

CONCERNING

An application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Nelson Standards Committee

BETWEEN

TX
Applicant

AND

NE
Practitioner

The names and indentifying details of the parties in this decision have been changed.

DECISION

Background

[1] The Standards Committee declined to uphold a complaint made by TX against a lawyer, NE (the Practitioner). TX sought a review of the Standards Committee's decision and she is referred to as the Applicant throughout.

[2] The Applicant's complaint relates to the conduct of the Practitioner when she acted for the Applicant's mother, TY, through TY's attorney, ND (the Attorney). TY was elderly at the time and issues arose as to whether she had capacity to manage her own affairs. The Applicant complained to the New Zealand Law Society that the Practitioner had acted inappropriately when she acted as the lawyer for TY on the instructions of TY's Attorney.

[3] At the heart of the complaint was the Applicant's belief that the Attorney was not acting in the interests of TY when he was exercising his powers under the Enduring Power of Attorney that he held, and that he continued to act after the power had been

validly revoked. The Applicant was of the view that the Practitioner acted inappropriately in following the instructions of the Attorney in a manner which she considered not to be in the interests of her mother and after he had been replaced as Attorney.

[4] A key question underlying these matters was whether, at the relevant times, TY was competent to give the instructions she gave and take the steps that she in fact took, which included revoking the Power of Attorney she had given to ND. If she was not competent to revoke her Power of Attorney then ND continued to be authorised to act.

[5] There is a fundamental divide in the views of the parties involved, insofar as the Applicant is of the view that her mother was at all relevant times competent and that steps taken by other parties which were premised on a lack of competence were ill-motivated. On the other hand the Practitioner states that there were genuine concerns that TY lacked the competence to make important decisions and therefore the Practitioner's actions were proper and justifiable on this basis.

The Complaint

[6] The Applicant complained to the Law Society in September 2011. It is not necessary for the purposes of this review to go over all aspects of the complaint; however it centred on an allegation that in December 2009 TY wished to change her Power of Attorney to remove ND (who is her son-in-law) and to move the management of her affairs to Public Trust. It is alleged that the Practitioner ignored the wishes of TY and did not cooperate in moving the affairs of TY to Public Trust. It was further alleged that the Practitioner continued to act on the instruction of ND when she ought to have known ND was acting without authority.

[7] It was also alleged that when the matter was brought before the Court on a 'without notice' application the Practitioner failed to properly inform the Court of all relevant facts (including the existence of certain documents signed by TY) when urgent directions were sought.

[8] The Applicant also complained about certain letters being sent to her in respect of taking belongings from TY's house, and also in respect of requiring her to vacate the house.

[9] A number of allegations were also made against ND that suggested that he was also being obstructive and not acting properly in accordance with the directions of TY. I note that ND is not the subject of the complaint and it would not be appropriate to

make any findings about his conduct. The only conduct under scrutiny is that of the Practitioner NE.

The Response

[10] In her response to the complaint the Practitioner provided a very detailed analysis which traversed the history of the matter. At the heart of the response was that in December 2009 concerns existed that TY's mental health had deteriorated such that she may have been unable to manage her affairs.

[11] In respect of the transfer of the affairs to Public Trust it was noted that discussions occurred with Public Trust which included the concern that TY did not have the capacity to make the decision to move her affairs. After those discussions the Practitioner states that she understood that Public Trust would not take any further steps without consulting her (the Practitioner) and she noted this in her letter to Public Trust of 15 December 2009, which was provided to the Committee. However it appears that without any consultation, Public Trust in late December 2009 / early January 2010 sought the transfer of TY's files to Public Trust on the basis of a handwritten authority. The Practitioner doubted that TY had the capacity to authorise the transfer of the files to Public Trust. In light of her concerns and the previous discussion (and the fact that the request arrived in the summer holiday period) no action was taken in January on the matter.

[12] The Practitioner outlined the steps that she took which, in her view, were appropriate to protect the interests of TY in the event that she was making inappropriate decisions due to the status of TY's capacity. This included ensuring that only ND as Attorney could withdraw funds from bank accounts and arranging for a medical assessment to determine the capacity of TY. The Practitioner explained that she had spoken to the Applicant on a number of occasions about the matter at around this time and emphasised the need for a medical assessment before it was safe to rely on, and act on the basis of, the decisions of TY.

[13] A medical report was obtained on 1 February 2010 and it indicated that TY lacked the capacity to make important decisions. On the basis of this report the Practitioner continued to act on the instructions of the Attorney, ND, who had been properly appointed and whose appointment had not been revoked (and was expressed not to be revoked in the event of incapacity of TY).

