

LCRO 217/2017

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

PY

Applicant

AND

SD

Respondent

DECISION

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

Introduction

[1] Mrs PY has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of her complaint concerning the conduct of Mr SD, a lawyer practising as SD Law, Hamilton.

[2] Her complaint is in respect of Mr SD having prepared enduring powers of attorney (EPA) for her mother, Mrs LM:

- (a) in October 2016, as to personal care and welfare appointing Mrs PY's younger sister, Ms JM (Ms J) as attorney, and her elder sister Ms WM (Ms W) as successor attorney (2016 personal care and welfare EPA);¹ and

¹ EPA, personal care and welfare, Mrs LM to Ms J, Ms W (successor), dated 7 October 2016.

(b) in May 2017, as to property appointing Ms J and Ms W jointly (2017 property EPA) and when Mr SD also prepared a revocation of EPAs created by Mrs LM in July 2013.²

[3] In 2013, Mr and Mrs LM lived in [suburb]. In July of that year, Mrs LM created EPAs both as to property, and personal care and welfare (2013 EPAs) pursuant to which she appointed her husband, Mr CM, as attorney and Mrs PY as successor attorney.³

[4] Mrs PY says that this represented a change from EPAs both as to property, and personal care and welfare created by Mrs LM in December 2011, under which she appointed Mr CM as attorney and Ms J as successor attorney.

[5] Mr CM died on 7 August 2016. RK of [Law Firm] a legal firm in [suburb], acted on the administration of Mr CM's estate in respect of which Mrs PY, together with two partners at that firm, are executors.

[6] At the relevant time, both Ms J and Ms W lived in [City] Mr SD was Ms J's lawyer. In October 2016, Ms J introduced Mrs LM to Mr SD. Mrs LM had either just moved, or was about to move, into residential care in [City].

[7] Mr SD then prepared a general power of attorney (PoA), dated 7 October 2016, and the 2016 personal care and welfare EPA pursuant to which Mrs LM appointed, in each case, Ms J as attorney. Mrs LM appointed Ms W as successor attorney in the 2016 personal care and welfare EPA. Mr SD witnessed LM's signatures on both documents. His secretary witnessed the signatures of Ms J and Ms W.

[8] Five months later in April 2017, Mrs LM informed Mrs PY that Ms J had arranged for Mrs LM to see a lawyer to sign some papers.

[9] On 11 May 2017, Mr SD prepared the 2017 property EPA, under which Mrs LM appointed Ms J and Ms W as attorneys jointly. He also prepared a Notice of Revocation of the 2013 EPAs. He witnessed LM's signature on both documents. His legal assistant witnessed the signatures of Ms J and Ms W as attorneys on the 2017 property EPA.

[10] Mrs PY received notification of these documents from Mr SD on 25 May 2017. Having subsequently obtained advice from RK, she asked Mr SD for details of the new EPAs created by LM. In response, Mr SD forwarded copies of the October 2016 general PoA, and the new EPAs to Mrs PY.

² EPA, property, Mrs LM to Ms J, Ms W jointly, dated 11 May 2017.

³ EPAs (1) property, (2) personal care and welfare, Mrs LM to Mr CM, Mrs PY, both dated 24 July 2013.

Complaint

[11] Mrs PY lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 14 June 2017.

Capacity issue

[12] Mrs PY claimed that when Mr SD acted for Mrs LM on the creation of the 2016 personal care and welfare EPA, the creation of the 2017 property EPA and the revocation of the 2013 EPAs, Mrs LM lacked the capacity to sign those documents.

[13] She stated that on 19 April 2016, Mrs LM had been assessed by a Gerontology Nurse Specialist as “displaying signs of Alzheimer’s type dementia”. She said that in October 2016 when Mr SD commenced acting for LM:

- (a) LM remained “grief-stricken, depressed and still shocked” following Mr CM’s death on 7 August 2016, she was unable to live alone, and because Mr CM had “managed” her day to day matters, she was not “wholly competent to do so”.
- (b) Mr SD did not obtain a medical certificate in October 2016, or in May 2017 concerning LM’s mental health;
- (c) on 6 May 2017, Mrs LM informed her that [Mrs LM] “was suffering from a urinary tract infection ... was also in a depressed state and had been so for some time”, and that when Mrs LM met with Mr SD on 11 May 2017 she “had no time to think”, “felt she had to act quickly” and “wasn’t aware” that she “had excluded” Mrs PY as an attorney.

Independent witness issue

[14] Mrs PY claimed that when Mr SD acted for Mrs LM on the preparation of both the 2016 personal care and welfare EPA, and the 2017 property EPA, because he had acted for Ms J his independence was compromised. Consequently, he did not qualify to be a witness for the purposes of s 94A(4) of the Protection of Personal and Property Rights Act 1988 (PPPR Act). She claimed that without being entitled to do so, Mr SD had nonetheless witnessed LM’s signature on those EPAs and had deleted from the required witness’ certificate in the 2017 property EPA the statement that he was independent.

