

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

BETWEEN

HF

of Auckland

Applicant

And

SZ

of Auckland

Respondent

DECISION

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

[1] The application was made by the Applicant for a review of a determination that had been made by Auckland Standards Committee 4. The Applicant is a law Practitioner who was the subject of a complaint by the Respondent. The Standards Committee found against the Practitioner in respect of the substantive complaint, and imposed a fine of \$1,500 and costs of \$1,000, and ordered that the Practitioner's name be published in LawTalk.

[2] The review application was in relation to all aspects of the Standards Committee determination. A review hearing took place on 23 February, and was attended by the Practitioner and his counsel. Also appearing was the Respondent with two members of her family, namely her sister and her uncle.

Review of substantive decision

[3] The original complaint by the Respondent related to the practitioner having prepared a will, and enduring powers of attorney (welfare and property) for her mother, Mrs AW. The complaint arose because Mrs AW is known to suffer from some mental deterioration, and the Respondent, her daughter, was concerned that her mother had signed these documents when her legal competency was impaired. After considering all of the information provided in relation to the matter the Standards Committee upheld the complaint. The Committee noted that the Practitioner had been informed that Mrs AW was in the 'early stages' of Alzheimers but that he was not aware that she is a patient of the ACV Clinic. He made no independent enquiry in relation to her mental status, relying instead on his own assessment of her ability to understand what was going on. The Committee wrote that it was essential to the validity of a will that a testator was of sound mind. The Committee stated that the Practitioner was not medically trained, and when alerted to the fact that his client may not fully understand the importance and impact of a will and a power of attorney, he should have obtained a medical report. The Committee found that the Practitioner had failed to take sufficient steps to establish Mrs AW's competency at the time he was advising her.

[4] The background is that an appointment was made by Mr and Mrs AV for their friend, Mrs AW, to see the Practitioner. Mr and Mrs AV are existing clients of the Practitioner. The Practitioner took instructions in relation to the preparation of a will and also of enduring powers of attorney which appointed Mr and Mrs AV as the attorneys. At no time throughout the meeting was Mrs AW interviewed alone, so that at all times throughout the interview Mr and Mrs AV were present and it appeared from the evidence that they had reasonable involvement in that discussion. It was Mrs AV who mentioned to the Practitioner that Mrs AW was in the early stages of Alzheimers. The documents were prepared while they all waited, and the Practitioner attended to their execution on that same day. He rendered an account to Mrs AW. It seems the family came to learn of Mrs AW's meeting with the Practitioner when her brother discovered the Practitioner's account among other accounts that he paid for Mrs AW under an existing power of attorney.

[5] Through his counsel the Practitioner submitted that by his assessment Mrs AW had the required legal and testamentary capacity to instruct him as to her wishes. He had arrived at this assessment having spent 30-45 minutes with her, despite having been informed by Mrs AV that she had '*onset of Alzheimers*'. It was submitted that Mrs

AW appeared aware of why she was there, what property she had to dispose of by will and who were to be the beneficiaries. It was further submitted for the Practitioner that *“Without clear and perhaps compelling reason to suspect that the elderly client may not have proper capacity or ability, he is bound to act on the instructions as [the Practitioner] did. At the time he did this there was no legal requirement for him in such circumstances to seek or request a medical opinion as to [Mrs AW’s] legal capacity or testamentary capacity.”* And later, *“..... it was not for [the Practitioner] to decline or refuse instructions of an adult who appears to have legal and testamentary capacity. Indeed if he were to do so, he may well be subjected to a complaint for misconduct in refusing such instructions.”* Counsel added that the Practitioner was unable to answer whether Mrs AW had such capacity but that the Practitioner had genuinely and sincerely believed that she did. He submitted that the Standards Committee was incorrect in its findings.

[6] For the review the respondent provided copies of medical reports, some of near contemporaneous date with the time of her visit to the Practitioner. These were provided to the Practitioner and his counsel. There are six reports and are all from various service providers within [Auckland] District Health Board. They include an Occupational Therapy Overview Report (July 2008) and a home visit report by Mental Health Services for Older people (June 2008). There are two reports dated in the second half of 2007, being a discharge report and an out-patient report by Mental Health Services for Older People. The last report, also 2007, is a General Medical report. These reports were not available to the Committee when making its decision. However, they make clear that Mrs AW did not have legal competency at the time she visited the Practitioner in June 2008.

[7] At the review the Practitioner reiterated that his impression of Mrs AW was that she was legally competent at the time he took her instructions and that he had seen no reason to question or further enquire into the circumstances that confronted him. He conceded that in the light of the medical evidence now provided that she lacked legal capacity. However, he reiterated his honest belief in his assessment of her. He had intended to assist Mrs AW with what he understood were her requirements. He was motivated by good intentions. He had asked her whether she had an existing will and she said yes but it had not been prepared by a lawyer. (The family said that Mrs AW’s will had in fact been prepared by a lawyer). The Practitioner had made no enquiry about whether anyone else, e.g. a family member, held a power of attorney for her.

The Practitioner had not sought clarification about why no family member accompanied her, and accepted the information that there were tensions within the family.

