

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the  
Canterbury-Westland  
Standards Committee 2

**BETWEEN**

**EJ**  
of Christchurch  
Applicant

**AND**

**VP**  
of Christchurch  
Respondent

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

**DECISION**

**Background**

- [1] The Respondent acted for EK, the Applicant's mother. In early 20XX, the Respondent prepared a will for her which was signed on X February 20XX.
- [2] EK took her own life on XX February 20XX.
- [3] Prior to making her last will, EK had made five other wills within the period from XX March 20XX to the date on which she made her last will.
- [4] Under her latest will, the Applicant and his brother EL, were appointed Executors and Trustees.
- [5] The Applicant and his brother did not co-operate with each other, and administration of the Estate proved contentious.

[6] On XX December 20XX, the Applicant authorised distribution of the Estate on the basis of a statement provided by the Applicant, and from the Trust Account records, it would seem that distribution was effected shortly thereafter.

[7] On 9 August 2010, the Applicant lodged a complaint with the Lawyers Complaints Service, which was expressed as being made *“to see if [the Applicant] was justified in what he was complaining about”*.

[8] After enquiring into the matters raised, the Standards Committee determined to take no further action on the complaint pursuant to s138(2) of the Lawyers and Conveyancers Act 2006. This section provides that a Standards Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[9] At the heart of the matters raised by the Applicant, was the treatment of the sum of \$10,000 which EK had made available to the Applicant prior to her death, to help him at a time when he was struggling to meet his mortgage commitments. The Applicant considers that the manner in which the Respondent treated this payment, had resulted in him being disadvantaged to the extent of \$16,446.67 and in his application for a review of the Standards Committee decision, he seeks payment of this amount.

## **Review**

[10] The application for review raises four distinct matters:

- (i) the payment of \$10,000;
- (ii) a conflict of interest;
- (iii) reimbursement of expenses to EL;
- (iv) refusal to allow the Applicant's daughter to attend meetings.

[11] In addition to the four matters referred to above, the Applicant raised a question as to the duties of a lawyer when taking will instructions. This was not one of the matters included in the complaint to the Complaints Service, but given that it was raised and discussed at the hearing, I will record my comments in respect thereof.

[12] The Applicant and his daughter attended a hearing in Christchurch on 21 July 2011. The Respondent was informed of the place and date of the hearing, but was not required to attend. He did not do so.

[13] Matters raised in the review application were addressed by the Standards Committee in some detail. Given that the result of this review is to confirm the Standards Committee decision, the Standards Committee decision and this review are to be considered as complementary to each other.

#### **The payment of \$10,000**

[14] Some nine months prior to EK's death, she had given the Applicant the sum of \$10,000 to assist him with difficulties he was having in meeting his mortgage payments.

[15] At the initial meeting with the Respondent and his brother following her death, the Applicant made it known that he had received this payment. Whether the payment was treated as a gift, or a loan, made a difference to the distributions to the beneficiaries.

[16] The will provided for the Estate to be divided equally between the Applicant, his brother, and another brother. Out of the part to be paid to the Applicant, the sum of \$10,000 was to be paid to his daughter. There was a similar provision in respect of the bequest to EL. By reason of the payment of the sum of \$10,000 by EK to the Applicant prior to her death, the value of her Estate was therefore reduced by that sum. Unless the payment was to be treated as a gift, it was necessary for that sum to be repaid to the Estate prior to division into three parts.

[17] The complaint against the Respondent is that he alerted EL to this issue, with the result that the payment was treated as a loan to be repaid to the Estate prior to distribution.

[18] At the hearing, the Applicant asserted that if his mother had intended that to occur, then she would have stated that in her will. It is my experience that in fact the converse would have been the case – namely, that unless the payment was identified by EK in her will as being a gift, then it was correct to treat the payment as a loan, and an asset in the Estate. This view is reinforced by the fact that it was EK's intention that her three children were to be treated equally.

[19] The issue for the Standards Committee and myself is, however, not necessarily which is the correct decision. Rather, it is whether or not the Respondent's conduct in advising that the payment should be treated as a loan, and then subsequently distributing the Estate, was such as would support a finding that his conduct in this regard constituted unsatisfactory conduct. Without such a finding, there can be no compensatory orders made.

[20] Section 12(a) of the Lawyers and Conveyancers Act provides that unsatisfactory conduct is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[21] When considering this aspect of the complaint, it is necessary to consider the events and the Applicant's conduct leading up to the distribution of the Estate.

