

LCRO 191/2010

**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**

**CP**  
of Auckland

Applicant

**AND**

**XF**  
of Auckland

Respondent

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

**DECISION**

**Background**

[1] The Respondent was appointed by the Family Court as lawyer for the child of the Applicant (J). That appointment terminated on 2 March 2010 following a report by the Respondent recommending that the file be closed.

[2] The complaint by the Applicant was lodged on 11 May 2010 and includes the following allegations:-

- That the Respondent was extremely rude in a telephone call to the Applicant.
- That the Respondent had a conflict of interest.
- That the Respondent disrupted J's attendance at school.
- That the Respondent encouraged the school to expel J.

- That the Respondent encouraged CYFS to uplift J from the Applicant's care forcing her to place J with friends.
- That the Respondent repeated unsubstantiated allegations that J accompanied the Applicant while she was working as a prostitute.
- That the Respondent harassed the Applicant.
- That the Respondent wrongfully advised her that J's father was in New Zealand and requesting access.

[3] In its decision the Standards Committee accepted that it was necessary for the Respondent to act in the best interests of J and formed the view that the Respondent had adequately addressed the issues of concern. It was satisfied that the Respondent had acted appropriately in the circumstances and determined to take no further action in respect of the complaint. This decision was taken pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006, on the basis that any further action would be inappropriate or unnecessary.

[4] The Applicant has applied for a review of that decision. In the supporting reasons for the application, the Applicant has made general allegations that the Respondent was rude and pushy on a number of occasions and that she did not believe that the Respondent had represented J well.

[5] She refers to a specific incident where she alleges that the Respondent had come to her house and advised her that J's father was in New Zealand and that he would like to have J for a week over the Christmas period, when in fact he was not in the country.

[6] The outcome sought by her in the application is to be reimbursed for a tenancy bond forfeited by her in the circumstances outlined subsequently in this decision. In addition, she has sought that the Respondent be struck off "so he can no longer play with children's lives and carry out personal vendettas".

## **Review**

[7] The review proceeded by way of a hearing attended by both parties on 14 June 2011.

[8] At the outset of the hearing, I observed that if the Applicant retained concerns as to the quality of the Respondent's representation of J following completion of this review, she may consider addressing her concerns to the Family Court which is

responsible for appointments of lawyer for the child under the Care of Children Act 2004.

### **The Lawyers and Conveyancers Act 2006**

[9] The Lawyers and Conveyancers Act 2006 came into force on 1 August 2008. Complaints about conduct prior to that date may be made pursuant to section 351 of the Act. That section provides that if a lawyer is alleged to have been guilty before 1 August 2008 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 established under section 121(1) of the New Zealand Law Society.

[10] The relevant standards for conduct prior to 1 August 2008 are set out in sections 106 and 112 of the Law Practitioners Act 1982. Those sections provide that disciplinary sanctions may be imposed where a practitioner is found guilty of misconduct in his or her professional capacity or conduct unbecoming if a barrister or a solicitor. Further provisions relating to negligence and to criminal convictions are not relevant here.

[11] The threshold for disciplinary intervention under the Law Practitioners Act 1982 is therefore relatively high. Misconduct is generally considered to be conduct of sufficient gravity to be termed “reprehensible” (or “inexcusable”, “disgraceful” or “deplorable” or “dishonourable”) or if the fault 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 practice or to bring the profession into disrepute. (*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] 3 NZLR 810 per Elias J at page 811).

[12] A practitioner can only be struck off for conduct of this nature.

[13] The Lawyers and Conveyancers Act introduced the concept of unsatisfactory conduct. That term is defined in sections 12(a) and 12(b) as being –

- (a) 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;  
or
- (b) conduct that would be regarded by lawyers of good standing as being unacceptable, including –

- (i) conduct unbecoming a lawyer; or
- (ii) unprofessional conduct.

[14] The Respondent was appointed as the lawyer for J in November 2007 and his appointment terminated in March 2010. Consequently, the conduct complained of falls to be considered under both sections 351 and 12 of the Act.

### **The complaints**

[15] At the hearing, I proposed that each matter complained of by the Applicant should be considered separately and the hearing proceeded in that manner.

