LCRO 159/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Manawatu Standards Committee
BETWEEN	**AG** of X Applicant
AND	**ZT** of X Respondent

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

DECISION

[1] An application was made by Mr AG (the Applicant) for a review of a decision by the Manawatu Standards Committee declining to uphold his complaint against Ms ZT (the Practitioner). Although not stated, the decision appears to have been made pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) which confers on a Standards Committee a discretion to take no further action on a complaint if, in the course of the investigation of the complaint, it appears to the Committee that, having regard to all the circumstances of the case, further action is unnecessary or inappropriate.

Background

[2] The Practitioner had acted for the Applicant's wife (H) in the preparation of a will, which was signed on 30 October 2008. The wife died in September 2009, at which time the will came to light. H had appointed the Applicant as Trustee Executor and her estate is largely disposed of by two clauses; Clause 4 which provided for the

disposition of the house, and Clause 5 dealing with the residue. It was Clause 4 that gave rise to the Applicant's complaint. This reads as follows:

> "4. If my husband dies before me, I give the house and the land at [*address*] (which is presently jointly owned with my husband) or my principal place of residence at my death and the contents thereof (excluding my personal effects, jewellery and watches) to be divided equally per capita among my son, [N], and my stepchildren [A] and [K] living at my death. If my son, or one, or both, of my stepchildren die before me, leaving a child or children living at my death, then that child shall take, or those children shall take equally, the share that the parent would otherwise have taken under this Clause."

[3] The following residual clause provides that the residue of H's estate was to go to H's son, N.

[4] At the time that H signed her will the house that she and the Applicant owned was in fact not 'jointly owned' as stated in the will, but was held by them as tenants in common. The Practitioner had not obtained a search of the certificate of title to the property prior to preparing the will for H, and was unaware of this. The house had been purchased in 2002, the conveyance having been done by another law firm.

[5] As a result of the nature of the ownership, H's half share became part of the "residue" of her estate, and fell into the residual clause 5, and devolved to her son N.

[6] These circumstances left the Applicant to deal with the situation in accordance with such legal remedies as were available to him. He obtained separate legal advice and eventually an Agreement was reached between the Applicant and N, granting the Applicant a life interest. Although the evidence shows that the Applicant agreed to this outcome, he remains dissatisfied with the overall result for the reason that the Agreement fails to make any provision allowing him to deal with the property or substitute it for another property without N's prior consent, a consent which the Applicant is concerned will be withheld due to the resulting ill feelings which have arisen between them.

[7] The complaint subsequently made against the Practitioner to the New Zealand Law Society concerned a number of different matters, also including complaints about how the Practitioner had treated the Applicant when administering the estate. His particular concern was that the house had not been properly dealt with in H's will, or alternatively the will did not properly reflect H's views as to her intentions for the house should she die first.

[8] He alleged that the Practitioner had acted incompetently, mentioning the Practitioner's failure to

> *"investigate and confirm the ownership of the house (mere $15 fee for a Title search). Had she done so, she would have found that the house was listed as tenants in common and would/should have counseled* [sic] [*H] on the necessary changes to her Will.".*

[9] In reply the Practitioner described the complaints as bizarre and incorrect. She informed the Standards Committee that she had spent considerable time with the Applicant to explain the situation, and had referred him to another lawyer to get separate legal advice. Concerning the matter of the ownership of the house, the Practitioner wrote to the Committee that H had refused to have the title of the house checked even though she had been told it would cost only $10. The Practitioner said that H was determined to have the house mentioned in the will. If the house became H's property solely by reason of her surviving her husband, the Practitioner said that H intended that it was to be shared equally between her son and her two step children. The Practitioner informed the Standards Committee that the different concepts of ownership was clearly explained to H.

[10] The Standards Committee concluded that the Practitioner had prepared the will in accordance with her client's wishes. The Committee added that H *"must have understood the "tenant-in-common" concept, otherwise the provisions of her Will would not have provided for her one half share to go to her son."* The Committee decided to take no further action.

Review

[11] The Applicant sought a review of the decision because there were still unanswered questions, particularly regarding the Practitioner's failure to have verified the house ownership. He sought clarification about the Practitioner's responsibility in regard to the matter.