[15] Concerning the 2017 property EPA, she stated that Mr SD did not certify, as he was required to do, that he “gave a copy of the prescribed form of standard explanation of the effects and implications of [the] enduring powers of attorney”, and therefore did not comply with “best practice”.

Client interests issue

[16] Mrs PY alleged that Mr SD did not protect LM’s interest. She stated that he failed to recognise the warning signs relating to LM’s health. She said that she doubts Mr SD explained to Mrs LM that [Mrs LM] was his client, not Ms J. She also doubts that Mr SD met with Mrs LM alone and therefore without “influence” so he “could get a better understanding of [LM’s] capacity at the time”.

[17] She claims that it was Ms J, not Mrs LM, who initiated the general PoA, and the personal care and welfare EPA in October 2016, and the property EPA in May 2017. She also doubts that in October 2016, Mr SD would have sufficiently explained to Mrs LM the meaning and effect of the general PoA before Mrs LM signed it.

[18] She stated that Mrs LM had informed her that Ms J and Ms W accompanied [Mrs LM] to “all appointments” with Mr SD, that [Mrs LM] did not want to sign any more “things”, and felt “scared”.

Act competently

[19] She alleged that by acting for Mrs LM in these circumstances, Mr SD had not acted competently.

Revocation of 2013 EPAs

[20] Considering that Mrs LM had created the 2016 personal care and welfare EPA seven months earlier on 7 October 2016, she queried why the notice of revocation of the 2013 personal care and welfare EPA was not given to her until 18 May 2017.

Response

Capacity issue

[21] In response, Mr SD rejected any suggestion that Mrs PY is “qualified” to assert that Mrs LM was “totally incapable of revoking the [2013 EPAs] and appointing new [a]ttorneys”.

[22] He states that he made his “assessment as to whether [Mrs LM] understood what she was doing and understood the contents, meaning and effect of those [EPAs] and concluded she did understand”. Mrs LM had “authorised [him] to confirm that he had in his possession a doctor’s report saying that [Mrs LM] is depressed” [but] “Alzheimer’s or dementia was not mentioned at all”.

Independent witness issue

[23] Concerning his role as lawyer/witness to Mrs LM’s signature on the 2017 property EPA, he stated that “[r]ightly or wrongly because [he] acted for one of the [a]ttorneys previously ... [he] crossed out everything that suggested [he] was independent and clearly informed [Mrs LM] that [he] had done so”. He said that Mrs LM “wasn’t in the slightest concerned”. He stated that his legal executive “probably had more to do with [Ms J] than [he] did” which was “the reason [he] crossed out the certification”.

Client interests issue

[24] Concerning Mrs PY’ claim that he had “neglected to protect and promote [Mrs PYs’] vulnerable [m]other’s best interests and ensured she could give instructions from undue influence and overbearing family members”, he says that he informed Mrs PY that “[a]ny information to do with [Mrs LM] is privileged, and [without her] consent, [he was] unable to respond to [Mrs PY]”.

[25] He stated that he explained to Mrs LM that if he:

responded to [Mrs PY’s] complaint then [he] would be divulging [Mrs LM’s] reasons for removing [Mrs PY] as [LM’s] attorney because the Law Society would pass on [his] letter to [Mrs PY].

[26] He says that Mrs LM wanted Mrs PY to know only that Mrs LM had appointed new attorneys without further “details”. He says that he “discussed the [EPAs] with [Mrs LM] at length, without [Ms J or Ms W] present”.

[27] In conclusion, he stated that taking into account the tension within Mrs LM’s family he considered that “the best option”, subject to Mrs LM’s approval, would be to complete new EPAs. Then, he stated, Mrs PY “can have no cause for concern as [Mr SD held] a current doctor’s certificate and a completely independent witness”.

Standards Committee decision

[28] The Committee, which delivered its decision on 11 October 2017, determined pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

Capacity issue

[29] The conclusion reached by the Committee on this issue was that because of the “limited information” provided no further action on this aspect of Ms PY’s complaint could be taken. In arriving at that conclusion, the Committee referred to:

- (a) the presumption of competence contained in section 93B of the PPPR Act, the independent witness requirements in section 94A and Mr SD’s evidence that “he discussed the enduring powers of attorney with Mrs LM at length” alone;
- (b) Mr SD’s “assessment” that Mrs LM “did understand” “the contents, meaning and effect” of the EPAs;
- (c) the “current doctor’s report” held by Mr SD; and
- (d) Mrs LM having “only provided a limited waiver of privilege, did not want Mr SD to divulge the reasoning behind her decisions” and therefore Mr SD “was unable to provide the doctor’s certificate in his possession”.

Independent witness issue

[30] The Committee’s findings on this issue were that:

- (a) Mr SD was not an independent witness to Mrs LM’s EPAs because he had previously acted for Ms J;
- (b) Mr SD had not followed the formalities required of an independent witness to an EPA. Section 94A(4) of the PPPR Act does not provide for a donor to consent to these formalities not being met;
- (c) despite not being an independent witness, it was not open to Mr SD to delete “all of the references to independence in his witnessing certificate”; and

- (d) because of the “obvious animosity between the parties, and a high likelihood that enduring powers of attorney could be challenged” Mr SD had “failed to properly protect [Mrs LM’s] interests”.