[14] It appears that around this time concerns were raised by family members about the conduct of the Applicant towards TY. The Practitioner wrote to the Applicant explaining her view of the position in relation to the Power of Attorney (advising that ND held the appropriate power) and referring to a suggestion that if property of TY's was to be removed by the Applicant, that this would not be appropriate.

[15] At this time it also appears that ND instructed the Practitioner not to provide documents to the Applicant because although the request appeared to be signed by TY, he did not consider that TY was competent to give that instruction. The Practitioner followed the direction of ND in that regard.

[16] The Practitioner also noted that in early May 2010 some confusion arose as to whether ND's Power of Attorney was effectively revoked by a revocation executed in early May and replaced by a power in favour of Public Trust. The Practitioner corresponded with Public Trust in this regard but it appears that matters were not resolved. Consequently a 'without notice' application was made to the Family Court for a direction on 17 May 2010. The Court ordered that the powers held by ND were valid and were to remain in place until any further order of the Court at a substantive hearing.

Applicant's Reply

[17] The Applicant provided a lengthy reply to the Practitioner's correspondence to the Standards Committee. The Applicant reiterated her view that ND had acted inappropriately and that the Practitioner ought not to have followed his instructions. She considered that the Practitioner ought to have sought instructions directly from TY. The Applicant raised several objections to the Practitioner's response, suggesting that it lacked detail and disagreeing with a number of the factual assertions or inferences made. She also provided her further views and information about the factual background to these matters.

[18] The main thrust of her reply was that the Practitioner ought not to have blindly followed the instructions of ND and ignored the requests of TY. The Applicant maintained that ND was acting inappropriately and against the interests of TY. She alleged that ND (who was not only TY's Attorney but also a trustee of the family trust and a beneficiary under the will) preferred his own interests and was motivated by greed. In support was a Deed of Forgiveness of Debt between TY and the TY Trust, showing the gifting of around \$150,000.00 by TY to the trust over a period of some five or six years.

[19] The Applicant also stated that the Practitioner ought not to have acted in the absence of a certificate in respect of the lack of competence of TY from a medical practitioner. She stated that the Practitioner owed duties not only to TY but also to her as a beneficiary under TY's will.

Standards Committee Decision

[20] The Standards Committee considered in some detail the complaint, as well as the response of the Practitioner and reply of the Applicant. The Committee concluded that in all of the circumstances it was appropriate that no further action be taken in response to the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act).

Application for Review

[21] The Applicant sought a review of the Standards Committee's decision. Her review application recast her complaint and alleged that the conduct of the Practitioner fell short of acceptable professional standards. While there was some overlap in the heads of the application for review the application included allegations that the Practitioner had;

- a. not acted competently;
- b. not acted independently;
- c. breached fiduciary duties;
- d. acted in breach of her duties to the Court;
- e. breached her duty of loyalty;
- f. charged an unreasonable fee;
- g. breached the duty of respect and courtesy;
- h. failed to provide information in respect of complaints;
- i. failed to assist TY in instructing another lawyer;
- j. failed to complete the retainer; and
- k. failed to respond to requests for information.

[22] For the purpose of this review to it is not necessary to consider each of the professional breaches that TX alleges, and I have therefore not traversed all of the matters touched on by the Committee. However, I have considered all information on the file, which comprises the material before the Standards Committee and also the application for review and the material provided with it.

[23] In support of the application for review the Applicant traversed in considerable detail the facts and provided further information in respect of her criticisms of the conduct of ND and the Practitioner. She also provided some handwritten notes from TY which showed tensions between TY and ND. She also sought an order that the “[TY] estate and Trust books be audited” and also more generally a “fair and just outcome”.

[24] In response to the application for review the Practitioner relied on her previous response to the Standards Committee. She objected to the reframing of the complaint and the inclusion of significant new information. She also observed that this Office is not able to order an audit of TY's affairs.

[25] The Practitioner also noted that there are issues relating to the validity of the will (or wills) of TY and those matters are before the High Court in [town in region of Marlborough]. She referred to the medical assessment of TZ which found TY lacked capacity, and which was accepted by the Court when it made its Order on the ‘without notice’ application.

[26] She also considered that she had acted properly and in reasonable reliance on the propriety of the instructions of ND and had no reason to suspect that he was not exercising his powers appropriately.

Analysis

[27] There will often be some doubt as to the competence of an elderly person and this review concerns the question of what is the appropriate course of conduct for a lawyer faced with such uncertainty. Regrettably conflict between family members in respect of the care and protection of elderly members of the family is not uncommon. At the root of this complaint is the conflict between ND and the Applicant. On the one hand the Applicant considers that ND was acting in his own interests and not using his powers of attorney in the interests of TY. She considers that the Practitioner assisted ND to wrongfully thwart the attempts to have him replaced by Public Trust to assume control of the affairs of TY. ND is not a party to the complaint and to this review and he has not been asked to comment. I make no comment or finding whatsoever in respect of the conduct of ND.