### **Lack of respect**

[16] J was in the day-to-day care of his father. In April 2008 the Applicant learned that J had been attacked by a friend of J's father. She uplifted J and alleges that shortly thereafter she was contacted by the Respondent by telephone. She alleges that the Respondent was extremely rude in that call and demanded that she return J to his father. She alleges that he demanded that she return J, in a loud and irate manner and that the Respondent yelled at her and showed no respect. She alleges that he threatened her with the Police.

[17] The Respondent cannot recall such a telephone call and denies speaking to the Applicant in the manner in which she alleges. The Applicant confirmed that over the time that Respondent was appointed as lawyer for J, she had a number of telephone conversations with him, and it was only on the one occasion to which she refers, that she alleges the Respondent spoke to her in this manner.

[18] There can be no resolution of the conflict in this evidence. This was no doubt a very difficult time for the Applicant and J, and any suggestion that J should be returned to his father would not have been favourably received by the Applicant. In the circumstances, it is possible that a raised voice may have been perceived as being more aggressive than it was or was intended. It is likely a telephone conversation took place, as J had been removed from the person who had day-to-day care, and the Respondent would have been involved. It is possible that the conversation may have become more heated than desirable. However, as noted, it is not possible to determine objectively the nature of any telephone conversation which took place through lack of corroborating evidence.

[19] The alleged telephone conversation took place in April 2008, prior to the commencement of the Lawyers and Conveyancers Act 2006. Consequently, the conduct complained of falls to be judged in terms of section 351 of the Act. The alleged conduct took place on only one occasion and in the circumstances would not be sufficient, even if proved, to approach the threshold required by that section before disciplinary charges could be considered.

[20] Even if the conduct in question were to be considered in terms of section 12 of the Lawyers and Conveyancers Act, the lack of verifiable evidence would make it difficult to support a finding of unsatisfactory conduct and even if it were able to be proven, it is likely that it would result in an order to apologise in terms of section 156(1)(c) of the Act.

[21] For these reasons, this conduct would not be sufficient as to enable a Standards Committee to conclude that disciplinary charges could have been brought, as required by section 351.

### **Conflict of interest**

[22] The second allegation made by the Applicant is that the Respondent had a conflict of interest "due to the fact that [the Applicant] would not follow his orders". At the hearing the Applicant explained that she considered the Respondent had not acted in the best interests of J. I am not sure that this results in a conflict of interest, but will nevertheless examine the allegation.

[23] This is a wide-ranging allegation, covering a number of the issues raised by the Applicant. The actions taken by the Respondent have to be measured against what was in the best interests of J, and the Applicant cannot be an objective judge of that, given that her conduct has been brought into question.

[24] The Standards Committee which considered this complaint has been constituted to consider complaints involving the Family Court and Family Law issues. The Committee includes lawyers who practice in the area of Family Law, and has concluded that the Respondent had acted appropriately in the circumstances. I take some cognisance of that.

[25] It is noted that none of the actions taken by the Respondent were challenged by the Applicant at the time at the various Court hearings. Even if the Applicant was not able to consider the matters dispassionately at the time given the matters in which she was embroiled, she was represented throughout by counsel, who could have raised questions at any time as to the representation of J being provided by the Respondent.

The Applicant has questioned the competence of her counsel, but I can only consider the facts as they are presented.

[26] As noted at the outset of the hearing, the Family Court appoints the lawyer for the child. If the Applicant remains of the view that an objective assessment of the representation of J by the Respondent would find his conduct wanting, then she has the further option of asking the Family Court Co-ordinator to consider the matter.

### **Interviewing J at school**

[27] The Applicant considers that the Respondent contributed to J's challenging behaviour by "pulling [J] out of school" to talk to him. She considers that it would have been more appropriate to interview J at her home. This can hardly be considered to be conduct which would support a disciplinary charge. The Ministry of Justice website relating to lawyer for the child, itself refers to the fact that the lawyer will need to, and is obliged to, talk to the child, and that this may take place at school.

### **Expulsion from school/CYFS' actions**

[28] The Applicant alleges that the Respondent encouraged the school attended by J to expel him, and also encouraged CYFS to remove J for placement elsewhere.