[31] The Committee observed that having become aware of the consequences of not having followed the requirements of the PPPR Act, Mr SD arranged for Mrs LM to see another lawyer who prepared new EPAs and revoked the 2017 property EPA prepared by Mr SD.

[32] The conclusion reached by the Committee “by a fine margin” was that although Mr SD’s conduct represented a professional failing or shortcoming no further action was necessary, because first, he “had rectified” his error, and secondly, it was Mrs PY, not Mrs LM, who had made the complaint against him.

[33] The Committee warned Mr SD to be “more cognisant in the future of the importance of independence”, and recommended that he “review other powers of attorney made by his firm”.

Application for review

[34] Mrs PY filed an application for review on 17 November 2017. She disagrees with both the approach taken and the conclusion reached by the Committee. At the hearing, she refuted that she was the type of person described by Mr SD in his responses.

[35] She contends that having identified professional failings and shortcomings by Mr SD when he acted for Mrs LM, it was wrong for the Committee “by a fine margin” not to make an adverse finding against Mr SD.

Capacity issue

[36] In her view, the Committee’s approach to her complaint proceeded on the mistaken presumption that Mrs LM “decided she wanted to change her [EPAs]” and “along with Mr SD, ignored [the warning signs] that identified [Mrs LM] as a vulnerable client with a diminishing capacity”.

[37] She says that the Committee did not give “consideration to Mr SD’s failure to take positive action by way of a capacity assessment”. She says that legal advice she had obtained “as to the merit of [her] concerns in relation to Mr SD’s conduct and competence” had “validated” her concerns.

[38] For these reasons, she contends that the Committee's decision sends the wrong message to lawyers, namely, if they "admit and rectify an error" there will be no consequences. In her view, disciplinary sanction is warranted against Mr SD in the interests of "consumer protection or public welfare".

[39] She states that assuming Mrs LM did not have capacity in October 2016 when she signed the general PoA and the 2016 personal care and welfare EPA, and again in May 2017 when she revoked the 2013 EPAs and created the 2017 property EPA, then she probably did not have capacity to create further EPAs in July 2017 with the lawyer [Mrs LM] was referred to by Mr SD.

[40] She says that whilst Mrs LM had withdrawn the April 2016 "full" Gerontology Nurse Specialist report from consideration by the Committee, [Mrs PY's] "awareness of [Mrs LM's] capacity and capability should be regarded as more credible than Mr SD's, who only met with [Mrs LM] a couple of times".

[41] In Mrs PY's view, by deciding that "the issue of Mrs LM's capacity could not be satisfied", the Committee "ignored that Mr SD should have requested a mental capacity assessment". She refers to the "medical certificate" subsequently obtained by Mr SD, which Mrs LM did not wish to discuss, and which [Mrs PY] says identified that Mrs LM "suffers from depression". She says that having met with Mrs LM, RK had raised with [Mrs PY] questions about LM's capacity.

[42] She says that the Committee placed emphasis on Mrs LM's representations in [Mrs LM's] letter dated 24 July 2017 to the Lawyers Complaints Service which, in her view, was written by Ms J. She contends that the Committee did not take into account that she was already Mrs LM's attorney under the 2013 EPAs which "would not be redundant" if Mrs LM was "found [to have been] mentally incapable to sign an [EPA] or will" in May 2017.

Independence issue

[43] Mrs PY repeats her claim that Mr SD knew he was not independent when he acted for Mrs LM both in October 2016 and again in May 2017. She says that although the "Notes to Witness" on the EPA recommend that the witness seek legal advice if the witness has "any concerns", Mr SD "deliberate[ly]" chose not to do so. She considers this conduct by Mr SD was not "a mere oversight or slip".

Notice of revocation issue

[44] In her view, the October 2016 general PoA “appears to have been specifically executed to avoid and circumvent” the 2013 property EPA. She repeats that although Mr SD acted for Mrs LM on the preparation of a general PoA, and the personal care and welfare EPA in October 2016, he did not notify [Mrs PY] until 18 May 2017.

Protect client’s interests issue

[45] She reiterates that she does not believe that Mr SD met with Mrs LM without Ms J and/or Ms W being present. For this reason, she considers that Mrs LM was subjected to “undue influence”.

Lawyer’s competence

[46] She claims that Mr SD’s lack of independence, his deletion from the witness certificate in the 2017 property EPA that he was independent, his failure to provide Mrs LM with the EPA “standard explanation”, his conflict of duties and his failure to request “a mental capacity assessment” before Mrs LM signed both the 2016 personal care and welfare EPA, and the 2017 property EPA combined to illustrate that Mr SD failed to protect LM’s interests and had not acted competently for her.

Response

Capacity issue

[47] Mr SD presents a different view. He submits that Mrs LM “visited [him] perfectly lucid and able to tell her story”.

[48] He says that Mrs PY:

who at that time was attorney for Mrs LM ... was overbearing, manipulative, and so interfering in [Mrs LM’s] life that it was ... the main cause of [Mrs LM’s] depression.

