LCRO 232/2010

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	**EQ** of Australia Applicant
AND	**VM** of Auckland Respondent

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

DECISION

Background

[1] In September 2004 the Respondent prepared a new Will for ER, the Applicant's mother.

[2] Shortly after that, ER left to reside in Australia where some of her children also resided.

[3] In December of that year, the Respondent also acted effectively on behalf of ER on the sale of the home owned by her late husband's estate, of which, the Respondent recalls, ER was the sole beneficiary.

[4] Part of the proceeds of the sale were paid out by the Respondent in December 2004 and January 2005 to enable the purchase of a retirement facility for ER, and the balance was paid to the Public Trustee of Queensland who was managing ER's affairs, in August 2005.

[5] ER died on 24 October 2008. The Respondent and one of ER's daughters (ES) were named as executers of the Will prepared by the Respondent in 2004. Other than the interest in the retirement village, all of ER's assets were held by the Public Trustee.

[6] To obtain release of those funds the Public Trustee required that Probate of the Will be granted by the Supreme Court in Queensland. The executors therefore instructed the Public Trustee in January 2009 to act on their behalf to file the necessary documents in the Court to obtain Probate.

[7] There then ensued an extraordinarily long period during which very little was achieved due to the fact that the Public Trustee insisted that it was necessary to file evidence of ER's testamentary capacity at the time of making her will. This was because a notation had been made on the death certificate that ER had suffered from dementia for a period of years.

[8] Obtaining this evidence proved difficult, as ER had changed Doctors around the time that she made her Will, and all of the Doctors with whom she had contact around the time she made her Will, both in the hospital system and privately, were unable to be located.

[9] It was then decided that an affidavit from the Respondent would be filed with the Application for Probate, but because the Public Trustee was not confident that the Court would accept this, the sum of $AU2,000.00 was required to be lodged with that office to meet the costs of making the Application. Not all of the beneficiaries paid in their share of these costs, and consequently the Public Trustee did not proceed with the Application.

[10] Finally, on 16 March 2010, the Respondent and his co executor terminated instructions to the Public Trustee and engaged a firm of solicitors in Queensland to take over the Application for Probate.

[11] Probate was obtained on 20 July 2010.

[12] Administration of the Estate was then able to proceed with the assistance of the Australian firm, and from the evidence on the Respondents file, it would seem that at the time I called for the file in February this year, matters had reached the stage where distributions would be made upon receipt of indemnities from the beneficiaries.

The Complaint

[13] In April 2010, i.e. before Probate had been granted, the Applicant lodged a complaint with the Complaints Service of the New Zealand Law Society. Her complaints were as follows:

- the Respondent was unable to advise her where her mother's ashes were;
- the Respondent had not accounted for the total funds received from the sale of ER's home;
- the Respondent had not ascertained whether investments had been accounted for;
- delays in obtaining Probate;
- the request for funds to enable the Public trustee to proceed with the Application for Probate;
- the Respondent and his co executor had declined an offer from the Public Trustee to handle the estate;
- the Respondent had dismissed the Public Trustee and engaged a firm of solicitors to obtain the Grant of Probate.

[14] The Applicant also noted that the Respondent would be unable to provide an affidavit confirming that ER had capacity to make a Will at the time he took instructions, as he had been informed six months previously by a person described by the Applicant as her mother's "guardian", that she had dementia.

[15] She also advised that she suspected the Respondent had been involved in preparing a Power of Attorney whereby ER appointed ES her Attorney.

[16] Having considered all of the material provided to it, the Standards Committee determined to take no further action in respect of the complaints.

The Review

[17] The Applicant has requested that the decision of the Committee be reviewed by this Office.

[18] In her Application, she raised a number of issues and questions which she wished to have answered. However, because this is a review, no new complaints will

be considered at this stage. A number of the issues raised by the Applicant in the Application for Review raised matters that were not the subject of the initial complaint and I do not intend to address these.

[19] In the course of my investigation, I called for, and received, the Respondent's file, and this has been helpful in carrying out this review.

[20] Both parties provided their consent pursuant to s 206 (2)(b) of the Act to this review being conducted on the basis of the material before me.

ER's Ashes

[21] The Applicant complained that as Executor of her mother's will, the Respondent had an obligation to inform her of the location of her mother's ashes. The question to be considered, is whether the duty of the respondent with regard to the ashes as executor of the will, was also a duty of the respondent as a lawyer, and thereby rendered him subject to disciplinary proceedings in the event that he did not fulfil his duties in that regard.

[22] A similar case has previously been considered by this Office. In K v E LCRO 37/2009, a lawyer was appointed as executor and trustee of a Will. The testator's funeral directions were contained in her Will but they were not followed. The daughter of the deceased lodged a complaint with the Complaints Service.

[23] In his decision, the LCRO referred to the case *of Hansen v Young* [2004] 1 NZLR 37, in which it was noted that the role of a lawyer as solicitor to the estate, and that of the lawyer as executor and trustee, are distinct. The LCRO considered that the lawyer's role in attending to the funeral arrangements was one that was carried out in the lawyer's capacity as executor, and while he considered that the mere fact that the lawyer was not acting in his role as solicitor did not preclude a finding that there had been a breach of professional standards, there would need to be some egregious conduct before such a finding would be made.

[24] I acknowledge that the conduct complained of in that instance took place prior to the commencement of the Lawyers and Conveyancers Act 2006, and therefore the threshold was higher. However the principles followed in that decision remain applicable to the present complaint.

