

LCRO 204/2017

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

CA and KB

Applicant

AND

MN

Respondent

DECISION

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

Introduction

[1] Dr CA and Ms KB (the complainants) have applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of their complaint concerning the conduct of the respondent, Mr MN who was appointed by the Family Court pursuant to the Protection of Personal Property Rights Act 1988 (PPPR) as lawyer for their father, Mr RA.

Background

[2] The complainants refer to a dispute between them and their brother, GA. The complainants say that Mr UX was appointed by the Court in 2014 when, on their brother's application, the Family Court revoked the power of attorney they had been exercising on their father's behalf. The Family Court then replaced Mr UX, who was no longer available to act, with Mr MN.

[3] The complainants' father passed away in August 2015, at which point any power of attorney or appointment under the PPPR would have ceased to have effect.

[4] The complainants contend that Mr MN failed to sufficiently review the documents they had supplied to Mr UX, which included receipts and a medical report confirming their father lacked competence. The complainants also believe that Mr MN's representation of their father was inconsistent with their father's wishes about how his affairs should be handled. They say Mr MN adopted an inappropriate and demeaning attitude towards persons with dementia in general and their father in particular. In carrying out his appointment, the complainants say Mr MN lacked diligence, misled the court over the information they had provided to him, prolonged, or at least did nothing to attenuate, the time taken to reach settlement. The complainants believe that if Mr MN had conducted himself appropriately they would have saved a significant amount of time, emotional energy and money.

[5] Dr CA says her record keeping as her father's attorney was meticulous and no documents were withheld. Dr CA says she did not obfuscate. She believes Mr MN acted unreasonably, and was less than zealous in opposing the complainants' brother's position. Dr CA objects to Mr MN having proposed their father's affairs might be better handled by the Public Trust. It is said Mr MN assisted their brother's cause.

[6] Dr CA objected to Mr MN having required her to file sworn evidence when the record keeping provisions of the PPPR did not require that of her. She believes she complied with the relevant section, and appears to resent any suggestion she may have taken a wrong turn at any point.

[7] The complainants consider Mr MN was not sufficiently suspicious of their brother and his motives, describing this as a lack of objectivity on Mr MN's part. They appear to think it was part of Mr MN's role to determine certain matters that would have been determined by the Family Court if the parties had not reached settlement, thereby avoiding a hearing.

[8] The complainants refer to Mr MN having described their father as "doolally", and believe he did not act in their father's best interests, in particular by not supporting their father's right to have them exercise the powers of attorney their father had given to them. The complainants believe Mr MN would benefit from updating his knowledge about dementia so he can act more appropriately next time the Family Court appoints him to assist a family.

[9] The complainants' view is that Mr MN's conduct cost their father's estate a substantial amount of money on legal fees and a lost return on investment. The

complainants would like a personal apology and reimbursement of “a token amount of the \$120,000 in legal fees and lost return on investment”.

[10] The complaint was dealt with through the NZLS Early Intervention Process. Mr MN’s firm was contacted, and Mr MN elected not to exercise his right to provide a response.

[11] The Committee determined the complaint pursuant to s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act), on the basis that Mr MN’s conduct while acting pursuant to an appointment by the Family Court should first be considered by the Family Court.¹ Any professional standards issues identified in the course of that process could then be referred for consideration by a Standards Committee. The Committee referred the complaint to the Family Court.

Review process

[12] The complainants were dissatisfied with the Committee having dismissed their concerns, and seek a full investigation into Mr MN’s professional conduct. They reject the contention that Mr MN’s conduct “can only be reviewed by that Court”, and maintain their concerns on behalf of their father. They would like a full enquiry.

[13] In the course of the review Mr MN responded to the complainants’ concerns. He noted that his duties were owed to the complainants’ father and the Court, and says that his appointment came to an end in 2015 when Mr RA passed away. He refers to difficulties that he would face in responding to the complaint given privilege attaches to his appointment, but notes that the Administrative Family Court Judge has access to all the information and material relevant to the complaint. His view is that the Committee’s referral to the Family Court “is probably the only decision that could be made by the Standards Committee”.

Review hearing

[14] The applicants attended a review hearing by telephone on 7 December 2017. Mr MN was not required to attend and did not exercise his right to do so.

¹ Standards Committee determinatoion, 29 September 2017 at [4].

Nature and scope of review

[15] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:²

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[16] More recently, the High Court has described a review by this Office in the following way:³

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

Discussion

[17] The only aspect of the complaint that raises any professional standards concern is the contention that Mr MN described the complainants’ father as “doolally”. Assuming he did, describing the complainants’ father as “doolally” was insensitive.

[18] Both complainants say they work in the health sector and Mr MN’s conduct would not be tolerated in their professional environment. They may be correct, but a reasonably robust approach is taken to lawyers’ use of language. There is no reason to accept that health professionals are, or should be, judged by the same standards as members of the legal profession.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

³ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[19] While Mr MN's choice of language was insensitive, it does not reach the point where it should properly form the basis of a determination of unsatisfactory conduct for the purposes of the Act.

[20] The majority of the complainants' other complaints are based on fundamental misconceptions about the adversarial process and Mr MN's place in that, given he was not the complainants' lawyer. The complaints could broadly be summarised as a series of objections to the manner in which Mr MN carried out his appointment on Mr RA's behalf. That is a key reason for the Family Court to be given the first opportunity to address concerns raised about Mr MN's conduct of matters in the course of his appointment under the PPPR.

[21] Part of Mr MN's job was to assess how best to serve the complainants' father's interests in a dispute between siblings. While it may make no sense to the complainants, and particularly Dr CA, there is nothing objectionable in Mr MN adopting a neutral position on some matters, and a position that happened to coincide with the interests of one sibling or the other in respect of other matters.

[22] The Committee's decision reflects the fact that, if the Family Court decides that Mr MN's conduct was somehow deficient, further enquiry might be made. Although the comments of the Court of Appeal in *Deliu v National Standards Committee of the New Zealand Law Society* are to the effect that each Tribunal is responsible for making its own enquiry,⁴ it was open to the Committee in the exercise of its discretion to determine the complaint on the basis of s 138(1)(f) in circumstances where Mr MN was appointed by the court, he was not acting for the complainants, and the parties' interests were not completely aligned in the Family Court proceeding.

[23] Having carefully considered all of the information provided, including the complainants' comments at the review hearing, I find myself unable to identify any good reason to modify or reverse that determination, which is therefore confirmed.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

⁴ *Deliu v National Standards Committee of the New Zealand Law Society* [2015] NZCA 399 at [34].

DATED this 8th day of December 2017

D Thresher
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:

CA and KB as the Applicant
MN as the Respondent
Mr BL as a related person
[Area] Standards Committee [X]
The New Zealand Law Society