[49] He says that Mrs LM told him that Mrs PY “thinks I’m losing my marbles and I’m not”, and has “influenced people to say that this is the case”. He adds that Mrs LM “was perfectly lucid ... not in any way confused, or nervous”.

[50] He acknowledges that he was “aware of [Mrs PY’s] diagnosis based on a nurse’s appraisal”. He states that he “sought opinions from two specialists”. He says that he had:

never considered an opinion from anyone other than a specialist geriatrician is sufficient evidence to determine permanent dementia necessitating the invoking of an [EPA] for the rest of that person’s life.

[51] He says that such an opinion “was not obtained by Mrs PY”.

Independence issue

[52] He states that he “divulged” to Mrs LM that he had “acted on a sale and purchase for [Ms J]”. He repeats that Mrs LM “wasn’t concerned”.

[53] He says that as soon as Mrs PY questioned the validity of the 2017 property EPA, he “had the [EPAs] revoked and [he] sent [Mrs LM] to another lawyer”. He says that he did not charge a fee to Mrs LM.

[54] He states that he assumed that the other lawyer who prepared the replacement EPA “was happy with Mrs LM’s cognisance as the [EPAs] were completed”.

[55] He says that there “is no coercion ... no conspiracy or collusion”. He states that Ms J and Ms W “are perfectly capable and more qualified in the real world to look after their mother”. He adds that this is “a family dispute and Mrs PY is trying to save face by making [him] the villain of the [piece]”.

[56] In conclusion, he states that his intention was “to see Mrs LM gets what she wants”. He says that he referred Mrs LM to another lawyer “for her benefit ... and when [he] last saw her she was grateful, happy and perfectly conversational”.

Review

[57] This review was progressed by way of an applicant only hearing in Auckland on 15 March 2018 by teleconference. Mr SD had previously stated his intention not to attend.

Nature and scope of review

[58] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁴

... 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” ...

⁴ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

... 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.

[59] More recently, the High Court has described a review by this Office in the following way:⁵

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.

Issues

[60] The issues I have identified for consideration on this review are that when Mr SD acted for Mrs LM on the preparation of the 2016 personal care and welfare EPA, the 2017 property EPA, and the notice of revocation of the 2013 EPAs:

- (a) Did he comply with the independent witness requirements of the PPPR Act?
- (b) Did he protect and promote Mrs LM's interests?
- (c) Did he act competently with particular reference to the independent witness requirements in the PPPR Act, Mrs LM's capacity, and revocation of the 2013 EPAs?

Analysis

[61] Because all three issues interrelate I will consider them together.

(1) EPA independent witness issue

(a) Enduring powers of attorney — a creature of statute

[62] Unlike ordinary powers of attorney, the law in respect of which is to be found in the general law of agency, enduring powers of attorney (EPAs) both as to a person's

⁵ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

property, and a person's personal care and welfare are creations of statute, the PPPR Act.⁶

[63] The intention of an EPA is to overcome an attorney not being able to exercise the powers conferred if the donor becomes mentally incapable. An EPA enables the attorney to either manage the donor's property, or look after the donor's personal care and welfare if and when the donor becomes incapable of doing so.⁷

(b) Creation of EPAs

[64] A number of requirements must be carried out or satisfied to create an EPA.⁸ An EPA must be in the prescribed form and have attached to it a certificate that it has been witnessed as required.⁹ The "donor, or ... some other person in the presence of the donor and by the direction of the donor" must sign the instrument. So too must "the attorney (or if more than 1, by each attorney)".¹⁰

(c) Lawyer/witness — independent of the attorney

[65] The witness to the donor's signature, who can be a lawyer, must be "independent of the attorney (or of each attorney)".¹¹

[66] Consistent with this requirement, the lawyer/witness is required to certify that "(c) the witness is independent of the attorney (or of each attorney)" or that one of the exceptions in "subsection (8)(a) or (b) applies or, if subsection (4A)(b) applies, the witness is satisfied that no more than a negligible risk of a conflict of interest arises".¹²

[67] Practical advice suggested to a lawyer who both acts for a donor client and proposes acting as witness to the donor's signature on an EPA is that the lawyer:¹³

⁶ *Hinde McMorland and Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [9.120], referring to *DFC Financial Services Ltd v Able* [1991] 2 NZLR 619 (HC) at 628.

⁷ *Re "Tony"* (1990) 5 NZFLR 609 (FC) at 620; *Re K (Enduring Powers of Attorney)* [1988] Ch 310 (Ch) at 313.

⁸ Protection of Personal and Property Rights Act 1988, s 94A — see also s 95, "When power of attorney is an [EPA]".

⁹ Section 94A(2).

¹⁰ Section 94A(3).

¹¹ Section 94A(4) — or "(b) an officer or employee of a trustee corporation ...; or (c) a legal executive who meets the requirements of [ss(9)]. ss(4) is subject to subsection (8) which concerns circumstances where the attorney "(a) ... is a trustee corporation" in which case "an officer or employee [so authorised] may witness the donor's signature: (b) ...is appointed in his or her capacity as a lawyer, another lawyer in the attorney's firm or a legal executive in that firm who meets the requirements of [ss (9)] may witness the donor's signature".