[25] The obligations of the Respondent with regard to ER's ashes quite clearly fall within his obligations as executor, and not as solicitor to the estate. His inability to

advise the Applicant of their precise location does not in any way approach the threshold described by the LCRO in K v E as "egregious" and there can therefore be no professional disciplinary consequences in respect of this.

[26] Indeed, I note that the will contained no specific directions as to the disposal or otherwise of the testator's ashes, and it is doubtful that the Respondent has any further obligation even as executor in respect of this matter.

The Proceeds of Sale

[27] The Applicant has sought details of her mother's financial records for the period from 2004 to 2010 from the Respondent. In his response to the Standards Committee, the Respondent replied that he could not provide these as he had nothing to do with ER from the time she left New Zealand in 2004. The Applicant also sought details as to how the proceeds of sale of ER's property had been disbursed.

[28] While a beneficiary of an Estate has a right to receive copies of accounts produced for the Estate (Apatu v Apatu CIV 2009-441-000515, CIV 2007-441-000823 High Court Napier Registry 10 May 2011) what the Applicant was asking for were records that belonged to her late mother. ER did not die until 24 October 2008. The Applicant was not an Executor of the Estate, and I do not consider that the Applicant was entitled to this information even if it were within the control of the Respondent.

[29] From a perusal of the Respondent's trust account relating to the sale, it is apparent that he accounted for the full proceeds of sale by remitting two payments to Australia in December 2004 and January 2005 which would appear to be for the purchase of the retirement home. The balance of the funds were remitted to the Public Trustee in August 2005.

[30] I do not intend to record the amounts that were remitted, but, it is clear from a perusal of the trust account records, that the full proceeds of sale were accounted for by the Respondent in this way.

[31] After August 2005, the Respondent played no part in the management of ER's funds, as they were firstly within the control of her attorneys, and then the Public Trustee.

[32] Following ER's death, the Public Trustee wrote to the Respondent to advise details of the funds he was holding on her behalf. It was reasonable for the Respondent to rely on the advice from the Public Trustee as to what constituted her

assets, as the Public Trustee had been in control of her funds from at least August 2005.

[33] The Respondents co-executor, ES, considers that the funds held by the Public Trustee included the previous investments held by ER, which had been remitted to the Public Trustee by the ABS although it must be noted that ES cannot say this with certainty, as there was a period prior to the Public Trustee taking over management of ER's affairs, when she was not ER's attorney.

Probate

[34] The Public Trustee in Queensland was instructed by the Executors in January 2009 to apply for the Grant of Probate. The manager handling the Application formed the view that the Court would require some evidence to enable it to be satisfied that ER had the necessary testamentary capacity at the time of making her Will. He initially endeavoured to obtain medical evidence in this regard, but this was unavailable for the reasons noted above. In about October 2009, the Public Trustee then decided that he would file for Probate with an affidavit from the Respondent deposing as to ER's capacity.

[35] While there seemed to be some lack of activity in getting that organised, this approach eventually foundered because the Public Trustee advised that he would not proceed with the Application until he had received $AU2,000.00 to meet the costs of applying on this basis. This was because he was not sure that the Court would grant Probate and in that event, he would be unable to deduct payment from the funds held by that office.

[36] Only three beneficiaries were prepared to do this and consequently there were insufficient funds to enable the Public Trustee to proceed.

[37] It was at that stage, that the Respondent and ES instructed a law firm in Southport, Queensland, to take over the matter from the Public Trustee. That firm was instructed in March 2010, and Probate was obtained some four months later on 20 July 2010.

[38] The decision to instruct the law firm was a decision to be made by the Executors of the estate. In making that decision, the Respondent and ES had no obligation to consult with the beneficiaries or obtain their consent to that course of action.

[39] There is therefore no substance to the complaints by the Applicant with regard to the delays in obtaining Probate, the request for funds to meet the costs of the Public Trustee, or the fact that Australian solicitors were subsequently instructed. Indeed, it was only this action by the Respondent that enabled the deadlock to be broken and Probate obtained.

Miscellaneous

[40] The Applicant included in her complaint, the fact that the Respondent had declined an offer from the Public Trustee for that Office to handle the estate. This would have necessitated both Executors renouncing Probate. ER had appointed the Respondent and ES to carry out this function. Unless there are good reasons for doing so, a person who had been so appointed should not readily renounce Probate. In any event, it is difficult to see how this would have improved matters to enable the Public Trustee to obtain Probate - indeed it seems to me that this would have made it more difficult. In any event, there is absolutely no reason why the Respondent should have acceded to the Public Trustee's suggestion.

[41] The Applicant refers to the fact that the Respondent was aware at the time that ER made her Will, that she was suffering from dementia. The Applicant asserts that the Respondent had been informed of this by her mother's "guardian" some six months previously. I have not noted any direct response from the Respondent to this assertion, but he provided an affidavit to the Australian solicitors which averred to ER's capacity. It would therefore seem that the Respondent does not accept that he was seized of this information. If such evidence were available as asserted by the Applicant, the proper course for her would have been to oppose the Grant of Probate of that Will through the Courts. She did not take that step.

[42] Finally, ES has advised that the only power of attorney held by her was a joint one with the Applicant completed in Australia. The Respondent was not involved with this at all.

Conclusion

[43] From the above review, it will be clear that I do not consider that there is any reason that the decision of the Standards Committee should be modified in any way or reversed.

Decision

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

DATED this 19th day of July 2011

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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:

EQ as the Applicant
VM as the Respondent
The Auckland Standards Committee 4
The New Zealand Law Society