LCRO 181/2010

CONCERNING	an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 4
BETWEEN	**EV** Of North Island Applicant
AND	**VJ** of Auckland Respondent

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

DECISION

Background

[1] The Respondent acted for EW, the Applicant's mother.

[2] In 2006, EW was 83 and had been married for over 60 years. The marriage had not been entirely happy, with EX having spent extended periods away from the family home in [Auckland]. However, both spouses had resisted suggestions that they should formally separate.

[3] There were four surviving daughters of the marriage, one of whom (EY) lived with EW.

[4] In 2005, EX and EW transferred the title to the [Auckland] property to themselves as tenants in common. This necessitated each of them making provision in their respective wills to dispose of their interests in the property.

[5] On 9 June 2006, EX made a will in which he left his half share in the [Auckland] property to a Trust that he had established in 1996 called the ABU Trust. He expressed the wish in his will that EW have occupation of the property during her lifetime. Following her death, or when she was no longer able to live there, the property was to be sold. At that time the ABU Trust was to be wound up and distributed between his four surviving daughters and two grandchildren, being the children of a deceased daughter.

[6] EX died on 6 November 2006.

[7] Following his death, EW made contact with the Respondent to advise the contents of the will. The Respondent sought advice from VI, a barrister experienced in this area of the law.

[8] VI advised that EW should immediately bring proceedings for provision of maintenance and support from EX's estate under the Family Protection Act 1955. He also advised that notice of her intention to do so should be given immediately provided it could be said with some confidence that proceedings would be issued in less than three months.

[9] EY and another daughter (EZ) supported EW's claim, while the Applicant and her sister (FA) supported the will.

[10] One of the issues, was that EW was not a beneficiary of the ABU Trust, being a member of the class of beneficiaries excluded by deed dated 29 September 2003. Consequently, the Trustees could not, in terms of the Trust, provide for EW as EX wished. In addition, the terms of the life interest which was expressed in the will, were somewhat more restrictive than what would normally be provided, in that it was restricted to the existing property, and once EW no longer lived in the property, she would not have access to the capital represented by EX's half share to purchase a replacement property and/or to receive the income generated by that interest. In addition, the interest in the property was to pass to the trustees of the ABU Trust rather than giving EW a direct and enforceable interest in her own right.

[11] The trustees of the ABU Trust were EX's solicitor VH, FA and an accountant.

[12] Proceedings under the Family Protection Act 1955 were filed in July 2007.

[13] Prior to issuing proceedings, the Respondent had sought advice from VI as to his estimated costs, which he indicated would be in the region of $16,000. The

Respondent provided this information to EW and the 2 daughters who supported her claim, but did not provide any written estimate of his own costs.

[14] Despite a Judicial Settlement Conference, and various offers of settlement, the parties were unable to reach agreement and the matter went to hearing on 22 and 29 April 2009. Judgment was issued on 29 June 2009 in which the Judge held that EX had breached his moral duty to EW by not providing for her in his will. To rectify this he directed that the trustees of EX's estate should hold his interest in the home in trust to provide EW with a life interest and with a right of substitution to purchase a replacement home and use the income from the Estate's share of the balance of the sale proceeds for her lifetime. On her death, the then value of the deceased's half interest in the home would be divided in terms of his will.

[15] An award of $10,000 was made in favour of EY, while no additional provision was made for EZ.

[16] Costs were reserved, with both parties being provided with an opportunity to make submissions in this regard. However, the Judge indicated a preliminary view that all costs should be paid out of the Estate, which is the usual and expected provision.

[17] Following the filing of submissions, and a further hearing, the Judgment as to costs was issued on 18 January 2010. At the time of that hearing, costs incurred were as follows:

Applicant's costs	$100,681.24
Trustees' solicitor's costs	$9,679.70
Opposition costs	$73,903.95
Total	**$184.264.89**

Further costs were to accrue in respect of the Costs Hearing.

