LCRO 07/2011

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Waikato Bay of Plenty Standards Committee 1
BETWEEN	**DX** Of [North Island] Applicant
AND	**WC** Of [North Island] Respondent

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

DECISION

[1] An application was made by DX (the Applicant) for the review of a Standards Committee decision on his complaint against Law Practitioner, Ms WC (the Practitioner) which declined to uphold his complaints against her.

Background

[2] The Practitioner had acted for the Applicant since around 2004 in a number of matters, including matrimonial matters when the Applicant separated from his former wife, who I shall refer to as R. By agreement the three daughters remained living with the Applicant.

[3] After R moved to Australia in 2007 the Applicant stated that she had been working towards getting the girls to come and live with her. There were some disagreements and also concerns that the girls might be kept in Australia should they visit following a planned holiday. Following an urgent application by the Applicant the Court granted a Consent Interim Parenting Order in March 2008 as travel had been

booked. This application was assisted by the appointment of Counsel for the Children who reported that all three girls were happy living with their father but keen to see their mother. The Order was extended in March 2009 to provide a contact regime.

[4] In March 2009 R applied to vary the Parenting Order so that she could have the day to day care of the girls who would be relocated to Australia. This application was opposed by the Applicant and a notice of defence was filed in April 2009. The main reason for opposing R's application was the Applicant's concern that R suffered from a personality disorder that affected her ability to assume responsibility of the girls in a parental role. He did not want the girls separated. There were sound reasons for his wish that the children should remain together, which I need not mention, but he was resolved that all should remain together wherever that should be. He gave clear instructions to the Practitioner that he did not wish the children to be separated but also that he did not believe it was in their best interests to live with their mother.

[5] A judicial conference was held to progress the matter and gave rise to consideration of obtaining a section 133 psychologists report. It was proposed that the psychologist's brief should include an assessment of the parents in the hope that this would provide support for the Applicant's concerns about R's personality disorder. Orders were then made for the partiers to file their affidavits. The Judge would not agree to extending the parameters of the section 133 report as sought in the way that had been proposed.

[6] Meanwhile it appears that R was in regular telephone contact with the girls from Australia trying to persuade them to live with her. The Applicant found this to be extremely disruptive, and saw this as a deliberate manipulative tactic on her part to persuade the daughters. While attributing her conduct to her personality disorder, he experienced these actions as an undermining of his authority, the domestic routine and all of the stable and sensible things he was trying to put in place for his children. He eventually reached a point where he felt he could no longer provide a stable home for his children due to R's disruptions through her telephone calls and other methods of manipulation.

[7] The psychologist's report was provided in October 2009 which stated that all three girls expressed a wish to go to live in Australia with their mother. At that point the Applicant gave up his efforts to keep the girls with him, and made arrangements for the girls to go.

[8] Throughout this time the Applicant was represented by the Practitioner whose attendances spanned a period from end 2008 until end 2009. He was left with a sizeable legal bill. He then filed complaints against the Practitioner for what he considered to have been inadequate advocacy.

Complaints

[9] The nub of the Applicant's complaint was that the strategy the Practitioner was pursuing was no match for the actions being taken by R to persuade the girls to go to Australia. He felt that the Practitioner ought to have explained to him that he did not have a good chance of success, and that he ought to have been advised to abandon his efforts before incurring legal fees.

[10] His letter of complaint also explained that he had believed that his case would eventually get before a Family Court Judge who would evaluate the matter, adding that he felt confident that he had a strong case to keep the girls in NZ, and felt confident that the Practitioner would ensure the case was handled effectively and that he would achieve his desired outcome. In his view this turned out not to be the case.

[11] He also raised concerns about the level of fees incurred, feeling particularly aggrieved at having been charged around $10,000 for the preparation of an affidavit that was in the event never debated in court. He was reluctant in these circumstances to pay the outstanding sum of around $18,000.

[12] The Practitioner's responses set out in detail the background of the matter, including that the Applicant had been advised as early as November 2008 that the matter would not come before the Court for at least 12 months. The Practitioner also set out the steps she had taken throughout in advising the Applicant as to his options as matters unfolded.