[12] A review hearing was held on 25 January 2011, attended by the Applicant and his daughter, and also by the Practitioner and her counsel.

[13] The Practitioner was further questioned on the issue of H's understanding of the ownership of the house and a lawyer's responsibility in preparing a will for a client. The Practitioner asserted that H understood the difference between joint ownership and that of tenants in common. The Practitioner asserted that H adamantly refused to pay out the $10 required for a search of the title to the property. The Practitioner submitted that she was required to follow the instructions of her client. The Practitioner stated that H had been determined to leave nothing to the Applicant.

Considerations

[14] I have considered the Standards Committee file and also the evidence of the parties at the review, as well as submissions made by the Practitioner's counsel.

[15] H consulted the Practitioner to make the will after she had been diagnosed with terminal cancer. The Applicant did not at that same time make a will. At that time H and the Applicant owned their home as tenants in common, each owning a half share.

[16] It is clear from both H's will and the Practitioner's evidence that H wanted particular provision to be made for the house. There is no dispute that H was mistaken as to her understanding of the nature of the ownership of the property. Clause 4 of her will indicates clearly that she believed the property to be jointly owned. The will was drafted on the basis of that belief, and not surprisingly there was no provision made in H's will for the house in the event she predeceased her husband. In these circumstances there would have been no need for her to consider providing for him in the event of her prior death. H's will reflects her belief that her will needed only to dispose of the main asset, the house, if she survived her husband.

[17] It is difficult to make sense of the Standards Committee's observation that that H *"must have understood the "tenant-in-common" concept, otherwise the provisions of her Will would not have provided for her one half share to go to her son."* The will did not make any provision for the house to go to N, and H was clearly confused as to the nature of the ownership, believing it to be jointly owned.

[18] It appears that the Standards Committee's decision was based on its acceptance that (a) the will was prepared in accordance with H's wishes, and (b) that H understood the differences between the legal concepts of ownership. On reflection this does not, in my view, indicate a sufficient consideration of the circumstances surrounding this matter. All that can be discerned from the will concerning H's wishes for the house was that it should be shared equally among the three children after her death in the event she survived her husband. Despite the Practitioner's assertion concerning H's wishes to exclude her husband entirely and producing a list of assets, there is nothing to clearly show what H's intentions would have been regarding the house had she been informed of the true nature of the ownership. A copy of what appears to be a will instructions document was produced by the Practitioner at the review. At the foot of the document the Practitioner had written *"joint?"* against her note recording that the house was to be shared equally between the children if H survived her husband, and

on a separate sheet was some writing said to be that of H which recorded in a very brief way some bare historical information.

[19] This complaint is not to be determined on whether H comprehended the differences between the legal concepts of ownership (although many lawyers would very likely doubt this). Nor can this complaint be determined on an unexamined assumption that the will was prepared in "accordance with H's wishes" when clearly H was mistaken in her belief as to the ownership of the property, and did not give any consideration to what should happen in the case that the house was not jointly owned. What H's wishes would have been had she understood the true nature of the ownership of the house is a matter of speculation.

[20] In my view the question that is central to this matter is whether the Practitioner's conduct met a standard of professionalism that was required and expected in the circumstances, in this case specifically relating to the scope of enquiry concerning the nature of ownership of the house.

[21] The Practitioner denied any failure to protect her clients' interests, implied that H did not hold positive feelings for the Applicant, and asserted that H had intended to leave nothing to the Applicant. I have discerned no evidence to support these submissions, noting that H's appointment of the Applicant as her sole trustee executor does not suggest that she held him at a distance. The Practitioner had not previously acted for H, and therefore had no prior knowledge of H's affairs or property matters. The evidence clearly shows that the Practitioner's drafting of H's will reflects an acceptance that the house was owned jointly, apparently at the advice of H. Undoubtedly the Practitioner would have been aware of the significant differences in the legal consequences arising from a property owned jointly on the one hand, or as tenants in common on the other.