[18] The extent of the costs sufficiently affected the Judge's initial indication as to how costs would be dealt with to cause him to depart from the usual practice of ordering costs to be carried by the Estate. Instead, he ordered that costs should lie where they fell.

[19] A decision was made to appeal the costs decision and on 20 December 2010, Justice Woodhouse issued his decision on appeal. His view was that, despite the submissions made by VI, he did not consider that EW was successful in substance, or

at least sufficiently to warrant the application of the general principle that costs followed the event. In addition, he did not agree that any of the grounds of appeal succeeded and upheld the decision of the Family Court Judge, with the exception that the costs incurred by the "Respondent beneficiaries" i.e., the Applicant and FA, were to be paid from EX's Estate on the death of EW or earlier termination of the life interest.

[20] The result of this is that EW and her daughters, EY and EZ, had significant legal costs to address. The only means of doing so was either to arrange a loan secured against the Estate's interest in the property, or for the property to be sold. A decision was made that the property be sold and at the time of the second review hearing, I was advised that this had occurred, with settlement to take place in the near future.

The complaint

[21] On 20 March 2010, the Applicant lodged a complaint with the Complaints Service of the New Zealand Law Society. Although it was expressed to be a complaint by her "on her mother's behalf", any person is entitled to complain about the conduct of a solicitor (s 132(1) Lawyers and Conveyancers Act 2006) and consequently the complaint has been treated as a complaint by the Applicant.

[22] The Applicant expressed dismay and concern at the Respondent's conduct in pursuing the proceedings and made the following points in support of her complaint:-

1. The Respondent had ignored basic considerations that should be addressed when advising an elderly client with potentially mental incapacity.

2. He had shown a lack of legal reasoning on which his submissions were made which could be considered tenuous at best.

3. He had failed to explain to his client the wider implications (such as financial implications, costs and family strain) in bringing such actions.

4. He had ultimately been self-serving for his monetary gain in bringing actions that really never had any chance of "success".

[23] She referred to the ongoing stress of the proceedings over the previous two years and the emotional, psychological and financial costs occasioned by them. She also referred to the irrevocable damage caused within the family. She noted, that the Respondent had further advised pursuing an appeal against the judgment as to costs with the result that at the time of the complaint, the proceedings were still not at an end.

[24] She also referred to a letter sent by EW in November 2008 instructing that legal proceedings be stopped and questioned why those instructions had not been acted upon. Similar letters were sent on 26 March 2010 and 1 April 2010.

[25] Finally, she referred to the total costs of the proceedings, some $235,000 at that stage, which had forced the sale of the home, the market value of which she assessed at $750,000. The result of the Court proceedings had therefore cost nearly one third of her parent's assets, a cost which she says her mother, then aged 88, should never have incurred.

[26] Her complaint finished with the statements "I believe my mother is being manoeuvred into expensive and vexatious ongoing legal actions with implications of which she does not have the capacity to understand." As a result of this, she considered that the Respondent was not acting in his client's best interests.

[27] The Standards Committee considered all of the material provided, and decided that no further action would be taken. That decision was made pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 which 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.

[28] The reasons given by the Committee was that "it was clear to the Committee that VJ was acting on behalf of his client and upon instruction. The Committee was satisfied that no professional standards issues were raised and that any further action by the Committee was unnecessary".

[29] The Applicant has applied for a review of that decision, for the reason that she does not consider the Committee has taken note of all of the issues set out in her complaint. She does not agree that the Respondent has exercised his duty to her mother in a professional manner and in her best interests. She again expresses doubt as to her mother's capacity to receive and understand the advice provided, as well as to give instructions following receipt of that advice. She advises that her mother only occasionally seems to understand that something is happening within the family to alienate its members and was distressed by that. She alleges that the Respondent was not acting in her mother's best interests by advising that proceedings should have been commenced and were continuing at the time of the application for review. She

seeks that the Respondent be reprimanded for his lack of professional responsibility, and also requested a review of the fees charged.