[28] The question is whether the Practitioner acted in accordance with acceptable professional standards. The conduct of the Practitioner is to be measured in light of the information that she had at the time. While documents have been provided to this Office which tend to suggest that there was conflict between TY and ND, these were

not provided to the Practitioner (even if they had been, it is not a sufficient basis for concluding that they would have warranted a change in approach by the Practitioner).

[29] The Practitioner was faced with the difficult problem of an elderly client whose capacity to make decisions in respect of her own property and welfare was in doubt. This is a situation which is faced by lawyers relatively commonly. It is also clear that there were allegations that family members were taking advantage of TY's age and infirmity.

[30] In the present case there existed a valid Power of Attorney to act in relation to property granted in favour of ND. It had been in place since 1997 and was expressed to remain in place and not be revoked in the event of incapacity. In light of the existence of that Power of Attorney it was entirely appropriate for the Practitioner to act on the instructions of ND until that power had been effectively revoked.

[31] The Practitioner had concerns about the validity of TY's legal capacity to transfer her files to Public Trust in late December 2009 (notice of which was received by the Practitioner in early January). Arrangements were underway for a medical assessment of TY and therefore the Practitioner concluded that it would be best to wait for the outcome of that assessment before actioning the request to transfer the matters to Public Trust; because if it transpired that TY lacked capacity then the request to transfer the matters to Public Trust would be invalid. That assessment was carried out on 1 February 2010 which was not an unreasonable length of time, and there is no evidence of any resulting prejudice or harm to TY. In my view it was reasonable for the Practitioner to defer taking further steps, until after the medical assessment. In the event the doctor concluded that TY was not mentally competent to manage her own affairs. This provides further support for the Practitioner's decision not to action the transfer of files to the Public Trust.

[32] The Applicant argued that the medical opinion in respect of capacity was not in the form of a certificate and therefore ought not to have been relied upon. This is not the case however, because the question of whether a person has the capacity to make decisions is one of law and fact and does not require any specific procedure or formal steps. The Applicant may be confusing this with a certificate in a prescribed form which is required under the Protection of Personal Property and Rights Act 1988 in some limited circumstances (in particular under s 98(3)) where significant decisions about personal welfare are to be made by an attorney). This does not apply here, and I can see no objection to the Practitioner relying on the medical assessment in the present case.

[33] Accordingly the Practitioner proceeded on the basis that she should follow the instructions of ND who held a valid Power of Attorney which endured in the event of TY's mental incapacity. It was appropriate for the Practitioner to have followed the instructions of ND. TY's lack of capacity meant that instructions that she herself issued (or conveyed via the Applicant) could not be relied upon, and it was entirely appropriate for the Practitioner to follow the instructions of ND in the circumstances. This included acting on ND's instruction to not transfer TY's files to Public Trust in accordance with its 3 May 2010 request. For the same reason it was also appropriate for the Practitioner not to act on the basis of the purported revocation of the Power of Attorney of ND.

[34] Shortly thereafter the Practitioner was informed that there was a medical opinion which indicated that TY did not lack capacity (this was an oral opinion only at that time - a formal certificate was signed on 10 May 2010). At this point the Practitioner was faced with two conflicting medical opinions about the capacity of TY. It appears that the Practitioner considered that the first opinion from a specialist geriatrician was to be preferred to that of the second which came from a general practitioner (who was not TY's usual G.P.).

[35] This gave rise to something of an impasse between the Practitioner and Public Trust, at which time it was resolved that a 'without notice' application should be made to the Family Court for a direction. That was done and the Order of the Court was issued on 17 May 2010. This was a very short time after the Practitioner became aware of the conflicting medical opinions.

[36] While it may have been open to the Practitioner to act on the basis of one or other of the medical opinions, that would have been at the risk of making the wrong decision. It is difficult to see on what basis the Practitioner could be criticised for having taken what appears to be a most reasonable step in seeking the guidance of the Court as to the appropriate course to take. In my view this was an entirely appropriate step to take, and no disciplinary issues arise.

[37] The Practitioner had provided to the Committee a copy of the affidavit of ND and of her own Memorandum which were before the Court. The Applicant suggested (in her complaint and on review) that the Practitioner misled the Court or in some other way did not adhere to her duty to the Court. I can see no evidence of that occurring and the evidence indicates that all relevant facts were placed before the Court. I also noted that the Practitioner's Memorandum to the Court proposed that independent counsel for TY would be appropriate. This reflects a responsible approach which was clearly focussed on protecting the interests of TY.

