

CONCERNING

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

AND

CONCERNING

a determination of the Standards Committee

BETWEEN

MR AND MRS JE

Applicant

AND

FQ

Respondent

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

DECISION

Introduction

[1] Mr and Mrs JE have applied for a review of a decision by the Standards Committee to take no further action in respect to their complaint concerning the conduct of Mr FQ.

Background

[2] The background to the complaint is comprehensively set out in the Standards Committee decision of 15 August 2012.

[3] The complaint is focused on concern that Mr FQ failed to follow appropriate process when tendering advice to Mrs JE's elderly father, Mr SP, ("Mr SP Snr"), when Mr SP Snr sought Mr FQ's assistance to revoke an enduring power of attorney in favour of the Public Trust, in favour of a new enduring power of attorney for property which granted power of attorney to Mr SP Snr's son [SP's son], and grandson, [SP's grandson].

The Complaint and the Standards Committee Decision

[4] Mr and Mrs JE lodged a complaint with the New Zealand Law Society Lawyers Complaints Service on 20 March 2012. The substance of the complaint was that:

- Adequate legal procedures were not followed.
- Mr FQ had failed to execute the change of attorney in a professional manner.
- Mr FQ failed to consult with other family members.
- Mr SP Snr's wife, who historically was always directly involved in any significant decisions affecting her husband, was not present at the meeting with Mr FQ.
- There was strong possibility that Mr SP Snr failed to understand the consequences of changing his power of attorney.
- Mr SP Snr lacked capacity to understand the legal implications of the document he was signing.
- Mr SP Snr did not have independent legal advice.
- Family members had suffered financial loss as a consequence of the change to the attorney.

[5] The Standards Committee identified the relevant issues to address as being:

- Whether Mr FQ's conduct, when acting for Mr SP Snr on his instructions, fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.
- If Mr FQ's conduct did fall short of the standard expected, then what penalty should follow?

[6] In its decision delivered on 15 August 2012, the Committee determined, pursuant to s138(2) of the Lawyers and Conveyancers Act 2006 (the Act), to take no further action on the complaint, as it considered any further action was unnecessary or inappropriate.

[7] In reaching that decision, the Committee concluded that:

- Mr FQ spent considerable time with Mr SP Snr taking instructions.

- There was nothing remarkable about Mr SP Snr appointing close adult relatives to hold an enduring power of attorney.
- Given Mr SP Snr's clear instructions the Committee could see no reason for Mr FQ to have challenged or queried Mr SP Snr's decision.
- Mr FQ took the necessary precautionary step of obtaining medical evidence to confirm that Mr SP Snr had the mental capacity to sign the attorney.
- Mr FQ also took steps to meet with the manager of the rest home in which Mr SP Snr was residing and made enquiry of the manager as to Mr SP Snr's state of health.
- There was nothing remarkable in the fact that Mr SP Snr's wife was not present at the interviews.

Application for review

[8] Mr and Mrs JE filed an application for review on 24 August 2012.

[9] Grounds advanced in support of that application were:

- There appeared to have been no medical examination of Mr SP Snr prior to the change of attorney being completed.
- Requests for a geriatric assessment were ignored.
- Mr FQ incorrectly reported that he had a letter from a doctor at the time of executing the change of attorney when he did not.
- Opinion of other legal counsel that Mr SP Snr was induced to change the power of attorney.
- Differing explanations provided for abandoning the Public Trust.
- Defect in process with Mr FQ witnessing the attorney as well as providing advice.
- Ignoring of ethics and legal ethics.

[10] In response, Mr FQ submits that:

- Mr SP Snr presented at all times as understanding his instructions to revoke his existing power of attorney.

- Mr SP Snr provided instructions free of any interference or influence from his son.
- He prudently sought, in light of Mr SP Snr's advanced years, a medical certificate from Mr SP Snr's doctor. That certificate confirmed that Mr SP Snr had capacity to execute a power of attorney.
- Discussions with the manager of the rest home where Mr SP Snr was residing identified no issues of concern with Mr SP Snr's ability to understand the implications of his instructions.
- Mr SP Snr had an opportunity to reflect on his instructions prior to executing the attorney.
- Mr [SP's son] was not present at the time the attorney was signed, thereby removing suggestion of improper influence on the process.