The review

[30] The review proceeded with a hearing in Auckland on 11 August 2011 attended by the parties. The Applicant was accompanied by her son. At that hearing, I requested the Respondent to leave his files with me to review, and following that review, I formulated questions that I wished the Respondent to address at a further hearing. The Applicant was not permitted to attend this hearing as the files provided were privileged as between the respondent and EW, and I made an interim order accordingly pursuant to section 208(2) of the Lawyers and Conveyancers Act 2006. This order is now made permanent. The second hearing took place on 25 August and was attended by the Respondent and VI.

[31] This complaint is somewhat unusual in that it has been made by the daughter of the Respondent's client, who was in effect a party opposed to proceedings issued by her mother for further provision to be made for her out of her late husband's estate. As noted above, the complaint is one made in her own right, and although expressed to be on her mother's behalf, the Applicant has no formal standing on which to make a complaint on this basis. She had indicated in correspondence with this Office that she would bring a letter from her mother to the review hearing which endorsed the complaint but did not do so. Given the provisions of section 132(1) of the Lawyers and Conveyancers Act 2006 this does not affect the Applicant's right to complain, although one of the factors which a Standards Committee (and the LCRO) may take into account when exercising the discretion to take no further action, is that the person alleged to be aggrieved does not desire that action be taken or continued. (section 138(1)(b)).

[32] In addition, the Applicant is not the party chargeable with payment of her mother's costs, and consequently no complaint by her as to those costs can be directly entertained. Indirectly, of course, the Respondent's costs could be reduced by the Standards Committee or the LCRO pursuant to section 156(1)(e).

Conduct prior to 1 August 2008

[33] EX died on 6 November 2006. The proceedings were filed in July 2007. The substantive hearing took place on 22 and 29 April 2009.

[34] On 1 August 2008, the Lawyers and Conveyancers Act 2006, came into force. Section 351 of that Act sets out the transitional provisions which determine how complaints lodged after that date in respect of conduct before that date are dealt with. It provides that if a lawyer is alleged to have been guilty of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made to the Complaints Service.

[35] In conjunction with this, section 352 provides that any penalty imposed in respect of that conduct must be a penalty that could have been imposed in respect of the conduct at the time when the conduct occurred.

[36] The relevant standards are set out in sections 106 and 112 of the Law Practitioners Act 1982. Those sections provide that disciplinary sanction may be imposed where a practitioner is found guilty of misconduct in his professional capacity, or conduct unbecoming a barrister or a solicitor (the provisions relating to negligence and to criminal convictions are not relevant here). Further guidance can be obtained from the Rules of Professional Conduct for Barristers and Solicitors which were the applicable rules at the time in question.

[37] Misconduct is generally considered to be conduct of sufficient gravity to be determined "reprehensible" (or "inexcusable", "disgraceful", "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 the practitioner's fitness to practice. (*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 is perhaps a slightly lower threshold. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3NZLR 810 per Elias J at 811). The threshold for disciplinary intervention under the Law Practitioners Act 1982 was therefore relatively high.

[38] The conduct that falls to be examined in the context of these provisions is the advice provided to EW leading up to the commencement of the proceedings, and the progress of the claim up until 31 July 2008.

[39] Following the transfer of the property from a joint tenancy into tenants in common on 27 January 2005, various discussions had taken place between EX and EW their respective solicitors, and the family, as to what provisions should be included in their

respective wills. The issue was therefore one which had been identified and discussed prior to EX's death.

[40] The first contact with the Respondent after EX's death was on 10 November 2006, when EW rang the Respondent's office and left a telephone message that "she wished to tell him something". That "something" apparently related to the terms of EX's will.