[22] There is a considerable responsibility upon a lawyer to ensure that property or assets that an individual seeks to dispose of by a will are able to be disposed of as intended. Where property is jointly owned by two individuals, the survivor automatically becomes owner of the property on the death of the other. The result is that no part of that property falls into the estate of the person who dies and cannot therefore be disposed of by that person by their will. By comparison, where property is held as tenants in common, an owner is at liberty to dispose of his or her individual share by a will. H's mistaken belief resulted in her half share of the property falling into the residual estate and going to her son, N. The impact of this error has been significant for the Applicant

[23] I accept the Practitioner's evidence that H was unwilling to pay for a title search. However, I cannot agree that this absolves the Practitioner from accounting for her failure to have obtained sufficient information to enable proper and thorough advice to have been given to her client. It is not a complete answer for a lawyer to say they are following their client's instructions (as the Practitioner has asserted here) when those instructions prevent a full consideration of factors relevant to the retainer, and hence hinder protection of a client's interests or prevent implementation of the client's wishes. The matter of ownership of assets was vital to the proper disposition of H's estate and I have noted the question mark against the Practitioner's notes. In failing to have undertaken a basic enquiry that would have formed the basis of sound legal advice to H, the Practitioner was unable to act in her client's best interests concerning H's testamentary wishes. As an aside, my own enquiry has revealed that the cost of a title search to a law firm with access to Landonline was, at that time, $3.20. It is difficult to comprehend that such a small sum could not have been absorbed by the firm.

[24] It may fairly be assumed that a client consulting a lawyer to prepare a will intends that the will reflects their wishes, and that they obtain full and correct legal advice. If it is the case that a client is insistent that their lawyer takes short cuts in terms of basic research, then if the lawyer nevertheless proceeds to act in such circumstances (which must be considered risky in any event), then the lawyer could be expected to make the clearest record of the client's instructions and inform the client of the risks, and include a disclaimer, all of which make it abundantly clear that the risks of incomplete or incorrect advice lay with the client.

[25] This review concerns the responsibility of lawyers when preparing a will for a client. It is clear that H was mistaken as to ownership of the property, even though it had been purchased only four years earlier. There is nothing to explain why the property was registered in this way, but I must assume that this was a deliberate decision by the Applicant and H who at that time had been married for some 36 years. The Practitioner had no connection with that purchase. Whether or not H understood the concepts of ownership (as stated by the Standards Committee) is irrelevant. What is clear is that H did not know or understand the nature of ownership of the property she owned with her husband, and no steps were taken by the Practitioner to check this important factor, and advise her accordingly. The failure of understanding this led to H making a testamentary disposition that cannot be said with confidence to have reflected her intentions. There is nothing to indicate that H was given advice about, or required to give consideration to, the situation that would arise in the event she was wrong about the joint ownership.

[26] In the above circumstances I have no difficulty concluding that the Practitioner's conduct fell short of 'best practice'. There is, however, a further stage of consideration required, and that is whether the failure amounts to unsatisfactory conduct.

[27] Section 12 of the Act defines as "unsatisfactory conduct", conduct that *"falls short of a standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer"* (section 12(a)), or conduct *"that would be regarded by lawyers of good standing as being unacceptable."* (section 12(b)).

[28] The Practitioner's failure to have undertaken sufficient enquiry necessary to have fully advised her client (in this case failing to obtain a title search to confirm the ownership) is, in my view, conduct that meets the threshold of both Sections 12(a) and (b). Members of the public need to be able to have confidence in the professional services provided by lawyers, the sufficiency of which should not be informed solely by the instructions of a client. I am also of the view that lawyers of good standing would not support the Practitioner's actions in this case as reflecting proper professional practice. In my view there is a proper basis for a finding of unsatisfactory against the Practitioner in this case. Accordingly, I find that the Practitioner is guilty of unsatisfactory conduct.

Orders

[29] A finding of unsatisfactory conduct has been made. In light of this I must consider the appropriate penalty. By s 211(1)(b) of the Act I am able to make any orders that could have been made by a Standards Committee. The range of orders that may be made are set out in s 156(1) of the Act. Ordinarily in such a case it appropriate to impose a fine that reflects the degree of wrongdoing.