¹² s 94A(7)(c) — see discussion in Theresa Donnelly, Annette Gray and Neil Williamson "PPPR Act – changes ahead" (New Zealand Law Society Seminar, October 2016).

¹³ Lesley Grant and Chris Kelly "EPAs: Protecting Personal and Property Rights" (paper presented to New Zealand Law Society Elder Law Intensive Conference, May 2016) 35 at 46.

must first ask [himself or herself] whether there is any material fact known to the [lawyer] as a result of the lawyer... having previously acted for the donor or attorney, which might compromise the advice to the donor when preparing the EPA.

[68] Moreover, because of uncertainty as to the meaning of “independent of attorney”:¹⁴

the safest option appears to be to arrange for independent advice for the donor where the [lawyer/witness] also acts for an attorney.

(d) Witness to attorney’s signature

[69] Apart from the requirement that “[t]he signature of an attorney must be witnessed by a person other than the donor or the donor’s witness”,¹⁵ there is no requirement in the PPPR Act that the attorney be independently advised, or that the witness to the attorney’s signature be a lawyer or a legal executive.¹⁶

(e) Notice of revocation issue

[70] The PPPR Act includes among the circumstances in respect of which an EPA ceases to have effect when “it is revoked by notice given in the manner set out in section 95A to the attorney or attorneys”.¹⁷

[71] Notice revoking an earlier power of attorney is “given when a copy of the later power of attorney is given to the attorney or attorneys appointed under the earlier power of attorney”. The notice may be given “by a person other than the donor ... the donor’s lawyer or one of the attorneys appointed under the later power of attorney”.¹⁸

[72] An EPA “continues in force until notice of an event revoking the power is received by the attorney”.¹⁹ This includes the giving of a notice of revocation under s 95A.

(f) Family Court jurisdiction

[73] The Family Court has “exclusive jurisdiction in all matters under the PPPR [Act]”.²⁰ The Court’s jurisdiction in respect of an EPA includes the power “to determine -

¹⁴ At 46.

¹⁵ Section 94A(5).

¹⁶ Grant and Kelly, above n 13.

¹⁷ Protection of Personal and Property Rights Act, s 106(1)(ab).

¹⁸ Section 95A(2).

¹⁹ Section 103C(2). The term “an event revoking the power of attorney means any event described in s 106(1) in which the Enduring Power of Attorney ceases to have effect”: s 103C(8).

²⁰ *Carrington v Carrington* [2014] NZHC 869, [2014] NZFLR 571 at [64], following *W v Public Trust* [2010] NZFLR 277 (HC).

(a) whether or not any instrument is an [EPA]; or (b) whether or not the donor of an [EPA] is mentally incapable”.²¹

[74] This may include a question whether a lawyer/witness was independent of the donor, or about the mental capability (or incapability) of the donor at the time the instrument was signed.

(2) *Client interests issue*

[75] The purposes of the Act have a consumer, or client objective and include “(a) to maintain public confidence in the provision of legal service ...: (b) to protect the consumers of legal services”.²²

[76] Consistent with these purposes the fundamental obligations of lawyers include:²³

(d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[77] This obligation is carried forward into r 6 of the Lawyers and Conveyancers (Lawyers: Conduct and Client Care) Rules 2008 (the rules) which requires that:

In acting for a client, a lawyer must within the bounds of the law and [the rules], protect and promote the interests of the client to the exclusion of the interest of third parties.

[78] The principle that applies to a lawyer who acts, or proposes to act for more than one client on a matter has been described as “an obligation of the lawyer to avoid any situation in which the duties of the lawyer owed to different clients, conflict”.²⁴ As noted above, in such circumstances r 6.1 contains a qualified prohibition that:

A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to one or more of the clients.

[79] The word “negligible” is not defined in either the Act or the rules. In a decision from this Office, the LCRO described “a more than negligible risk” in r 6.1 as

²¹ Protection of Personal and Property Rights Act, s 102(1).

²² Lawyers and Conveyancers Act 2006, s 3(1).

²³ Section 4(d).

²⁴ Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 209 referring to *Moody v Cox* [1917] 2 Ch 71 (CA) at 81 per Lord Cozens-Hardy MR.

circumstances where there is “no meaningful risk that the obligations to the parties would not be able to be fulfilled” and “a real risk of an actual conflict of interest”.²⁵

[80] Where a lawyer is requested, or proposes acting for more than one client on a matter, the responsibility for determining whether the threshold “a more than negligible risk” is likely to be exceeded rests with the lawyer concerned.²⁶

[81] In circumstances where a lawyer considers that the prohibition in r 6.1 does not apply, r 6.1.1 contains a qualified permission for a lawyer to “act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained”.