[41] The terms of the will were confirmed by VH when he forwarded a copy of Probate on 19 December 2006. As related in the background section of this decision, although bequeathing his interest in the property to the ABU Trust, the will expressed an intention that EW should have the right to remain in occupation of the house during her lifetime, or until she was no longer able to reside in the property. At that time, the property was to be sold and the Trust wound up by distributing the sale proceeds in the manner expressed in the will. The legal difficulties and the limitations of EX's expressed wishes have been set out in paragraphs [10] above.

[42] The issue with which the Applicant is concerned, is whether the Respondent acted in the best interests of EW by advising and promoting the issuing of proceedings as the means of rectifying these shortcomings. As noted by Dr Duncan Webb at paragraph 5.3.2 of his text, *Ethics, Professional Responsibility and the Lawyer* (2nd Edition):

> The relationship between lawyer and client automatically gives rise to a fiduciary relationship. The existence of such a relationship imposes onerous duties on a lawyer. This reflects an assumption that the features giving rise to a fiduciary relationship will almost invariably exist between lawyer and client. Those features include an imbalance of power, the vulnerability of one party, a relationship of trust and confidence, and an assumption by one party of a duty to act in the other's interests.

Those features and obligations are enhanced when the client is elderly as was the case in this instance. EW was in her eighties. She had limited, or in fact no, means to fund litigation. The Applicant asserts that she was in the early stages of dementia. She relied heavily on the Respondent to do the right thing by her. This is reflected in a memorandum that the Respondent wrote to VI later on 23 April 2010 recording EW's comments following receipt of written instructions signed by her to terminate the costs appeal.

[43] The onus on him to ensure that his advice was in EW's best interests was therefore high. When considering this question, a lawyer must necessarily take into account all issues such as a client's age, health, and ability to pay, and not merely

focus strictly on the legal issues. With regard to the situation in which the Respondent found himself, the comments of G E Dal Pont in his text *Lawyer's Professional Responsibility (4th edition)* at paragraph 4.135 are pertinent where he states that:

> …lawyers should, where it is in their client's best interests, seek to settle a dispute out of Court rather than commence or continue legal proceedings. This may, in some cases, legitimately involve placing some pressure on the client to settle the dispute. As explained by Lindemayer J in Marriage of Anderson (1982) FLC paras [91] to [251] at 77, (386-7) "counsel and solicitors representing clients involved in litigation in the Courts frequently subject their clients to considerable pressure to compromise that litigation. That is a necessary and proper part of the function of such legal representatives in the proper discharge of their duties to their clients and the Court.

[44] It is trite to note, that a lawyer must ensure that his or her client is able to comprehend the issues and to give clear instructions.

[45] The Respondent took advice from VI on the legal issues. VI's advice was to issue proceedings immediately.

[46] Given the fiduciary obligations assumed by the Respondent towards EW, and the duty to seek to settle a dispute out of Court where possible as referred to by G E Dal Pont, I was particularly interested in the steps that the Respondent took in not only discussing with EW the legal issues outlined in VI's opinion, but also what discussions took place as to the alternatives to issuing proceedings, the consequences of issuing proceedings and how the costs of those proceedings were to be funded.

[47] At the hearing on 25 August 2011 the Respondent advised that following receipt of VI's opinion, he met with EW, EY and EZ. At that meeting the opinion of VI was considered in depth. He advised that alternative options to a full life interest were discussed and considered but that EW was adamant that she wished to have control of what she referred to as "her home". The life "tenancy" through the ABU Trust as expressed in the will would not give EW that control. Ownership of EX's interest would remain with the trustees of the ABU Trust.

[48] When discussing the commencement of proceedings, the Respondent also had regard to VI's expectations that the issue of proceedings would establish a base from which negotiations could take place to achieve a satisfactory outcome for EW. Neither the Respondent nor VI expected the case to escalate in the manner in which it did.