Standards Committee Decision

[13] The Standards Committee had perceived the complaint to be two-fold, one relating to conduct and the other relating to reasonableness of fees. A response was sought from the Practitioner who denied any wrongdoing. Her explanation to the Standards Committee included steps she had taken on the Applicant's instructions, and options that they discussed at various stages. She informed the Committee that the options and strategies were under constant review.

[14] The Standards Committee also arranged for a Costs Assessor to review the Practitioner's fees, this report concluding that the Practitioner's charges were fair and

reasonable and that the work undertaken was appropriate. This report was provided to the parties.

[15] In its decision, the Standards Committee noted that the Applicant believed that the strategy adopted by the Practitioner in relation to his attempt to keep the three children in New Zealand was fundamentally flawed, and that he believed or had been led to believe, that he had every chance of succeeding in his quest to keep them in New Zealand. The Committee understood that the fact that it did not turn out as he wished appeared to have formed the basis for his complaint, but made no further comment on these matters.

[16] Turning its attention to the Costs Assessor's report, the Committee noted that the Costs Assessor did not see any unsatisfactory conduct in relation to the size of the bill. The Committee said it could see no reason to criticise the Practitioner, and accordingly resolved to take no further action pursuant to Section 138(2) of the Lawyers and Conveyancers Act.

Review application

[17] The Applicant sought a review of that decision on the basis that the Standards Committee appeared to have missed the point of his complaint. He said he was not disputing the Practitioner's hourly rate, but rather that he believed the Practitioner had adopted a "*prolonged, ineffective and unnecessarily expensive strategies*". He believed that the whole situation could have been sorted out far more effectively on sound reality-based advice. He explained that his grievance concerned the approach adopted by the Practitioner which lacked, in his view, a strategic overview that one would have expected of an experienced Family Court lawyer, and that she had ignored his pleas for frugality.

[18] A review hearing was held on 10 August 2011 attended by the Practitioner and also the Applicant with a support person.

[19] At the hearing the Applicant expressed in greater detail the basis of his grievance. He wanted to keep R's personality disorder at the centre of his complaint. He considered this to be a dominating factor, and ought to have dominated the Practitioner's assessment and the strategy in opposing R's application.

[20] In essence, he considered that the Practitioner had a duty to keep him "in reality", that she should have told him that he couldn't win against someone with a personality disorder, and the Practitioner had not factored R's personality disorder into her

strategy. He said that in the end their approach which was based on reason and logic was bound to fail in the light of the manipulative strategies employed by R. In essence, the Applicant was aggrieved because he felt that the Practitioner had failed to present the reality of the situation to him, rather having embarked on a pathway which she ought to have known could not succeed.

[21] At the review hearing the Applicant reiterated the essential concerns that he had with the Practitioner. Some discussion surrounded the costs associated with the affidavit which he considered to have been a waste of time, money and effort. Despite this I accept that his grievance concerns the way that the Practitioner managed the file rather than fees.

Considerations

[22] Although the Applicant referred to R's "personality disorder" I note that there was no formal diagnosis, he having reached this view on the basis of his knowledge of her and her conduct. Without a formal diagnosis there would have been difficulties in establishing a ground for defending her application for the Parenting Order on that basis. Notwithstanding this, the concerns the Applicant expressed about R indicated that there was a sound basis for his concerns and for the purposes of this review, I do not doubt that he held genuine concerns and as a medical practitioner was in a position to make relevant observations.

[23] There is clear evidence that the Applicant instructed the Practitioner to oppose R's application and he does not dispute this. The Family Court had set a timetable for the Applicant to file his affidavit in response to R's application, and again this was done prior to the section 133 Report. The Practitioner had explained to the Applicant the importance of the affidavit in establishing the main ground work for his opposition to R's application. The Practitioner and the Applicant set to work on a lengthy and detailed affidavit which was eventually filed.

[24] The Applicant had held the belief that once the matters and the evidence was put in front of a Judge, that common-sense and rationale would win out, and that R's application would be declined by the court. Also in his favour at the time (prior to the s. 133 Report) was the fact that Counsel for the Children had also reported that the two older girls wanting to remain with the Applicant.