[30] By section 156(1)(i) of the Act a fine of up to $15 000 may be when unsatisfactory conduct is found. In allowing for a possible fine of $15 000 the legislature has indicated that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked. For a fine of that magnitude to be imposed it is clear that some serious wrongdoing must have occurred. It is unlikely that large fine would properly be imposed for conduct which was due to inadvertence or a failure to appreciate the proper legal position. That is not the case here, however, since I have found the Practitioner to have failed in her professional responsibility to the client.

[31] It is important to mark out the conduct as unacceptable and deter other practitioners from failing to pay due regard to their professional obligations in this

manner. The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* [2002] NZAR 573 as being:

- to punish the practitioner;
- as a deterrent to other practitioners; and
- to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[32] Where unsatisfactory conduct is found as a result of a breach of applicable rules (whether the Rules of Conduct and Client Care regulations or the Act) and a fine is appropriate, a fine of $1000 would be a proper starting place in the absence of other factors. While the overall circumstances justify the imposition of a fine, the Act confers a discretion concerning appropriate remedies.

[33] Reflecting on the overall circumstances of this case, however, and giving due consideration to the purposes of the Lawyers and Conveyancers Act which is stated to include maintaining the public confidence in the provision of legal services and protecting consumers of legal services, it seems appropriate to give consideration to a remedy which, instead, addresses in a practical way some issues arising from the Practitioner's wrongdoing. I gave given consideration to the fact that the Applicant has incurred legal costs as a result of the will being drafted in a way that required him to consult a lawyer for advice about the circumstances, and concerning his legal rights to make a claim against the estate. Notwithstanding the uncertainty as to how H would have prepared her will had she been properly informed, and taking into account that the Applicant may have incurred some legal costs in any event, it seems to me appropriate that the Practitioner should bear some of the cost incurred by the Applicant in seeking advice in relation to the will, and that she should make a contribution towards the Applicant's legal costs.

[34] Section 156(1)(d) provides for a compensation order to be made where it appears to the Standards Committee (and the LCRO by virtue of section 211(1)(b) of the Act) that a person has suffered loss by virtue of any act or omission of the practitioner. I need not be deterred by the fact that no application for compensation has been made by the Applicant, who perceives the appropriate remedy somewhat differently (I refer to this further below). It appears to me that the Applicant has suffered loss as a result of the Practitioner's failure to have properly advised her client.

[35] I consider that compensatory order would be appropriate in all of the circumstances, and that the Practitioner should be required to contribute the sum of $1,000 to the Applicant by way of compensation.

[36] I also consider it appropriate to make an order pursuant to section 156(1)(b) of the Act to mark out the conduct as unacceptable, and which justifies an order censuring the Practitioner. An order will be made accordingly.

Remedy sought by the Applicant

[37] For the sake of completion I note that the remedies the Applicant sought were to have the will overturned or to have a court interpret the will. Such powers lie only with a Court and neither the Standards Committee nor this office has the jurisdiction to assist the Applicant in this regard.

[38] In any event it is doubtful that any steps can now be taken to challenge the will since not only has probate been granted, but in addition the Applicant has entered into an Agreement that would appear to preclude any further steps being taken by him. Although the Applicant has expressed some dissatisfaction with the overall agreed outcome, he was independently represented in relation to that Agreement and his dissatisfaction with it cannot be directly attributed to the Practitioner.

Costs

[39] Where a finding has been made against a practitioner is it appropriate that a costs order in respect of the expense of conducting the review be made against them. In making this costs order I take into account the Costs Guidelines published by this office. Applying those guidelines I consider this to have been a relatively straightforward review and a costs order should also reflect the fact that the Practitioner had originally been invited to consent to a review on the papers, to which she was agreeable. The Practitioner is ordered to pay costs in the sum of $900.00.

Decision

The application for review is upheld pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 and the Standards Committee is reversed in accordance with the terms of this decision The Practitioner is found to be guilty of unsatisfactory conduct.

Orders

The following orders are made:

- The Practitioner is censured.
- The Practitioner is to pay the sum of $1,000 to the Applicant. This payment is to be made to the Applicant within 30 days of the date of this decision.
- The Practitioner is to pay $900.00 in respect of the costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 18th day of February 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:

AG as the Applicant
ZT as the Respondent
XX as the Respondent’s Counsel
The Manawatu Standards Committee
The New Zealand Law Society