[82] Informed consent, which is defined in r 1.2, must be given without influence, and independent from the other clients.²⁷ Where different lawyers in a firm represent more than one party on a matter, r 6.2 provides that “[r] 6.1 applies with any necessary modifications whenever lawyers who are members of the same practice act for more than 1 party”. This means that the above rules still apply where different lawyers in a firm act for different parties in a matter or a transaction.²⁸

(3) *Act competently issue*

[83] Consistent with the consumer purposes of the Act, the intention of the rules is to ensure that lawyers act competently. To that end r 3 requires that:²⁹

In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[84] Rule 3 applies when a lawyer is providing “regulated services” to a client.³⁰ The duty to be competent has been described as “the most fundamental of a lawyer’s duties” in the absence of which “a lawyer’s work might be more hindrance than help”.³¹

²⁵ *Sandy v Kahn* LCRO181/2009 (December 2009) at [27], [36]. In this context, the word “negligible” means, “unworthy of notice or regard; so small or insignificant as to be ignorable”: Oxford English Dictionary <www.oed.com>.

²⁶ *Taylor v Schofield* [1999] 3 NZLR 434 (HC) at 440, applying *Clark Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 646 — referred to by Webb, Dalziel and Cook at, above n 24, at 213.

²⁷ *Sandy v Kahn* at [41], [42]; see also discussion by Webb, Dalziel and Cook, above n 24, at [7.4].

²⁸ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 6.3 states that “[a]n information barrier within a practice does not affect the application of, nor the obligation to comply with, rule 6.1 or 6.2”.

²⁹ Rule 1.2: “retainer” — “an agreement under which a lawyer undertakes to provide or does provide legal services to a client” is described as the recipient of legal services from a lawyer.

³⁰ Protection of Personal and Property Rights Act, s. 6 - “regulated services” is defined as including “legal services” and “conveyancing services”, which are themselves defined.

³¹ Webb, Dalziel and Cook at, above n 24, at [11.1].

[85] Relatedly, the definition of “unsatisfactory conduct” includes:³²

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.

(4) Discussion

[86] As explained in the “Standard Explanation of effects and implications of an [EPA] in relation to property” the roles and responsibilities of the donor, on the one hand, and the attorney, on the other, are by their very nature markedly different.³³

[87] The tasks required of a lawyer who acts as an independent witness include explaining the effects and implications of the EPA set out in the Standard Explanation, such as, “What does it mean to have an EPA?”, “When does your EPA take effect?”, “What are your attorneys responsibilities?”, “Is there anything your attorney cannot do?”, “Who does your attorney need to consult?”, “What happens to any advance directives you have given?”, “Your attorney’s actions can be supervised”, “Your attorney’s actions can be challenged”.

[88] This further serves to explain the difference between the roles of a donor, and attorney and their respective responsibilities, and why a lawyer/witness must be “independent of the attorney (or of each attorney)”.

(a) Independent witness issue

[89] It is most important from the perspective of both a donor client, and that client’s lawyer who acts on the creation of an EPA, and who intends to perform the role of lawyer/witness, that the lawyer is thoroughly familiar with the requirements and procedures pertaining to EPAs set out in Part 9 of the PPPR Act. This includes being alive to the fact that unless the exceptions to the independence rule apply, strict adherence is required.

[90] Although Mr SD considered that he was not an independent witness, he proceeded to complete the 2017 property EPA. He struck out from the lawyer/witness certificate that he was “independent of the attorney”. The result was that Mr SD completed, and had Mrs LM sign, an amended EPA which did not comply with the requirements of s 94A of the PPPR Act. In my view, by doing so did not act competently

³² Protection of Personal and Property Rights Act, s.12(a). See also Duncan Webb “Unsatisfactory Conduct” (2008) 717 Lawtalk 18.

³³ Protection of Personal and Property Rights (Enduring Powers of Attorney Forms and Prescribed Information) Regulations 2008, reprint as at 16 March 2017, SR 2008/310.

consistent with the terms of his retainer and his duty to take reasonable care, thereby contravening r 3 discussed above.

(b) Client interests issue

[91] This leads to the question, was Mr SD providing regulated services to Ms J and therefore acting for [Ms J] as well as for Mrs LM on LM's EPA matters at the same time in respect of their different interests by having:

- (a) his legal secretary in respect of the 2016 personal care and welfare EPA witness the signatures Ms J as attorney; and
- (b) his legal assistant in respect of the 2017 property EPA, witness the signatures Ms J as attorney"

[92] In order to make an adverse finding against a lawyer, whether it be unsatisfactory conduct, or misconduct, it is, in the majority of cases, necessary to establish whether or not a lawyer was at the relevant time providing regulated services.³⁴

[93] The term "regulated services" is comprehensively defined in the Act and refers to "legal services".³⁵ "Legal services" is defined as services that a person provides by carrying out legal work for another person. "Legal work" includes work in connection with proceedings or anticipated proceedings, giving legal advice in other matters, preparing legal documents and things incidental to the above.³⁶

[94] Circumstances where the lawyer concerned has been held to have been providing regulated services include a lawyer who complained to an organisation about a course which the lawyer's wife, who was employed as the lawyer's secretary, had attended and who held himself out as acting as a lawyer;³⁷ a lawyer who had met with a client to discuss legal issues and not socially;³⁸ a lawyer who acted for a client both as an immigration consultant and a lawyer, and had met the client socially had breached the client's confidence to a third party.³⁹ These decisions illustrate that the answer to the question, which will inevitably turn on the particular facts of each case, is not always clear cut.