[38] The above concludes my analysis of the issues arising in the complaint. However, I will add some final comments about the processes of the Standards Committee. In this case the Committee determined to take no further action on the complaint, doing so pursuant to s 138(2) on the ground that *“in the course of the investigation of the complaint, it appear[ed] to the Standards Committee that, having regard to all the circumstances of the case, any further action [was] unnecessary or inappropriate.”* This indicates that the Committee had formed the view that no further enquiry was needed in order for it to reach a decision on the complaint. The review process includes consideration of whether it was appropriate for the Committee to elect to dispose of this complaint by resolving to take no further action under section 138, which meant that no further investigation would occur, the matter would not go to hearing, and the parties would not be invited to make any further submissions.

[39] In this case the Committee had before it substantial material from both the Applicant and the Practitioner. There was, in my view, a sufficient amount of information to have properly informed the Committee about the nature of the complaint and the position of the respective parties. Having considered that information, it is my view that the decision of the Committee to take no further action on the complaint was a reasonable one.

[40] The Applicant’s additional complaints about the conduct of ND are not of themselves relevant to this complaint. If ND was engaging in wrongdoing and the Practitioner was aware of this then it would not have been appropriate for her to assist ND in that. There is however no evidence that this was the case.

[41] While there is evidence that there was a deep division of opinion between family members as to how the affairs of TY should be managed and who should have managed them, there were also concerns about the Applicant’s own part in the family disputes. While the Applicant and ND each raised concerns about the conduct of the other, the Practitioner was faced with a situation where there was uncertainty as to the competence of TY who had appointed ND to act as her Attorney in the event she was incapacitated. Any disputes between various family members did not mean that the Practitioner ought not to have followed the instructions of ND. There is no evidence that the Practitioner had any information that ought to have put her on notice about whether it was appropriate to follow the instructions of ND at the relevant time.

[42] The Applicant made a number of specific allegations on review, many of which had not been raised earlier. It is the function of the New Zealand Law Society, through its Standards Committees, to decide conduct complaints in the first instance, and it is

the function of this Office to review their decisions. However, noting that a considerable number of the additional issues overlap with, or are incorporated in, the original complaints I can see no objection to adding some comment because in the light of the review I have undertaken I can find no proper basis for any finding of wrongdoing on the part of the Practitioner in respect of any matters. In my view the Practitioner acted competently throughout, and there is a sufficient volume of evidence from which to conclude the following:

- (a) There is no evidence that the Practitioner breached her duty of competence or duty of care to her client.
- (b) She acted with the proper degree of independence. There is no evidence of any conflicting interest or consideration in the way in which she acted.
- (c) There is no evidence that the Practitioner breached any of her fiduciary duties of loyalty, care, confidence or otherwise.
- (d) The Practitioner did not breach her duty to the Court or otherwise act inappropriately in the manner in which she brought the 'without notice' application before the Court.
- (e) There is no evidence that the Practitioner acted other than in the interests of TY.
- (f) There is no wrongdoing when a lawyer takes guidance from the Attorney as to the best interests of a person who is incapacitated. (It was proper in this case that the Practitioner sought that guidance from ND.)
- (g) There is no evidence that the fees charged were unreasonable.
- (h) There is no evidence that the Practitioner breached the duty of respect and courtesy to any party; her conduct appeared to be professional, restrained and courteous throughout.
- (i) There is no evidence that the Practitioner failed to provide information in respect of complaints to her client.
- (j) The Practitioner did not inappropriately fail to assist TY in instructing another lawyer. I have concluded that the Practitioner properly deferred transferring files to Public Trust and when uncertainty arose due to conflicting medical reports, she then acted correctly in seeking the direction of the Court, and acting on the basis of that direction.

- (k) The Practitioner did not fail to complete the retainer. She acted properly on the instructions of ND and there is no suggestion that the work that he required of her was not properly completed.
- (l) The Practitioner did not improperly fail to respond to requests for information. The Practitioner's refusal to provide information to the Applicant (under the signature of TY) was due to doubts that those requests were properly made, and in this she also followed the directions of ND. This was the appropriate approach to take.

[43] I have found no professional failings on the part of the Practitioner. I am satisfied that the decision of the Committee was one which was reasonable and open to it and should be confirmed.

Decision

Pursuant to 211(1)(a) of the Lawyers and Conveyancers Act, the decision of the Standards Committee is confirmed.

DATED this 18th day of February 2013

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

TX as the Applicant
NE as the Respondent
The Nelson Standards Committee
The New Zealand Law Society