The role of the LCRO on review

[11] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Standards Committee, without good reason.

The Hearing

[12] Both parties attended a hearing on the 12th of May 2015.

Analysis

[13] The nub of Mr and Mrs JE's complaint is argument that Mr FQ failed to take proper steps to ensure that Mr SP Snr's instructions to revoke the power of attorney with the Public Trust, were genuinely and properly given, and understood by him.

[14] Underpinning Mr and Mrs JE's complaint is suggestion that Mr SP lacked capacity to understand the implications of his decision to revoke the power of attorney, and that his decision to do so was significantly influenced by Mr [SP's son].

[15] Members of the SP family were at odds over the management of the affairs of their elderly parents, and the family had split into opposing factions.

[16] Regretably, conflict between family members in respect of the care and protection of elderly members, and the management of those elderly members' property interests is not uncommon.

[17] Mr and Mrs JE contended that Mr SP Snr was very suggestible, unaccustomed to managing his financial affairs, and unwilling and reluctant to engage in discussion concerning his financial interests.

[18] They consider it highly improbable that Mr SP Snr would, on his own volition, have initiated steps to change his power of attorney.

[19] Their suspicions of improper influence are prompted by the role they perceive that Mr [SP's son] played in facilitating the arrangements. Mr [SP's son] and his son are seen by Mr and Mrs JE to have interests at odds with other family members, and their potential ability to control Mr SP Snr's financial affairs was considered by them to likely conflict with the interests of other family members.

[20] Compounding their concerns was the shift of attorney from the Public Trust, who were perceived to be independent, to family members who were seen to be not.

[21] It is important at the outset to emphasise that practitioners are not qualified to make what are essentially medical decisions about a client's competency. Those decisions fall within the province of medical professionals.

[22] It has been noted that:¹

... the line between legal competency and non-competency is generally a difficult one for lawyers (and often times doctors) to discern. This is particularly so in that phase of the process of decline where an individual's mental status may be fluctuating.

[23] Individuals with mental impairment may nevertheless have legal competency concerning their own welfare and affairs. There is a strong legal presumption of legal competency, unless there is contrary evidence.

[24] That is not to suggest that lawyers entrusted with the responsibility to manage their client's affairs in a competent and professional manner, do not have an obligation to exercise a considerable degree of care, if their client appears to have difficulty providing instructions or seems incapable of understanding the consequences of the legal processes in which they are engaged.

¹ *HF v SZ*, LCRO 186/2009 at [22].

[25] The critical question is whether there were indications during the term of Mr FQ's engagement with Mr SP Snr that could or should have alerted him to concern that Mr SP Snr may not have had sufficient capacity to provide informed instructions.

[26] It is important to emphasise that it was Mr FQ's view that Mr SP Snr gave no indication whatsoever at interview that he laboured under any impediment which impeded his ability to provide clear instructions.

[27] It is not possible to exhaustively list the factors which may prompt a practitioner to have concerns about a client's capacity, but where a client manifests behaviour which gives indication that the client may be mentally unwell, a practitioner must exercise a considerable degree of caution.

[28] It may also be the case that the circumstances and context in which the request is made to facilitate a change of attorney are such that a competent and prudent practitioner would be alerted to the need to take particular care to ensure that instructions are freely and properly given.

[29] The question is whether the practitioner acted in accordance with acceptable professional standards. The conduct of the practitioner is to be measured in light of the information that he had at the time.

[30] The Standards Committee decision traverses the facts it considered material, in leading it to conclusion that Mr FQ's conduct was, in all the circumstances, conduct which could be expected of a reasonably competent lawyer.