³⁴ Lawyers and Conveyancers Act 2006, ss 12, 7 respectively. There are limited circumstances in which a lawyer who is not providing regulated services may still be subject to a misconduct finding under the Act: s 7(1)(b)(ii).

³⁵ Section 6.

³⁶ Section 6.

³⁷ *EA v BO* LCRO 237/2010 (September 2011) at [1].

³⁸ *CX v WZ* LCRO 251/2010 (June 2011) at [31] to [34].

³⁹ *Morpeth v Ramsey* LCRO 110/2009 (November 2009) at [2]

[95] As I have already noted, whilst Mr SD acknowledges that he had acted for Ms J, no evidence has been produced that at the time she introduced Mrs LM to him she retained him to advise and act for her on Mrs LM's EPA matter.

[96] On the information provided to this Office for this review, I am not able to determine, to the degree of proof necessary, namely, the balance of probabilities,⁴⁰ that Ms J had retained Mr SD concerning that matter, and that he was therefore acting for both Ms J and Mrs LM at the relevant time.

[97] However, in my view, by not completing the 2017 property EPA as required by the PPPR Act, Mr SD failed "to protect and promote" Mrs LM's interests and as such contravened r 6 referred to above.

(c) Revocation issue

[98] Concerning the revocation of the 2013 EPAs issue, from the evidence provided to this Office neither Mrs LM, or Mr SD on her behalf, nor Ms J or Ms W gave notice to Mrs PY of the 2016 personal care and welfare EPA. Mrs PY states that apart from having understood from Mrs LM in April 2017 that there were documents for her to sign, she was unaware that the 2013 EPAs had been revoked until she received Mr SD's 18 May 2017 letter.

[99] As noted above, the giving of a notice revoking an earlier EPA under s 95A can be given by either the donor, the donor's lawyer, or one of the attorneys appointed under the later EPA.

[100] Apart from the desirability from a business perspective, and the courtesy of informing an attorney appointed under an earlier EPA in a timely manner that he or she had been replaced, there does not appear to be an obligation imposed by the PPPR Act on the donor's lawyer to do so. In those circumstances between 7 October 2016, the date of the 2016 personal care and welfare EPA, and receipt by Mrs PY of Mr SD's 18 May 2017 letter, the 2013 personal care and welfare EPA would have "continue[d] in force".⁴¹

(5) EPA – donor capacity

[101] Before a donor signs an instrument intended to be an EPA, the matters a lawyer/witness must attend to include:

⁴⁰ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [26].

⁴¹ Protection of Personal and Property Rights Act, s 103C.

- (a) “explain the effects and implications of the enduring power of attorney to ... and advise the donor” of matters including those “(a) ... referred to in the notes to the prescribed form of power of attorney”.⁴²
- (b) “certify on the prescribed form for the certificate” that he or she has provided this explanation to the donor,⁴³ and where the donor has signed an EPA after 16 March 2017 that the witness believes on reasonable grounds that the donor:⁴⁴
 - (i) understands the nature of the instrument; and
 - (ii) understands the potential risks and consequences of the instrument; and
 - (iii) is not acting under undue pressure or duress; and ...
- (c) certify that he or she “has no reason to suspect that the donor was or may have been mentally incapable at the time the donor signed the instrument”.⁴⁵

[102] In the context of having to make an assessment about the donor’s capability or capacity, the responsibility of a lawyer/witness “who is not required to have any medical training” has been described as “significant”.⁴⁶

[103] In its review of EPAs, the Law Commission warned that the neglect by a lawyer/witness to be satisfied that a donor client had capacity to create an EPA could lead to the validity of the EPA being challenged, a claim in negligence and possibly an adverse disciplinary finding against the lawyer/witness.⁴⁷

[104] In circumstances where there may be a question as to the donor’s mental capability when creating an EPA, the Court has stated that:⁴⁸

the appropriate test requires the donor of an [EPA] to understand the nature and extent of the power conferred and that it is not necessary for the donor to be capable of managing his property and affairs on a regular basis.

⁴² Section 94A(6).

⁴³ Section 94A(7)(a).

⁴⁴ Section 94A(7)(ab), as inserted by the Statutes Amendment Act 2016, s 77(4).

⁴⁵ Section 94A(7)(b).

⁴⁶ Lesley Grant “Enduring Powers of Attorney” (New Zealand Law Society Elder Law Intensive, May 2014) at 29.

⁴⁷ Law Commission *Misuse of Enduring Powers of Attorney* (NZLC IP 71, 2000) at [12] referred to by Brian Burke “Capacity and Undue Influence” (New Zealand Law Society Elder Law Intensive, May 2014) at 16.

⁴⁸ *Re EW* (1993) 11 FRNZ 118 at 120, following the approach in *Re "Tony"* (1990) 5 NZFLR 609 (FC).