[8] The Respondent and her family members said that their particular concern was that vulnerable people needed to be protected from the possibility of abuse and generally being taken advantage of by others, especially by unscrupulous people. Although the family expressed some concerns about the appropriateness of Mrs and Mr AV, their concerns was less about their appointment as attorneys for their mother, than about the risk to vulnerable individuals taken to a lawyer by unrelated persons, perhaps unscrupulous persons, to have legal instruments prepared by the lawyer that could result in such persons obtaining control over the assets of the vulnerable person and their welfare. Their view was that lawyers have a high responsibility to make sure that when acting on instructions, especially of vulnerable or elderly persons, that this does not result in adverse consequences for that person. Their concerns were demonstrated by the present circumstances. They noted that the Practitioner had been made aware that Mrs AW had mental health issues and had taken no basic steps to test her competency. Among the omissions of the Practitioner they cited his failure to have questioned Mrs AW on her own, saying that had he done so it would have been quickly apparent that she could not sustain a conversation for very long. Further failures in their view were that the Practitioner had made no enquiry into whether Mrs AW had an existing attorney and had made no attempt to contact any member of her family.

[9] It is clear that family members are actively involved with Mrs AW on almost a daily basis. One daughter holds an existing power of attorney for welfare and her brother holds a power of attorney relating to property. These arrangements were made at the recommendation of Mrs AW's GP soon after the diagnosis was made. Her brother has for some time now attended to her bill payments and other financial needs. The Practitioner was unaware of any of these matters, and it was of concern to the family that he had nevertheless created legal instruments with so little information about his client in the whole circumstances which confronted him.

[10] This is not a case where the Practitioner's intentions or the honesty of his belief are in issue. I accept that he intended to provide a legal service that he believed Mrs AW wanted. I also accept that the Practitioner honestly thought that he was dealing with a client who was legally competent. What is central to this complaint is the professional judgement of a lawyer.

[11] It is the task of the New Zealand Law Society, through its regulatory function, to investigate complaints concerning conduct of Practitioners and this involves, in the first tier through Standards Committees, an evaluation of the conduct complained of in the context of peer review. The conduct complained of should be considered in the light of all of the relevant circumstances prevailing at the time the professional service was provided, and not by reference to subsequent information that could not have been discovered by the Practitioner. In this case the Standards Committee concluded that the judgement of the Practitioner was not, in this case, of a standard that a member of the public could reasonably expect of their lawyer.

[12] In reviewing this conclusion I note the Practitioner acknowledged having been alerted to Mrs AW's mental condition. He honestly thought it was enough to rely on his own assessment about whether Mrs AW was competent. However, in considering the overall circumstances at that time there were several factors, when taken together, ought to have led the Practitioner to some further enquiry, particularly in the light of being informed as to her medical situation. The appointment had not been made by Mrs AW but by his existing clients, Mr and Mrs AV who had taken her to the Practitioner for the documents to be prepared, appointing them as her attorneys. The evidence showed that they were actively involved in the consultation. The Practitioner had been alerted to her mental condition but took no steps to 'test' his observations as to competency. It is not apparent that the Practitioner turned his mind to that question.

[13] It is within the power of a lawyer to create legal instruments which can have profound consequences for the lives and property of individuals. This is necessarily accompanied by a high level of professional responsibility. When confronted with elderly persons or others who may be vulnerable for one reason or another, the question of mental competency is one that needs to be in the forefront of a practitioner's mind. There are basic steps that can readily be taken by a Practitioner to 'test' the competency and/or free will of a client. Members of Mrs AW's family said that Mrs AW's difficulties would have been quickly apparent had she been interviewed alone. Questions might be asked about practical matters such as how bills are paid, whether and who takes the client to see the doctor, whether the client attends hospital, who assists with general needs. Enquiry into these matters, and also family circumstances, may elicit a good deal of information from a client and alert a practitioner about the situation or circumstances of the client and may bring issues to light about what further enquiry should be made. It is the responsibility of practitioners

to be alert to circumstances where further enquiry ought to be made, and to be able to undertake basic steps that can assure them of their client's legal capacity. The necessity for such enquiry is particularly clear where mental health has been raised.

[14] This complaint is focused on the Practitioner's professional judgement. That he honestly believed that Mrs AW was competent may be indicative of how deceptive appearances can be. However, the Practitioner's best intentions or honest belief are not enough to displace the high degree of responsibility involved in preparing the legal instruments involved in this case. I agree with the findings of the Standards Committee on the substantive complaint.

Review of Monetary Orders

[15] The Practitioner had also sought a review of the monetary orders made by the Standards Committee following its determination. At the review however, it was conceded that the fine and the costs order fell within the discretionary parameters of the Standards Committee and the Practitioner elected not to proceed with this part of his application.

Review of Publication

[16] The review application also related to the Committee's decision to publish the Practitioner's name in LawTalk. The Practitioner said he had been given no opportunity to make submissions in respect of the matter before the Committee issued the order. Some submissions were forwarded to this office in relation to the Committee's order but they do not address all matters that maybe relevant to such an order. The publication of a practitioner's name is understandably a matter of concern. The Applicant is to have a further opportunity to forward any additional submissions in relation to his application. I shall issue a separate decision with regard to that part of the review after I have considered his submissions.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed in relation to the substantive

complaint and the monetary orders. This decision does not relate the application for review of the Committee's determination concerning publication.

DATED this 3rd day of March 2010

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:

HF as the Applicant
SZ as the Respondent
The Auckland Standards Committee
The New Zealand Law Society