[31] Relevant factors included:

- The time Mr FQ had spent with Mr SP Snr at the initial interview.
- The apparent lack of interference or influence of Mr [SP's son].
- Mr FQ's independence from Mr SP Snr.
- Mr FQ's conviction that the choice of attorney was Mr SP Snr's alone.
- The finding of nothing remarkable or untoward in the appointment of close adult relations to hold an enduring power of attorney.

[32] Another factor of significance in persuading the Committee to the view that there was no substance to the complaint, was Mr FQ's decision to obtain medical evidence to confirm whether Mr SP Snr had the mental capacity to fully understand the implications of his decisions.

[33] The Committee considered that in light of Mr SP Snr's express instructions that he wished to proceed, and having received confirmation that Mr SP Snr had mental capacity to execute the attorney, Mr FQ was under no further obligation to investigate the wisdom of the appointment, particularly when the power of attorney was granted to two immediate family members.²

[34] I do not consider that Mr FQ took sufficient steps to ensure that he could be confident that Mr SP Snr appreciated and understood the implications of his decision to change his attorney.

[35] A decision to execute a power of attorney in respect of property is a significant one.

[36] The consequences of placing responsibility for the administration and control of property into other parties' hands are wide reaching.

[37] Section 94A of the Protection of Personal Property Rights Act 1988 requires an instrument creating an enduring power of attorney to be in a prescribed form, and the signature of the party executing the attorney must be witnessed by a person who is independent of the attorney. The witness must be a lawyer or otherwise appropriately qualified person.

[38] It is not intended in any way to make adverse comment on the capacity and ability of elderly persons to make clear and lucid decisions regarding their affairs, but any lawyer taking instructions on a matter of this nature from a client entering their 95th year, should be particularly attentive to the need to ensure that they are fully satisfied that their client is properly placed to provide clear instructions.

[39] Whilst I agree with the Committee that it is commonplace for parties to execute a power of attorney in favour of adult family members, in this instance, Mr SP Snr was seeking to remove his attorney from the apparent independence of the Public Trust, to family members, in circumstances where he knew that there was some degree of discord in the family.

[40] Mr FQ did not know Mr SP Snr. He had not acted for him previously. He had no knowledge of Mr SP Snr's background circumstances other than what he was told on first taking instructions. Mr FQ did, however, confirm at the review hearing that he had during that first interview gleaned "some knowledge that there was a family ruckus".

² Standards Committee decision dated 15 August 2012 at [22].

[41] In light of Mr SP Snr's advancing years, an awareness that there was an ongoing family dispute, and Mr SP Snr's indication that he wished to remove the attorney from what could be considered as the neutral and independent position of the Public Trust, particular care was called for.

[42] It was not of course Mr FQ's role to assert any degree of influence over Mr SP Snr in his choice of attorney.

[43] Whilst it was Mr FQ's view that Mr SP Snr presented as entirely capable of providing instructions, he considered it prudent in light of Mr SP Snr's age, to seek a medical report.

[44] It was appropriate for him to do so.

[45] Mr FQ did not secure Mr SP Snr's authority to contact Mr SP Snr's doctor, and it appears to be the case that Mr [SP's son] was tasked with following up with the Doctor.

[46] Mr FQ initially met with Mr SP on 12 January 2009. Mr FQ reports that on 29 April 2009 "a person from Dr TT's surgery telephoned to say Dr TT had written to me advising that SP had mental capacity to sign and the letter would be forwarded to me".³

[47] Mr FQ advises that he took no notes in relation to this call, and took the call on "face value".

[48] Mr FQ was unable to recall who he spoke to from the doctor's surgery, but it was clear that he did not speak directly with Dr TT.

[49] On the same day he received the call from the doctor's office, Mr FQ attended at the [Rest Home] where Mr SP Snr was a resident, and organised for the power of attorney to be signed. He notes that he spoke with the manager of the rest home before meeting with Mr SP Snr. He records that Mr SP Snr confirmed his instructions that he (Mr SP Snr) wished to sign the power of attorney.