[22] On X December 20XX, the Respondent wrote to the Applicant and EL enclosing an administration statement, showing the proposed distribution of the Estate. To avoid the Applicant having to pay the sum of \$10,000 to the Estate prior to distribution, the Respondent provided for payments of the same amount to each of his two siblings first, prior to division of the Estate into three equal parts. This was consistent with the manner in which he had dealt with the funds that EL had retained from the sale of the car owned by EK.

[23] At the foot of that letter, the Respondent provided an authority to distribute to be given by each of the Executors in accordance with the statement. EL provided his authority without reservation on XX December.

[24] On Friday XX December the Applicant attended at the Respondent's office, and advised that he did not agree with the proposed distribution. He requested that the sum of \$20,000 be retained pending discussion as to how the payment to him was to be treated. The authority to distribute was signed by him, but in his own handwriting he added the words *"except that you are to hold back \$20,000 being the two \$10,000 sums which were shown as going to [EM] and [EL]"*.

[25] The Respondent agreed to contact EL to discuss the matter with him. However, before he did that, a new authority from the Applicant was delivered to his office on Wednesday XX December 20XX. This authority was signed in the form as prepared by the Applicant with no requirement to retain the sum of \$20,000. Having received this new authority without further communication from the Applicant, it was reasonable for the Respondent to assume that the Applicant had either had a discussion with EL and agreed the figures, or alternatively that he had reconsidered the matter and decided to approve the figures as they stood.

[26] The Respondent then proceeded to distribute the Estate.

[27] The Applicant has advised that he was due to leave for the UK at the end of that week, and needed to have the funds to enable him to pay for expenses in relation to the trip. At the review hearing, he advised that he thought that he could subsequently

address the matter through the Complaints Service of the New Zealand Law Society to have the matter resolved in his favour.

[28] That is not an assumption which it was open to the Applicant to make. From the Respondent's perspective, he had received unconditional authorities from both of the Executors to distribute in accordance with the statement prepared by him, and he was entitled to rely on that. Having approved the distribution, it is not possible for the Applicant to subsequently assert that the Respondent's distribution in accordance with the authority could be considered to be unsatisfactory conduct.

[29] At the hearing, the Applicant also suggested that the Respondent was tardy in contacting EL to discuss the Applicant's request that the sum of \$20,000 be withheld from the distribution. Given that the unconditional authority was delivered to the Respondent's office on Wednesday, XX December, I do not accept that there was any unreasonable delay in the Respondent making contact with EL, and upon receipt of the unconditional authority to distribute, the Respondent was entitled to believe that the need to do so no longer existed.

#### **The conflict of interest**

[30] At an early stage during the administration of the Estate, the Applicant asked the Respondent whether he also acted for EL. The Applicant says that the Respondent somewhat hesitantly acknowledged that he did, and also acknowledged that this created a conflict of interest. The Respondent has confirmed that he did act for EL, but does not recall acknowledging that there was a conflict of interest.

[31] The conflict that the Applicant perceives, is that, as a result of the Respondent having previously acted for EL, the Respondent tending to favour EL whenever disputes arose between him and the Applicant.

[32] The Respondent was acting for the Applicant and his brother in their joint capacity as Executors and Trustees of EK's will. In that regard there was no conflict. The Respondent was obliged to act in accordance with joint instructions from the Executors.

[33] The Applicant and his brother had some disagreements with regard to distribution of EK's chattels. At that stage, the Respondent wrote to each of them to confirm verbal advice given to each of them, that if they were unable to agree, then they should each seek separate advice. The Applicant declined to do so, as did his brother.

[34] In his complaint, the Applicant states that whenever there was a disagreement between him and his brother, the Respondent would advise him to take independent advice. He then states that because of this, he was obliged to back down and agree. That was not necessarily an outcome which followed from the Respondent suggesting that he should take separate advice.

[35] What is clear, is that the Respondent presented to the Applicant (and to both parties) the option for them to seek independent advice. The fact that the Applicant chose not to do so is not something for which the Respondent can be held responsible.

[36] Rule 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 provides that “a lawyer must not act for more than one client on a matter in any circumstances where there is more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients”. The Respondent was acting for the Applicant and his brother together – he was not acting for one against the other. Such circumstances would only arise if either of them disagreed with the other, and in those circumstances, the Respondent suggested the need for both of them to take independent advice.