[25] Difficulties arose when R's disruptions to their family life became more than the Applicant could reasonably tolerate. It appears that much of this occurred from between April 2009 until the Section 133 Psychologist's report in October of that year.

As noted the outcome of the Report was that the girls all stated their wish to go and live in Australia with their mother. This was devastating to the Applicant. At that stage he elected to discontinue with opposing R's application, and made arrangements for the girls to go to Australia.

[26] The Applicant contended that the Practitioner ought to have known that R's personality disorder would undermine every effort he could have made to oppose her application. He felt that he had incurred fees for work that was essentially a waste of time and of no benefit to the case, particularly in relation to the affidavit. He felt aggrieved that the Practitioner had embarked on a strategy which, in the Applicant's view, could not have succeeded on any count due to R's personality disorder.

[27] His grievances against the Practitioner were not about what she had done, but what she had failed to do. These omissions were described in two ways. Firstly he contended that the Practitioner's strategy, namely approaching the matter on the basis of being reasonable, was flawed in the light of the conduct by R. He considered that there should have been a wholly different strategy adopted to deal with R's manipulations, in particular to be more confrontational. He perceived the Practitioner's failure was in terms of steps she took and advice she gave, which did not factor in R's personality disorder.

[28] Second, he considered that the Practitioner had the responsibility of keeping him "in reality", and had failed in this regard. He did not deny that the Practitioner had set out various options along the way, or that there had been discussion of these options. However, he described his level of distress during these times to have been so great that it affected his ability to see matters objectively, or impaired his ability to have fully comprehended the information being given. He considered that it was the Practitioner's responsibility to have ensured that he had a full and comprehensive appreciation of the situation, in particular concerning the low likelihood of success in opposing R's efforts to persuade the girls to live with her, and that she ought to have guided him into abandoning his opposition.

[29] He described himself as being vulnerable in those circumstances, and placing a very great reliance on the Practitioner's objective analysis and her advice to deal with the situation as it really was. In his view the Practitioner had not factored into her strategy that R was manipulative and disruptive and would eventually win the children over to wanting to be with her in Australia.

[30] The Applicant wanted R's personality disorder to be the focus in my consideration of the Practitioner's services. In various ways the Applicant expressed the view that there was no way that he could ever have succeeded against a manipulating person such as he saw R to be, that the Practitioner ought to have signalled this at a much earlier stage, and had she done so he would not have incurred the significant fees that remain outstanding.

[31] In response the Practitioner denied any wrongdoing. She reiterated that all of the options had been outlined to the Applicant and she referred to correspondence and dates at which these advices and discussions had taken place. She considered that she had kept the Applicant informed throughout. She referred to the complexity of issues, and considered that she had assessed the strengths of the Applicant's claim and his defence, and kept him informed as matters progressed and changed. She said she had also made it clear to the Applicant throughout that there could be no certainty as to the outcome.

[32] She said that the Applicant was aware that the situation was constantly under review, and on several occasions had reiterated that all matters needed to be reassessed after the Section 133 psychologist's report. After that report was obtained, there were further discussions between the Practitioner and the Applicant about the options for the way forward. The Practitioner did not consider the Applicant's case to be 'hopeless' as a result of the section 133 Report, noting that there was information in both the report and the Applicant's affidavit which supported the concerns raised by the Applicant about the fitness of R to parent the girls.

[33] The Practitioner noted that towards the end of 2009 the Applicant was distressed by R's manipulative conduct to an extent that he felt he could no longer provide a safe home for his children, felt that he could not go on fighting R, and decided to simply give in.

[34] I have read all of the information on the file, which included the Standards Committee file and the information accumulated for the review. I have also heard from the parties directly.

[35] Although the Practitioner describes the complaints in terms of the Practitioner's omissions rather than actions, it also appears that from one perspective he had suggested that she ought to have embarked on a strategy to counteract the strategies employed by R. For example, he considered that R's tactics ought to have been met with a firmer approach so as to "expose her" weaknesses or areas of vulnerability.

[36] In terms of "omission", the Applicant is of the view that the Practitioner ought to have seen the inevitability of his efforts to oppose R's application because he could not win against the strategies employed by a person with a personality disorder. While not denying that options had been discussed, he believed that he had not fully comprehended the futility of his efforts due to the distress and emotional turmoil he was personally experiencing, and he felt that it was the Practitioner's duties to have made sure that he "got" the message.