[50] At the time the attorney was executed, Mr FQ had not received a written report from Mr SP Snr's doctor.

[51] Shortly after attending on Mr SP Snr, Mr FQ wrote to Mr [SP's son] advising that no report had been received from Dr TT. Mr FQ notes in that brief correspondence, that it is important for him, and for Mr [SP's son], that confirmation is received from the doctor that SP had capacity to execute the documents.

³ Letter FQ to NZLS (26 April 2012) Note: Mr FQ's correspondence inadvertently records date of phone call as 29 April 2009, when he intended 29 January 2009.

[52] It is relevant to note that Mr FQ observes that it is important for Mr [SP's son] that correspondence is received from the doctor. That would indicate that Mr FQ was mindful of the need to ensure that any concerns about Mr SP's mental capacity were properly addressed

[53] Mr [SP's son] was tasked with organising the medical certificate. In my view, it would have been preferable if Mr FQ had left it in Mr SP's hands to obtain the information from his doctor, or alternatively, if he had obtained Mr SP's permission for him to speak directly with the doctor.

[54] Dr TT forwarded correspondence to Mr FQ's office on 29 January 2009.

[55] That correspondence records as follows:

Dear FQ

I have known Mr SP for quite a few years and have noticed a gradual deterioration particularly in his short-term memory. He thus struggles with decisions that involve a degree of complexity. He is, however, aware of the requirement and implications of appointing a Power of Attorney and he is quite capable in this regard. I hope this is of assistance to you.

[56] Mr FQ relies on that opinion to support argument that he took proper and appropriate steps to ensure that Mr SP Snr was capable of providing instructions. In that position, he is supported by the Standards Committee.

[57] I disagree that the correspondence received from Dr TT satisfactorily addresses any concerns that may have been raised concerning Mr SP Snr's ability to understand his decision to revoke his existing power of attorney.

[58] The correspondence is ambiguous. Mr SP Snr's doctor notes that he has known Mr SP Snr for a number of years and has observed deterioration in his short term memory. He records that Mr SP Snr struggles with decisions that involve a degree of complexity. That sits somewhat uncomfortably alongside conclusion that Mr SP Snr is aware of the requirement and implications of appointing a power of attorney and is quite capable in this regard.

[59] There is no indication in the correspondence as to whether Dr TT has met with Mr SP Snr prior to providing his opinion, or whether he relies on his knowledge of Mr SP Snr from previous consultations. There is no evidence that the doctor has conducted any specific tests to get a gauge on Mr SP Snr's current state of health.

[60] In any event, Mr FQ executed the power of attorney prior to receiving correspondence from the doctor. Mr FQ placed reliance on a message conveyed from

Dr TT's office reporting that Mr SP Snr understood the implications of changing his attorney.

[61] In my view the process adopted by Mr FQ presents as unsatisfactory, and not sufficiently attentive to the need to ensure that he could be totally satisfied as to Mr SP Snr's ability to understand the implications of his decision to change his attorney.

[62] The medical certificate obtained does not provide the degree of comfort and assurance necessary.

[63] Further enquiries should have been made. A Power of Attorney document is a reasonably complex document. The powers given under an attorney are considerable. Mr SP was required to consider issues such as who would be provided with information regarding his affairs, and who would carry out an assessment of his medical condition and be given authority to execute a will on his behalf if he was unable to do so.

[64] Mr SP Snr is described by his doctor as being a person who struggles with decisions that involve a degree of complexity. A power of attorney is a legal document, couched in legal terms, which necessarily engages a degree of sophisticated understanding when its terms and effects are being explained.

[65] Mr and Mrs JE produced copies of other certificates from Dr TT, in which he had made assessment of Mr SP Snr's capacity. These certificates were not, as far as I am aware, available to the Committee.

[66] In the first of these, dated 21 August 2008, Dr TT records that he had met with Mr SP Snr on that date, and had formed the view that Mr SP Snr was of reasonable mind to make decisions, but that his health was gradually deteriorating. Dr TT reports that he was aware of major conflicts developing within the immediate family, and noted that Mr SP Snr had a habit of avoiding family conflict (described as the habit of a lifetime) and that Mr SP Snr was "very open to suggestion".