[49] The Respondent also advises that the question of costs was discussed. He did at that stage have the indication from VI that his costs would be in the region of $16,000 even assuming the matter proceeded to a full one-day hearing. The

Respondent advised that he indicated to EW and her two daughters that as a rule of thumb, costs in these type of proceedings could amount to 10% of the value of the property in question. As commented by me at the second review hearing, this is a somewhat odd measure for costs, as litigation of this nature has no relationship to the value of the property in question. There is no subsequent recording of this suggested comment by the Respondent, and I have largely discounted it.

[50] The Respondent advises that EW, EZ and EY told him that a combination of savings and expectations of distributions from the ABU Trust would enable costs to be met.

[51] The responded was also aware of the attempts which had been made prior to EX's death to reach agreement as to the provision to be made for EW, which in one instance resulted in a family conference being terminated in extremely confrontational circumstances. He also sought in a series of communications with VH, details of the ABU Trust, its financial statements since 1995 and details of the Estate's assets and liabilities. He formed the view that without this information, he would be unable to formulate and/or advise on any formal settlement proposals.

[52] Nevertheless, no approach was made to VH with a view to engaging in any form of dialogue to explore whether or not there was any possibility of reaching agreement within the family to provide for EW in a manner which was acceptable to her. There is no doubt, that given agreement between the beneficiaries of the Trust, the technical difficulties could have been overcome through various means.

[53] No such approaches were made, and instead on 12 June 2007, the Respondent gave notice of an intention to issue proceedings under the Family Protection Act 1955. This had the effect that proceedings then had to issue within three months. If that letter had not been sent, the date within which proceedings were required to issue was 14 December 2007, being 12 months from the date of the grant of Probate. By his letter of 12 June, therefore, the Respondent shortened the period available within which a possible settlement could be explored by some three months.

[54] The proceedings were filed and served on VH in July 2007.

[55] Upon being served with those proceedings, VH in his letter of 27 July, expressed surprise that EW had issued proceedings in view of the fact that she had unilaterally severed the joint tenancy and that it was acknowledged that she was entitled to live in the home in accordance with the terms of the late EX's will.

[56] Notwithstanding VH's comments, the parties could not resolve the matter themselves by agreement and with the benefit of hindsight it is highly unlikely that the matter would have been resolved at this early stage. However, the effect of the issue of proceedings, cannot be discounted. By issuing proceedings, members of the family were enabled to join in the proceedings, and the Respondent was well aware of the divisions within the family. It enabled these apparently bitter relationships to affect the issue, and indeed, for those parties to be actively involved in the proceedings, all of which extended the breadth and cost of the proceedings.

[57] In summary, therefore, I would make the following observations in respect of the Respondent's conduct prior to 1 August 2008:-

[a] There is no evidence that issues such as the stress occasioned by litigation and its impact on EW's health were considered or discussed by the Respondent and whether, taking issues such as these into account, it was in EW's best interests that she should embark upon these proceedings.

[b] No approaches were made to VH to explore whether there was any possibility of reaching agreement which would provide some measure of protection acceptable to EW.

[c] By issuing proceedings, other members of the family were enabled to join in the proceedings, thereby exacerbating already strained relationships within the family. This also resulted in the possibility of any settlement being significantly diminished.

[d] There is evidence that at least VI's costs were communicated to EW. The expectations at that stage with regard to costs were much less than the end result and there was an indication that funds were available to meet these costs.

[58] The question to be decided, is whether the actions of the Respondent were such that proceedings under the Law Practitioners Act 1982 could have been commenced. As noted in paragraphs [37] above, the threshold for disciplinary intervention under the Law Practitioners Act 1982 is relatively high. Balanced against the apparent shortcomings, it must be recognised, that it was not entirely against EW's interests to commence the litigation, and she did approve that step. I cannot make any decision as to EW's state of health at the time, but I do observe that no comment was passed by the Judge as to any apparent lack of capacity, and that both the Respondent and VI

had no reason to consider that she was incapable of making decisions relating to the litigation. Both the Respondent and VI comment that at various times EW had telephoned each of them, and on those occasions repeated with some consistency the instructions given to the other.