[29] Both the school and CYFS do not act on the suggestions of a lawyer alone. In addition, both bodies do not act through one person. Before any action is taken, independent assessments must be made of the facts. The report from J's teacher dated 31 October 2008 describes some particularly challenging behaviour as "inappropriate" and finishes with the words "we as a team at [O school] are concerned about his behaviour and how it affects his learning and those around him – children and teachers". Reference to the "team" does not suggest that the Respondent was responsible for any part of the decision taken by the school.

[30] Similarly, the Respondent had a duty to raise with CYFS any concerns he or others may have had about J's evening care even though it may have been indirectly critical of the Applicant. Not to do so would have been failing in his duty to J.

### **Monetary loss**

[31] As a result of CYFS' stated intentions to remove J from the Applicant's care, the Applicant says that she was "stonewalled" into placing J with friends. WINZ then reduced her benefit which resulted in her being unable to meet her rent payments, and forfeiting her bond. This is what she seeks compensation for.

[32] As noted above, the Respondent cannot be held responsible for CYFS's decisions, and would have been failing in his duty if he did not raise his concerns with CYFS. Consequently it follows, that he cannot be held accountable for her monetary loss.

### **CYFS investigations**

[33] The Applicant accuses the Respondent of reporting unsubstantiated accusations to CYFS that she was working as a prostitute, and that J was with her on the streets. She alleges that it was likely that the Respondent received these reports from J's father and considers that he should have attempted to verify those accusations by at least raising the issue with her before passing that information on to CYFS.

[34] It must be noted in the first instance, that the Respondent denies that this specific allegation was made to CYFS, although he does acknowledge that there would have been some discussions concerning the Applicant's occupation.

[35] It must be remembered that the Respondent was appointed as lawyer for J. His duty was to J. The report by the Respondent to the Court expresses concerns about J's care in the evenings. As a result of this the Court directed that a social worker's report be obtained. It was the function of the social worker to satisfy herself that proper arrangements were in place for J's care, and it would seem that she was satisfied in this regard. It is difficult to identify what harm the Respondent is responsible for, particularly to J.

### **Harassment**

[36] The Applicant accuses the Respondent of harassing her and J, by turning up at her home unannounced, and leaving notes that if she did not return his calls he would just turn up.

[37] On the other hand, the Respondent states that the Applicant was difficult to contact. Attempts were made to contact the Applicant through her lawyers but this was not successful, as she did not maintain regular contact with her lawyer, and she also moved address on at least two occasions.

[38] The Respondent has acknowledged being unable to keep two appointments and apologised to the Applicant for that at the time in his letter dated 19 November 2009.

[39] The Applicant may have perceived this as being harassment. The Respondent states that he needed to make contact with the Applicant to enable him to carry out his obligations to J and the Court. Perhaps the Applicant did not recognise that there was

a need for the Respondent to have been appointed in the first instance, but whatever the reason, it does not seem to me that even arriving unannounced could be considered to constitute harassment when there were difficulties in making contact otherwise.

### **Access by father**

[40] The final matter raised by the Applicant, was the allegation that the Respondent had caused her considerable stress by suggesting that J's father wished to have access to J for one week. She produced a letter from the father that confirmed he was not in New Zealand at the time being suggested.

[41] The Respondent explained that he had then been contacted by J's paternal grandmother to discuss the possibility of arranging access for her son. The Respondent acknowledges that he did raise this with the Applicant but denies that he suggested that it was going to be at a specific time.

[42] Even allowing for the fact that there could have been a misunderstanding between the parties as to when access was to take place, an enquiry as to possible access by J's father is not a matter which would support a finding of unsatisfactory conduct. The father was entitled to access and it was appropriate for J to have contact with his father.

### **Summary**

[43] For the reasons indicated above, I consider that none of the alleged conduct of the Respondent, either before or after 1 August 2008, is capable of supporting an adverse finding in terms of the relevant legislation.

### **Decision**

[44] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Auckland Standards Committee 4 is confirmed.

**DATED** this 20<sup>th</sup> day of June 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:

Ms CP as the Applicant  
Mr XF as the Respondent  
The Standards Committee  
The New Zealand Law Society