[37] The complaints are made against the Practitioner in a disciplinary context. In order for any adverse finding to be there needs to be clear evidence of a failure on her part, whether that failing is by way of action or inaction. I have difficulty finding any such evidence.

[38] The issues were complex and the situation was not stable with the girls getting older and their changing needs and perceptions changing with time, making the outcome less than certain. Notwithstanding this, it could not be said that the Applicant's case was "hopeless" or could not have been successful. While this report noted the children's wish to be relocated to their mother, this would still have needed to be considered by the Court in terms of their children's "best interests", and factors such as R's fitness to parent the girls would undoubtedly have been raised at that time. The Applicant believed that rationality and common-sense would eventually win out in the Court, but the fact is that the matter never came into the Court for the reason that he decided to discontinue the fight following the Section 133 Report.

[39] That the Applicant eventually decided he could continue no longer is entirely understandable in the circumstances. However I have considerable difficulty in seeing that the Practitioner should be held responsible for this state of affairs.

[40] It is very clear from the evidence that the Applicant gave the clearest instructions to the Practitioner to oppose the R's application. He had good reasons for taking this position. There is also clear evidence that the Practitioner informed the Applicant that the entire matter needed to be reviewed after the Section 133 report was obtained.

[41] Prior to the Section 133 report the evidence showed that the two older children wished to remain with their father. That this subsequently changed was no doubt due to a number of factors, but I do not see that this related to any act or omission of the Practitioner. I also note that the oldest daughter was almost outside the Court's jurisdiction, and the weight given to the children's wishes increases as they get older.

[42] The Applicant's main fee-related grievance concerned the costs for his detailed affidavit which he considers was, in the event, a waste of time. This is a complaint made with the benefit of hindsight. I am obliged to consider these matters in terms of circumstances that existed at the time. The affidavit was prepared in response to an application made by R, and within a time-frame set by the Court for filing. Had the Applicant taken no steps to oppose R's application, it would simply have been granted. The evidence is abundantly clear that this was his intention.

[43] There is no basis for criticising the Practitioner for informing her client that the information and detailed provided in an affidavit could provide crucial information to the Court. Preparation of affidavits invariably requires a considerable amount of time and attention to detail, and not infrequently take up a large bulk of the legal costs.

[44] I now turn to the Applicant's perception that the Practitioner ought to have kept him "in reality". The essence of the complaint is that the Practitioner ought to have known that the strategies employed by R through her personality disorder meant that his defence could not possibly succeed, and that she had a responsibility of ensuring that he understood this and advise him accordingly.

[45] As a matter of legal process the Applicant had an opportunity to continue with his opposition and as noted his case could not have been considered hopeless as he has subsequently perceived it to be. It is not hard to understand the Applicant's dismay all three girls would change their minds and decide to relocate to Australia, but I cannot see that this situation arose from any act or omission of the Practitioner.

[46] The evidence also shows that the Practitioner's advice to the Applicant about options was restated on a number of occasions and at different times when the Applicant was faced with making various choices, including after the s.133 report was to hand. It is difficult to see what other options the Practitioner could have pursued in furtherance of the Applicant's objectives and instructions. That he finally elected to withdraw was essentially because he could no longer tolerate the situation caused by the interference and destabilising behaviour of R. This did not result from the Practitioner's failures.

[47] I can find no wrongdoing on the part of the Practitioner in this matter. I anticipate that the Applicant may believe that I have not understood his perspective. However, my view is that he has sought to place on the Practitioner a burden of responsibility that falls outside the normal range of professional duties by which lawyers are assessed in a professional capacity.

[48] I further explained these matters at the review hearing, at that time informing the Applicant that I could find no reason to alter the Standards Committee's finding. I do accept, however, that the Standards Committee did not provide useful reasons for its finding that the Practitioner's conduct did not fall short, but this review process has addressed any shortfall in that regard. For reasons stated, the review application is declined.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 17th day of August 2011

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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:

DX as the Applicant
WC as the Respondent
The Waikato Bay of Plenty Standards Committee 1
The New Zealand Law Society