industry is highly regulated to protect consumers since agents have special access to their finances, personal information, and ultimately their trust. Prohibiting unfair trade practices serves to protect against the inherent conflict of interest when an agent serves as both insurance salesperson and a customer's financial decision-maker or beneficiary. Respondent sidestepped these important ethical cornerstones when she became Ern's POA for financial decisions and the beneficiary of his annuities. In 2009 and 2010, she took advantage of an isolated, elderly customer. By becoming Ern's POA, she put herself in a position to entirely manage his money. Of particular concern, this included the power to buy or sell annuities and insurance on Ern's behalf. She further exploited Ern's trust and isolation by knowingly being named as the beneficiary of his annuities when she had no insurable interest in his life. She profited illegally by more than \$1 million.

She knew what she was doing was wrong. As an example of her culpability, the record contains an audio recording of a telephone call she made to Integrity just two weeks after Ern died. She informed the Integrity representative of his death and made clear that no new transactions should occur on the contract so it would remain liquid and not be "tied up." (OCI Ex. 7 audio CD; 11/29/17 Tr. at pp. 60-70) She conspicuously left out that she was the beneficiary. More than once, she identified herself to the Integrity representative as the agent on the contract, once she identified herself as Ern's POA, and at no time did she mention that she was also the beneficiary, despite multiple references to the beneficiaries by Integrity's representative. She used her authority as the insurance agent and POA to ensure her rights as a beneficiary would not be hindered. This shows exactly why it is such a problem for an insurance agent to mix being an insurance agent with being a customer's POA or beneficiary.

OCI requests various forms of relief to address the law violations. Wisconsin Statutes Chapter 601³ charges the Commissioner with administering insurance law and gives him strong enforcement powers. Courts have recognized the breadth of those powers, especially pursuant to Wis. Stat. § 601.41(4), noting there is no limitation on the nature of orders the Commissioner is authorized to issue so long as they are necessary to ensure compliance with the law. *Homeward Bound Servs., Inc. v. Office of Ins. Com'r*, 2006 WI App 208, ¶ 33, 296 Wis. 2d 481, 724 N.W.2d 380. These powers include ordering money to be returned, because allowing someone to make a profit on money illegally-received deprives the lawful beneficiaries of it. *Id.* at ¶ 19. OCI points out that Respondent must be ordered to expunge and refund the annuity proceeds directly to the insurers rather than to Ern's estate, since she could still profit for those same funds under the latter circumstances depending on the outcome of the probate action.

³ I agree with OCI that Chapter 601 governs the order for remedy in this case, as opposed to Wis. Stat. §§ 628.347(5) and (6) as cited by Respondent. The latter provision is not applicable here. It applies to compliance and remedial measures specific to violations of suitability in annuity transactions, which were not alleged or found here.

OCI requests that the Commissioner exercise his authority to enforce insurance law in the following ways:

- (1) Permanently revoke Respondent's insurance agent license;
- (2) Bar Respondent from retaining funds from the annuities and require her to return them to the annuity insurers;
- (3) Void the May 2010 annuity change of beneficiary forms so that the funds are issued to the beneficiary who was named prior to the changes;⁴
- (4) Require Respondent to forfeit \$3,000 to the state; and
- (5) Require Respondent to forfeit \$2,022,232.62 (twice the profit gains) to the state.

Respondent counters that none of this is necessary and fails to account for mitigating circumstances. She believes she dutifully fulfilled her role as POA by managing Ern's care in his final years when no one from his family stepped in to do so. The record generally corroborated this. She believes as a result that she is more deserving of his estate than the children of his now-deceased siblings. She urges that OCI cannot substitute its will for that of Mr. Ern, who deemed her worthy of his entire estate (by naming her beneficiary of the annuities and his will) and intentionally excluded his family. She further points out that she enjoys a reputation for good character in the community and her previous insurance agent record is unblemished. She requests dismissal of the action outright but contends that if violations of the law are found, then she should forfeit at most \$3,000. She contends that license revocation is neither warranted nor necessary, as she is 70-years-old and has surrendered her insurance agent license in anticipation of retirement.

As explained at the outset, this case is not about what Ern may have wanted. Nor is it about maligning Ern's extended family. Perhaps the probate court will consider such things, but they have no bearing on the Commissioner's authority to enforce insurance law. Respondent's post-violation conduct is not mitigating and not even particularly relevant. It should come as a surprise to no one that she maintained a relationship with Ern after he put her in charge of his finances, named her the beneficiary of his annuities worth more than \$1 million, and named her the beneficiary of his sizable estate. It was in her best financial interest to stay the course and maintain his trust, lest he cut her out. If she truly enjoyed his intermittent companionship in the meantime, that was likely an unintended bonus. In any event, the Commissioner cannot allow insurance agents to benefit or profit from violations of the insurance law and that is exactly what happened here. It is within his statutory power, and is in fact his statutory obligation, to remedy it by issuing remedial orders.

⁴ In the case of the Integrity annuity, that would be the issue of Ern's now-deceased sister Carole Carter per stirpes. For the Lincoln Benefit annuity, it would be Ern's estate distributed per stirpes.

It was not lawful for the Respondent to be named as her customer's POA or beneficiary of her customer's annuities. These are very serious violations involving a vulnerable elderly insurance customer. To not impose stiff sanctions as a result would unduly depreciate the seriousness of the violations and fail to effectively send a message to Respondent and others in the insurance industry that such conduct will not be tolerated. The Commissioner has the obligation and authority to correct the law violations by ordering Respondent to return all annuity proceeds to the insurers immediately, and ordering the insurers, in turn, to void the unlawful beneficiary change forms they received from Respondent in May 2010. This puts the annuities in the place they would have been but for the insurance law violations. Under these circumstances, Respondent will expunge any profit she illegally-obtained and therefore she cannot also be required to forfeit twice any of the profit to the state. She can and should, however, be made to forfeit \$3,000 as a penalty for the violations, and she must lose her insurance agent license. Although she has apparently decided to retire from the insurance industry, the Commissioner must revoke her license permanently to preclude her from changing her mind in the future. Anything less would fail to adequately convey and impress upon her the seriousness of the law violations.

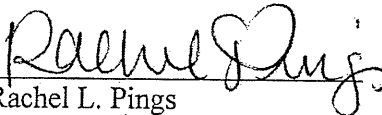
PROPOSED ORDER

NOW THEREFORE, based on the findings of fact and conclusions of law, it is recommended that:

- (1) Respondent's insurance agent license should be revoked permanently;
- (2) Respondent should forfeit \$3,000 to the State of Wisconsin no later than 30 days from the date of the final order;
- (3) Respondent should not receive, retain, or benefit in any way from the proceeds of the Integrity Life or Lincoln Benefit annuities;
- (4) Respondent should immediately repay \$276,648.66 to insurer Integrity Life;
- (5) Respondent should immediately repay \$734,467.65 to insurer Lincoln Benefit;
- (6) Insurer Integrity Life should immediately void the May 12, 2010 change of beneficiary form for annuity contract no. 2100108593; and
- (7) Insurer Lincoln Benefit should immediately void the May 14, 2010 change of beneficiary form for annuity contract no. 01F0079636.

Dated at Madison, Wisconsin on February 8, 2018.

STATE OF WISCONSIN
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By: 
Rachel L. Pings
Administrative Law Judge