[67] In correspondence to Mr FQ dated 9 June 2009 (presumably written in response to Mr FQ identifying to Dr TT what are described as problems with the power of attorney) Dr TT advises that when he had previously assessed Mr SP Snr "about a year ago", Mr SP Snr had a mental test score at that time of 24/30. Dr TT is presumably referring to the assessment completed in August 2008.

[68] There is no indication that when Dr TT provided a report to Mr FQ in January 2009, that any specific cognitive assessment had been made of Mr SP Snr at that time.

It may have been the case, that in providing that report, Dr TT placed reliance on the assessment carried out around June/July 2008.

[69] In his report of 9 June 2009, Dr TT concludes that “at the moment I feel there is no doubt he would not be aware of the implications of his recent decision regarding changing the power of attorney”.⁴

[70] It is important to reiterate, that Mr FQs conduct is to be assessed by reference to the information that was available to him at the time.

[71] It is accepted that issues of capacity can be difficult to determine, and in elderly persons capacity can deteriorate rapidly over a short period of time. The fact that Dr TT, a few months after providing a report which stated that Mr SP Snr was capable of understanding the decision to change his power of attorney, forms a contrary view, does not in itself lead to conclusion that Mr FQ failed to exercise reasonable care.

[72] But Mr FQ’s failure to subject the medical evidence received at the time to a more rigorous scrutiny, and his failure to obtain the medical report before attending to the execution of the attorney, is unsatisfactory.

[73] At the very least, in the face of a medical report which disclosed concerns about Mr SP Snr’s ability to understand complex matters, Mr FQ would have had opportunity to:

- (a) Speak with Dr TT.
- (b) Clarify when Dr TT had last completed a cognitive assessment of Mr SP Snr.
- (c) Seek explanation as to the apparent contradiction in the report.

[74] In carrying out that type of inquiry, Mr FQ would have been alerted to Dr TT’s concerns regarding the family conflicts, and importantly, Mr SP Snr’s propensity to avoid making decisions and his suggestibility.

[75] After attending to the execution of the new attorney, Mr FQ set out to advise the Public Trust that the attorney in favour of the Public Trust had been revoked.

[76] He wrote to the Public Trust on 11 February 2009 advising that Mr SP Snr wasn’t sure who held his power of attorney in relation to property, but in any event, giving notice of the cancellation of the attorney, if it was held by the Public Trust.

⁴ Correspondence TT to FQ, 9 June 2009.

[77] At first glance that correspondence presents as concerning as it would seem to indicate that Mr SP Snr, despite Mr FQ's reported instructions, was unaware that the Public Trust had previously held his attorney. I accept Mr FQ's explanation that his correspondence was somewhat unclear, and that his intention in that correspondence was not to establish whether the Public Trust held a power of attorney, but rather, which office held the document.

[78] Mr FQ also gave evidence that he was instructed by Mr SP Snr to locate Mr SP Snr's will. Mr SP Snr was unable to recall the solicitor who had been previously acting for him, and which solicitor's office retained a copy of his will.

[79] Mrs JE's evidence was that Mr SP Snr had been a hard-working and successful farmer, who had spent a lifetime farming in the Timaru area.

[80] Mr SP Snr who was presented as having full capacity to understand the implications of changing his power of attorney, could not recall which office of the Public Trust held his attorney, or the solicitor's office which held his will.

Conclusion

[81] There are a number of aspects of Mr FQ's management of this matter which persuade me to the view that his conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[82] In arriving at that view, I have considered the conduct in its totality. Individual elements of the conduct may not in themselves have been sufficient to warrant a disciplinary finding, but the conduct considered in its entirety, presents as unsatisfactory.