[59] I would also observe, that if the Applicant was sufficiently concerned as to EW's state of health and/or capacity, that there were options that she could have taken to "protect" her mother.

[60] Overall, whilst I acknowledge the concerns that the Applicant holds for her mother, there is no reason that these should translate into a disciplinary finding against the Respondent, particularly given the somewhat higher threshold in respect of conduct prior to 1 August 2008.

Conduct after 1 August 2008

[61] VI advised at the second hearing, that any initial estimate of costs became irrelevant immediately the reply affidavits to the proceedings as filed were received. These reply affidavits introduced wide-ranging issues which had the effect of escalating costs considerably from those expected, at least by VI. The divisiveness amongst the family also contributed significantly against any ability to settle the matter.

[62] VI says that he referred to the escalation in costs in a general way to EW. In addition, the Respondent points to correspondence from EZ in December 2008, in which she indicated an awareness that costs could be in the region of $123,000 for all parties. It is reasonable to expect that her knowledge was imparted to EW.

[63] By 1 August 2008, the proceedings were well-advanced. On 9 November 2008, a letter was written under EW's name and signed by her suggesting (or requesting) that she should pull out of the case as she was concerned at the increasing costs. However, on 10 November EW telephoned the Respondent's office with a request for him to ring her. The Respondent's note of the subsequent telephone conversation was that EW did not want him to give in, but that he was to try and settle the matter in line with the advice that he had provided. This was followed by a letter dated 17 November, signed by EW and EZ, "revoking" her last letter.

[64] This series of events provides an indication that EW was aware of the increasing costs, but nevertheless wished to continue the proceedings. It is a matter of opinion as to whether the final outcome warranted the costs incurred, but for the purposes of this review, there is no evidence that EW did not have an understanding of the

considerable costs involved. The level of costs being incurred was something which was largely beyond the control of the Respondent, being driven as they were, by the steps being taken by the various parties, and the inability for any settlement to be reached.

The Costs Appeal

[65] On 18 January 2010, the decision as to costs was issued. Contrary to the indication given in the substantive decision, the Judge determined that costs should lie where they fell.

[66] A decision was taken to appeal this judgment, and the same issues arise to be considered as previously – namely whether EW had the capacity to understand and give instructions, and whether the manner in which the appeal was to be funded was addressed

[67] The Respondent's advice from VI was that the judgment should be appealed. I have not located any written record of this advice, either from VI or recorded by the Respondent. There is however a file note from the Respondent dated 3 February 2010, in which it is recorded that EW telephoned the Respondent to discuss the appeal in which she expresses confidence in the decisions made by the Respondent and VI.

[68] However, following receipt of the letters dated 26 March and 1 April 2010 signed by EW, the respondent wrote a lengthy letter dated 16 April 2010 to her, recording the history of the matter, the objectives of the proceedings, the outcomes to date, and the reasons for the costs appeal. He advised that he then visited EW and discussed this in detail with her. Following that, he wrote on the letter an acknowledgement that the content of the letter had been read to her by the respondent, the content discussed, and that she understood the matters raised in it. The respondent advises that he had no reason to consider that EW did not comprehend the matters discussed.

[69] The decision to appeal, although unsuccessful, cannot in itself be criticised, provided the advice tendered was given honestly and without ulterior motive. There is nothing to indicate that this was the case.

[70] Woodhouse J in his judgement on the costs appeal, is implicitly critical of the failure to reach a settlement at an early stage of the proceedings, which is what the Respondent and VI anticipated would occur. He indicates that he considers that the trustees, the Applicant, and her sister FA, made settlement offers on the same terms as the Court decision. The Respondent and VI take issue with this, and contends that

the settlement offers from the trustees, EZ and EY, failed to recognise the distinction between a “true” life interest and a limited right of personal occupation or entitlement to limited income from investment returns.