[37] I am satisfied that the actions of the Respondent were such that he has met all of his professional obligations to the Applicant in this regard.

### **Reimbursement of expenses**

[38] EL paid for some Estate expenses, such as the funeral service, headstone and lawn-mowing, for which he was to be reimbursed.

[39] The Applicant advises that he was telephoned by the Respondent at one stage, to advise that he was proposing to issue a cheque to EL to reimburse him for a number of expenses for which receipts had been provided. The Applicant asked the Respondent whether he had checked the receipts and the Respondent replied that he had not.

[40] The Applicant has stated in his complaint to the Complaints Service, that he then instructed the Respondent not to check them off, but that he would do that himself. The lists and receipts were provided to the Applicant under cover of a letter dated X May 20XX. The Applicant noted a number of discrepancies in the list, as a result of which the amount claimed by EL needed to be adjusted. The Applicant’s complaint is that contrary to his instructions, the Respondent had already paid the sum claimed to EL. He points to a letter dated XX May 20XX addressed to EL as evidence of this. In

that letter the Respondent advises EL of the errors, and the adjustments required to be made. He then states that *“taking into account the above ... for the gardening, you owe the Estate \$907.13.”*

[41] I have seen the Respondent’s Trust Account for the Estate. It does not show any payments to EL around this time, and it would seem that reimbursement of these expenses took place in conjunction with the final distribution in December 20XX.

[42] However, the Applicant is not satisfied that this was the case, and following the hearing, I wrote to the Respondent and requested an explanation of this from him. The Respondent has replied, advising that when he made the initial contact with the Applicant about the proposed payment, he expected to be making the payments to EL shortly thereafter. He says that he therefore mistakenly assumed that the payment had been made when writing to EL on XX May. He confirms that reimbursement of the expenses took place at the same time as distribution was made to EL on XX December 20XX.

[43] I am satisfied that this is a reasonable explanation and more importantly, I am satisfied that on the evidence provided, no payment was made to EL either before seeking approval from the Applicant or in contravention of his instructions.

#### **Refusal to allow EN to attend meetings**

[44] In September 20XX the Applicant had a stroke which resulted in the loss of his short-term memory and part of his sight. As he could not drive, his daughter EN drove him to the proposed meetings with the Respondent and EL. The Applicant asked if EN could attend the meeting with him to assist him to remember matters. As noted in the Applicant’s letter of complaint, it was EL who refused to allow her to attend the meetings.

[45] The Respondent advises that while he was aware that the Applicant had health issues, he was not aware that he had had a stroke or suffered from memory loss.

[46] However, the question of whether or not EN was permitted to attend meetings was not a matter for the Respondent to decide. It was EL who refused to allow her to attend, and without agreement from him the Respondent could not do otherwise.

#### **Testamentary capacity**

[47] This was not an issue that was raised in the complaint to the Complaints Service, and is consequently not a matter to be included in this review. However, it was raised

at the hearing by the Applicant, and it is appropriate that I should record my comments, particularly as the Respondent was not present.

[48] The question which the Applicant raises, is whether or not the Respondent should have been put on notice that EK may have lacked testamentary capacity by reason of the fact that she made six wills within the space of eleven months, and then committed suicide within approximately two weeks of making her last will.

[49] A lawyer's obligations when taking instructions for a will are the same, regardless of how often the testator wishes to make a new will, or amends an existing one. The frequency within which wills are made or amended, is not in itself an indicator of lack of testamentary capacity.

[50] The Applicant and EN both acknowledge that EK would not have presented with any indication of a lack of testamentary capacity. Indeed, they acknowledged that they themselves were unaware of any issues. Similarly, they acknowledge that she would not have given any indication of suicidal tendencies.

[51] Consequently, it cannot be expected that the Respondent would have had any suspicion that she may have lacked testamentary capacity. If the Applicant suspected that was the case, then he should have opposed the Grant of Probate of EK's last will through the Courts.

### **Conclusion**

[52] Having considered all of the matters raised by the Applicant, I can find no reason to interfere with the decision of the Standards Committee.

### **Decision**

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

**DATED** this 9<sup>th</sup> day of August 2011

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Owen Vaughan  
**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:

EJ as the Applicant  
VP as the Respondent  
The Canterbury-Westland Standards Committee 2  
The New Zealand Law Society