[83] For completeness, I record the matters which persuade me that it is appropriate to reverse the decision of the Standards Committee:

- (a) Mr SP Snr's age demanded that there be careful attention to the need to ensure that he understood the implications of his decisions.
- (b) Mr SP Snr was seeking to change his attorney from the Public Trust, in favour of family members, in circumstances where Mr FQ was aware that there was a degree of dissension within the family.

- (c) Whilst Mr FQ was convinced that Mr [SP's son] asserted no influence over his father, Mr [SP's son] was present during the course of the initial interview.
- (d) Mr SP Snr was not an existing client of Mr FQ's. Mr SP Snr's inability to identify which solicitor's office held his will should have raised some concerns.
- (e) Mr SP Snr was reportedly adamant that he wished to move his attorney from the Public Trust, but unable to identify which office held his attorney.
- (f) Mr FQ indicated that he would require a medical certificate, but took no steps to obtain an authority from Mr SP Snr to obtain that certificate, or to seek permission from Mr SP Snr to speak directly with his doctor. Liaison with Mr SP Snr's doctor was left in the hands of Mr [SP's son].
- (g) Mr FQ placed reliance on a telephone call from an unidentified member of Dr TT's staff, to satisfy his understandable concern that Mr SP Snr's ability to make decisions be confirmed by a medical practitioner.
- (h) Mr FQ made no attempt to speak directly with Dr TT.
- (i) Mr FQ arranged to have the attorney executed before Dr TT's written report was available.
- (j) The medical report, when received should have placed Mr FQ on notice to make further enquiries.
- (k) He may well have done so, if he had waited for the report to become available before proceeding to have the attorney executed.
- (l) The medical report was ambiguous and raised concerns about Mr SP Snr's capacity to make complex decisions.
- (m) The medical report gave no indication as to whether Dr TT had completed a recent medical assessment of Mr SP Snr.

[84] I do not agree with the Standards Committee that Mr FQ, after taking the steps he describes, was under no further obligation to investigate the wisdom of the appointment. In my view, the matters identified above should have alerted Mr FQ to the need to make further enquiries. That is not to say that if those enquiries had been completed that his decision may have been different, but his failure to make further

enquiries, and in particular to obtain the medical report before having Mr SP sign the change of attorney, indicated a failure to exercise the degree of care necessary in the circumstances.

[85] Unsatisfactory conduct is defined in section 12 of the Lawyers and Conveyancers Act 2006.

[86] Section 12 (a) of the Act, provides that conduct is deemed to be unsatisfactory if in the course of providing regulated services, the lawyer's conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[87] Conduct may also fall within the unsatisfactory category, if it is conduct that would be regarded by lawyers of good standing as being unacceptable, including conduct unbecoming, or unprofessional conduct.⁵

[88] It is against that backdrop that Mr FQ's conduct falls to be considered.

[89] In my view, for reasons summarised in p. 83 above, Mr FQ's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Outcome

[90] The Standards Committee's decision is reversed, and replaced with findings of unsatisfactory conduct under s 12(a) of the Act.

[91] Having concluded that it is appropriate that a finding of unsatisfactory conduct be recorded, it is necessary to consider whether any further orders should be made. I do not propose to make any additional orders. The finding of unsatisfactory conduct is, in itself, an adequate disciplinary sanction.

Costs

[92] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review, it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

⁵ Lawyers and Conveyancers Act, s 12(b).

[93] Taking into account the Costs Guidelines of this Office, the practitioner is ordered to contribute the sum of \$1,200 to the costs of the review.

Decision

(a) This application for review is upheld. Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is reversed.

(b) A determination is made that there has been unsatisfactory conduct on the part of the Respondent pursuant to s 12 (a) of the Lawyers and Conveyancers Act 2006.

(c) The Respondent is to pay \$1,200 in respect of costs incurred in conducting this review pursuant to s 210 of the Lawyers and Conveyancers Act 2006. Those costs are to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 17th day of June 2015

R Maidment
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 JE as the Applicant
Mr JE as the Applicant
Mr FQ as the Respondent
Standards Committee
The New Zealand Law Society