[105] To assist lawyers in these circumstances, a helpful group of questions has been suggested that may be put to a donor.⁴⁹

[106] Importantly for the lawyer/witness:⁵⁰

it is the best possible practice to precede the signing of an [EPA] with a medical examination sufficient to determine beyond any reservation the contractual or testamentary capacity of the party concerned.

Discussion

[107] In her complaint, Mrs PY listed a number of warning signs about LM's mental health. These included the Gerontologist Nurse Specialist's assessment dated 18 April 2016, Mrs LM's grief following Mr CM's death on 7 August 2016 and Mrs LM being "unable to live alone in her home in [suburb]". Mrs PY referred to the fact that the 2013 EPAs were in place. At the hearing she stated that she does not find it credible that Mr SD would not have "picked up" that Mrs LM displayed these characteristics.

[108] She stated that she believed that Mr SD "failed to notice or ignored" these warnings and:

neglected to take into account the recent life changing stressful events that would point to the need for further investigation as to [Mrs LM's] mental capacity or decision-making capacity at that time

[109] I observe that whilst in her complaint Mrs PY placed some reliance on the Gerontologist Nurse Specialist's assessment, in a subsequent communication to the Lawyers Complaints Service she requested that the report be removed from the material provided to the Committee because it had "caused [Mrs LM] embarrassment". A few days later she stated that she had "not used" Mrs LM's "medical history ... to suggest that [Mrs LM] is mentally incapable but to highlight her vulnerability and susceptibility to influence".

[110] Mrs PY considers that Mr SD had "a duty of care to protect [Mrs LM] from potential exploitation at the most vulnerable time of her life, regardless of the medical history" in respect of which "a relevant capacity assessment for signing an [EPA] or Will" was required.

[111] Although Mr SD refers to having on his file a doctor's report which stated that Mrs LM suffers from depression, he does not say whether he had a copy of the

⁴⁹ Grant, above n 46, at 30.

⁵⁰ *Dark v Book* [1991] 1 NZLR 496 (HC), at 500, cited in *Re "Tony"* at 621.

Gerontology Nurse Specialist's April 2016 report, which as noted earlier, refers to Mrs LM "displaying signs of Alzheimer's type dementia".

[112] Faced with opposing views about Mrs LM's health in October 2016, and again in May 2017, and in the absence of any further medical evidence which supports either party's view on this issue it is not possible for me to continue with this aspect of Mrs PY's complaint.

[113] As I noted earlier, any doubts about a client's competence or capacity in the context of the creation, or revocation of an EPA,⁵¹ or where "the donor of [an EPA] was induced by undue influence or fraud to create the [EPA]" is a matter for the Family Court, and not for a Standards Committee, or this Office on review.⁵² If, on any application made by any member of the family to the Court for a determination on such a matter, any issues of a professional nature about the role of the lawyer concerned arose during those proceedings then a complaint could be laid at a later stage.

Decision

[114] For these reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

- (a) Confirmed as to the finding to take no further action concerning Mrs PY's allegation that Mr SD did not act competently with reference to Mrs LM's capacity.
- (b) Reversed as to the finding to take no further action as to whether Mr SD was an independent witness, and substituted with a finding that when he acted for Mrs LM in respect of the 2017 property EPA he did not comply with the requirements of s 94A of the PPPR Act and in doing so contravened rule 3, and rule 6 which constitutes unsatisfactory conduct pursuant to both s 12(c), and 12(a) of the Act.⁵³

Orders

[115] In giving consideration as to whether it is appropriate to order a penalty, I refer to the guidance provided by the High Court which has stated that the "predominant

⁵¹ *Carrington v Carrington*, above n 20, at [70].

⁵² Protection of Personal and Property Rights Act, s 102(2)(h).

⁵³ Lawyers and Conveyancers Act 2006, s 12(c) — includes "contravention of ... any regulations or practice rules made under [the] Act"; s 12(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".

purposes [of orders] are to advance the public interest (which include “protection of the public”), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties and to provide scope for rehabilitation in appropriate cases”.⁵⁴

[116] In his response to Mrs PY’s complaint, and review application Mr SD expressed his own doubts that he had fulfilled the role of independent lawyer/witness. He states that he referred Mrs LM to another lawyer to redo the EPAs before the Committee heard Mrs PY’s complaint. It is for this reason I have concluded that in these particular circumstances, a finding of unsatisfactory conduct is sufficient in itself without additional penalty.

Costs

[117] Where an adverse finding is made, costs will be awarded in accordance with the Legal Complaints Review Officer (LCRO) Costs Orders Guidelines. It follows that Mr SD is ordered to pay costs in the sum of \$1200 to the New Zealand Law Society by 26 April 2018 pursuant to s 210(1) of the Act. Pursuant to s 215(3)(a) of the Act, the costs order may be enforced in the District Court.

Anonymised publication

[118] Pursuant to s206(4) this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 26TH day of March 2018

B A Galloway
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 PY as the Applicant
 Mr SD as the Respondent
 [Area] Standards Committee [X]
 New Zealand Law Society

⁵⁴ *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [22]. See also Lawyers and Conveyancers Act, s 3, the consumer protection purposes.