[71] If I were to consider finding against the Respondent on the basis that he failed in his duty to promote settlement on the basis of the offers made, it would be necessary for me to undertake a close examination of each of the settlement proposals and form my own view of their merits, rather than taking the views of Woodhouse J as being a correct representation of them. This is the principle derived from the judgement of Brewer J in *Dorbu v The Lawyers and Conveyancers Disciplinary Tribunal CIV -2009-404-7381(11 May 2011).*

[72] However, even if I were to undertake that exercise and come to a different view from the Respondent and VI, that is not to say that they should be exposed to disciplinary proceedings for exercising judgement with which others disagree. That would be untenable. This is reflected in various decisions made in negligence claims such as G*riffin v Kingsmill [2001] Lloyds Rep PN 716,* where Sir Murray Stuart Smith said at para [63]:

> The circumstances in which barristers and solicitors have to exercise their judgement vary enormously.....Or in a very complex case it may be that in advising settlement too much weight is given to some factors and not to others. Here again a difficult judgement has to be made; and unless the advice was blatantly wrong, i.e such as no competent and experienced practitioner would give it, it cannot be impugned and the prospects of successfully doing so would be very slight.

[73] The circumstances in which a disciplinary finding could be made against a practitioner for advice given with regard to settlement proposals, would need to approach, if not be greater, than the standard referred to in that decision; i.e be such as to be blatantly wrong, and one which no competent or experienced practitioner would give.

[74] I have satisfied myself, that charges could not be levelled against the Respondent for declining to recommend acceptance of any of the settlement proposals put forward by the trustees. In each case, there were conditions involved which were such that it could not be said that the proposal reflected simpliciter, the outcome of the proceedings.

[75] In all of the circumstances there is nothing to support a finding that the conduct of the Respondent in this regard constituted unsatisfactory conduct as is defined in the Act.

Conclusion

[76] If there is any aspect of the Respondent's conduct which could be the subject of criticism, it is that he did not engage in any form of communication with VH to explore whether there was any common ground which would enable EW's position to be improved without the need for litigation. With co-operation from all parties, the legal issues with regard to the Trust could have been overcome. Regardless of whether or not this would have resulted in a satisfactory outcome, the Respondent had a duty to attempt resolution. Instead, the actions of the Respondent resulted in a shortened period within which to attempt any resolution, and once notice of a claim had been given, the time-frames involved dictated that he proceed with the formulation and service of the proceedings. From that time on, in reality, any opportunity to resolve the matter without recourse to litigation was lost.

[77] The failure to do this was however influenced by the previous attempts to reach a resolution, and in the circumstances, I do not consider that the Respondent's conduct could be considered to have reached the threshold required by section 351 of the Lawyers and Conveyancers Act 2006 such that would support a disciplinary finding against him, i.e misconduct or conduct unbecoming.

[78] Once the proceedings under the Family Protection Act 1955 were issued, the two factions of the family were drawn into the proceedings and it was the actions of those parties which greatly expanded the ambit of the proceedings, with the resulting escalation of costs.

[79] The first instruction to withdraw from the proceedings were countered almost immediately by EW telephoning the Respondent with contrary instructions to proceed and unless he was sure that EW lacked the capacity to provide these instructions, he was obliged to continue. The same circumstances arose with regard to the later letters. Neither the respondent or VI formed the view at any time that EW was sufficiently impaired as to justify the respondent to fail to act in accordance with her instructions.

[80] Finally, the respondent proceeded to support the decision to appeal the costs order on advice from VI and relayed this advice to EW. She may not have fully comprehended the legal niceties, but placed her faith in the Respondent. He, in turn,

relied upon the advice of VI. This was not misguided, and there is no evidence that the advice was anything other than properly tendered, notwithstanding that it was subsequently unsuccessful.

[81] In all of the circumstances, I concur with the decision of the Standards Committee.

DATED this 31st 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:

EV as the Applicant
VJ as the Respondent
Auckland Standards Committee 4
The New Zealand Law Society