

CONCERNING

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

AND

CONCERNING

a determination of the Auckland Standards Committee 4 of the New Zealand Law Society

BETWEEN

Mr Falmouth
of Auckland
Applicant

AND

Mr Holyhead
of Auckland
Respondent

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

DECISION

[1] Ms Falmouth complained to the New Zealand Law Society in respect of the conduct of Mr Holyhead when he acted as counsel for the child for Ms Falmouth's son in proceedings relating to access by the child's father (amongst other things). The proceedings were conducted between 2004 and 2006. The complaint was made on 11 June 2009.

[2] The essence of the complaint was that the conduct of Mr Holyhead resulted in the child being placed in the care of XX where the child's father had access supervised by XX staff. It is the view of Ms Falmouth that this was very harmful to her child who was "humiliated" and "scared" and has resulted in a need for counselling. There was also a suggestion that the child had suffered bruising during the periods of access.

[3] Ms Falmouth is of the view that she was inappropriately pressured to consent to the access arrangement and that Mr Holyhead misrepresented matters to her regarding the access. In her view it was inappropriate for orders to be made for supervised access at XX. She considers that Mr Holyhead should be held accountable

for the distress her child has suffered, as well as the associated stress she has suffered.

[4] The complaint was considered by the Auckland Standards Committee 4. On 29 September 2009 it provided a determination of the matter. In that determination it resolved to take no further action. The reason for that determination was that on the facts before it the Committee considered that there was no grounds for disciplinary action applying the standards in force at the time the conduct complained of occurred (pursuant to s 351(1) of the Lawyers and Conveyancers Act 2006). Ms Falmouth seeks a review of that determination. Both parties have consented to this matter being considered on the papers and without a hearing in person.

Applicable standards

[5] As noted by the Committee this review concerns conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008 and conduct after that date. The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was generally considered to be conduct:

of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society NZLPDT*, 15 August 1990; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming could relate to conduct both in the capacity as a lawyer, and also as a private citizen. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

[6] For negligence to amount to a professional breach the standard found in s 106 and 112 of the Law Practitioners Act 1982 must be breached. That standard is that:

the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[7] It is against these standards that the conduct of Mr Holyhead must be considered.

Consideration

[8] Mr Holyhead was appointed as counsel for the child by the Court. Both Ms Falmouth and the father of the child were separately represented. As counsel for the child the role of Mr Holyhead was to provide to the Court his views on the course of action which, in all of the circumstances, was in the best interests of the child. While it may be that Ms Falmouth does not consider that the arrangements finally agreed to were in the interests of the child, there is no evidence that Mr Holyhead breached his duty as lawyer for the child in promoting what, in his view at that time, was in the best interests of the child. In this case the Court further dictated the role of Mr Holyhead as counsel for the child as being, to meet with the parents and the child and to “consider each party’s proposals for re-establishing and progressing the child’s contact with his father and to present counsel’s own proposals to the parties for consideration” (as noted in the oral judgment of 5 October 2004). Mr Holyhead appears to have done exactly that.

[9] It was not inappropriate for Mr Holyhead to seek to persuade Ms Falmouth to consent to the access arrangements. Ms Falmouth has also raised issues relating to matters she considers were inaccurately conveyed to the Court (such as the fact that she was not in a marriage-like relationship with the father). It is the role of her own counsel to put matters she considers relevant to the Court and if necessary to correct any inaccuracies of the evidence of other parties. Mr Holyhead did not fail in this regard.

[10] Ms Falmouth claims that Mr Holyhead said that unless she consented to the arrangement the father would be able to pick the child up and have access for the whole day. She considers this to have been untrue. This may be a reference to the fact that unless some arrangements for supervised access were agreed to there was a risk that the Court would order unsupervised access. I also note that a handwritten consent memorandum provided to the Court records an agreement under which the father was, after eight weeks of supervised contact, to have been permitted to collect the child from the home of Ms Falmouth on Saturdays and have contact from 10.00 am to 2.00 pm. In light of this I do not consider it to have been shown that Mr Holyhead inappropriately misrepresented any information to Ms Falmouth. I note that this finding is reinforced by the fact that Ms Falmouth was separately advised and her own lawyer was in a position to inform her of the likelihood of any orders being made.

[11] It can also be observed that the consent order avoided the necessity for conducting a hearing in the matter. The strong presumption that a parent of a child is entitled to some access is also relevant.

[12] I conclude that the Auckland Standards Committee 4 was correct to determine that there was no evidence of conduct by Mr Holyhead which was of a nature such that proceedings of a disciplinary nature would have been appropriate under the prior (Law Practitioners Act 1982) legislation. Accordingly it was appropriate for the Committee to decline to consider the matter further.

Decision

The application for review is declined pursuant to section 211(1) (a) of the Lawyers and Conveyancers Act 2006 and the decision of the Auckland Standards Committee 4 is confirmed.

DATED this 19th day of January 2010

Duncan Webb
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:

Ms Falmouth as Applicant
Mr Holyhead as Respondent
The Auckland Standards Committee 4
The New Zealand Law Society