

LCRO 239/2012

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

NU

Applicant

AND

ZY

Respondent

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

DECISION

Introduction

[1] Mr NU has applied for a review of a decision by the Standards Committee to take no further action in respect of his complaint concerning the conduct of the respondent, Mr ZY.

Background

[2] The background to this review involves a dispute over the management of an elderly lady's affairs.

[3] Mrs EL (now deceased) was at the time the complaints arose an elderly widow residing in a [City] rest home. Her faculties were declining. She owned one significant asset, a home which had been the family home for her and her late husband.

[4] Mr NU enjoyed a long and enduring relationship with Mrs EL and her late husband. In 2007, shortly after her husband's death, Mrs EL appointed Mr NU as her power of attorney for property. Mr NU had a background in the finance industry. For

some time he competently and efficiently assisted Mrs EL with the management of her affairs.

[5] Mrs EL, who had no children, had made provision for Mr NU in her will.

[6] At the time the dispute arose, Mrs EL's will provided that Mr NU would inherit the family home on her death.

[7] Mr ZY had also had a lengthy engagement with the EL family. He had been Mr EL's solicitor, and continued to act for Mrs EL after the death of her husband. In 1997 Mrs EL executed a power of attorney, appointing Mr ZY as her property attorney. Whilst Mr ZY held that attorney for a lengthy period of time, he appears to have not had cause to exercise the attorney until around the time of the events which prompted the complaints.

[8] In 2007, shortly after her husband's death, Mrs EL appointed Ms HX her attorney in respect of personal care and welfare. Ms HX was also a beneficiary under Mrs EL's will. Under the testamentary document that existed at the time of the events that led to the complaints, Ms HX was a beneficiary as to a quarter share in Mrs EL's residual estate.

[9] In November 2009, Mrs EL, following a brief hospital admission, moved into a rest home.

[10] Mr NU contends that he had over a period of time discussed with Mrs EL whether she wished to sell her home, and had received consistent response from her that she was considering a return to her home, and did not wish for the home to be disposed of until she had made a firm decision.

[11] Around mid May 2010, Mrs EL listed the home for sale. That came as a surprise to Mr NU who immediately contacted the listing agent with request that the property be taken off the market.

[12] Mr ZY spoke with Mr NU and expressed concern that the property had been delisted. Mr ZY advised Mr NU that he also held a power of attorney for Mrs EL, a fact that Mr NU says was, to that point, unknown to him. The house was put back on the market. Mr NU sought advice from Mr ZY as to whether it was appropriate for him (Mr NU) to continue in the role of attorney. Shortly after, Mr NU was provided with a revocation of his attorney, that document prepared by Mr ZY, and executed by Mrs EL.

[13] Mr NU concluded that Mrs EL had been pressured into listing her house for sale. He spoke with Mrs EL and says that he received instructions from her that she wished to revoke Mr ZY's attorney. Mr NU prepared a notice of revocation of Mr ZY's attorney, and arranged for Mrs EL to execute that document on 26 May 2010.

[14] Mr ZY arranged for Mrs EL to undertake a medical assessment to assess her mental capacity. That assessment took place on 3 June 2010. It was the medical practitioner's conclusion that Mrs EL lacked capacity to understand the nature, or to foresee the consequences of decisions in respect of matters relating to her personal care and welfare. He considered that Mrs EL was mentally incapable in terms of section 94 of the Protection of Personal and Property Rights Act 1988.¹

[15] Mr ZY advised Mr NU that he considered the revocation of his authority to be of no effect, due to Mrs EL's diminished capacity at the time she had executed the revocation. At the same time, Mr NU was advised that Mrs EL's welfare attorney had formed the view that Mr NU's contact with Mrs EL was causing Mrs EL distress. He was advised to have no further contact with Mrs EL.

[16] Mr NU endeavoured to make contact with Mrs EL and to communicate with her, but was unable to do so. Mr NU considered that he had been deliberately excluded, and that efforts to prevent him from having contact were being driven by Ms HX who was manipulating the situation for her personal ends.

[17] Mrs EL's house was sold.

[18] Mr NU continued to manage Mrs EL's day-to-day affairs. In December 2010, he became concerned about Mrs EL's capacity to manage her cheque account. He arranged for a stop to be put on the account.

[19] That action was considered by those opposed to Mr NU's continuing involvement with Mrs EL, to be an egregious and unnecessary intrusion into Mrs EL's right to manage her affairs, which had resulted in significant embarrassment for Mrs EL.

[20] Matters escalated. Complaint was made to the Police that Mr NU's engagement with Mrs EL was causing her intolerable stress. Mr ZY was interviewed by the Police, as was a colleague from his firm, Ms DM. Ms DM's involvement in that process became the subject of separate complaint to the Complaints Service, and is the subject of a current review to this Office. This complaint led to a criminal

¹ Dr SA report, (21 June 2010).

harassment order being made and served on Mr NU. The order prevented him from contacting Mrs EL.

[21] It appears that Mrs EL's affairs were being managed, for a brief period of time, within a factionalised and polarised environment where two competing sides had legal authority to manage her affairs but opposing views as to what action should be taken in respect to the management of her major asset.

[22] Mr NU and Ms HX were both beneficiaries in Mrs EL's will. Their interests in the will conflicted. Ms HX stood to benefit should Mrs EL's unoccupied house be sold as the residual estate would be larger. Mr NU stood to benefit if the house was not sold. It seems that an atmosphere of suspicion and mistrust developed between Ms HX and Mr NU. This provided fertile ground for levelling of accusation that venal interests were dominating the decisions.

[23] It is against the backdrop of that troubled context, that this review falls for consideration.

The complaint and the Standards Committee decision

[24] Mr NU filed his complaint with the New Zealand Law Society Lawyers Complaints Service on 19 December 2011. The complaints filed were comprehensive. Mr NU submits that:

- (a) Mr ZY had failed to take steps to ascertain whether Mrs EL had capacity to make decisions.
- (b) Mr ZY should have, at the time of organising Mr NU's power of attorney, ensured that Mr ZY's appointment as an attorney was identified to Mr NU, and recorded.
- (c) Mr ZY incorrectly advised Mrs EL that Mr NU wished to resign as Mrs EL's attorney.
- (d) Mr ZY had failed to comply with his obligations to communicate.
- (e) Mr ZY had been disrespectful to Mr NU.
- (f) Mr ZY had failed to ensure that a medical certificate was recorded in an appropriate format.

- (g) Mr ZY had rendered fees to Mrs EL which were not justified.
- (h) Mr ZY had provided a misleading and deceptive statement to the Police.
- (i) Mr ZY had used a legal process for an improper purpose.

[25] In response, Mr ZY submitted that:

- (a) He was confident that Mrs EL had proper capacity to provide instructions, when he took instructions from her to act on the sale of her property.
- (b) He rejected suggestion that he had failed to communicate with Mr NU.
- (c) He had utilised his attorney on limited occasions.
- (d) Mrs EL had made request that Mr NU's attorney be revoked.
- (e) Mr NU refused requests to refrain from contacting Mrs EL.
- (f) He rejected suggestion that he had been discourteous to Mr NU.
- (g) He rejected allegation that any elements of his statement made to the Police was inappropriate.
- (h) Mr NU's position was compromised and self interested.
- (i) Costs occurred by his firm were appropriate.
- (j) He perceived his duty to be to protect his vulnerable elderly client, as best he could.

[26] The Standards Committee described Mr NU's complaints as "numerous" and "highly detailed". The Committee distilled the issues to be considered to three matters:

- Did Mr ZY fail in his duty to his client by not seeking medical advice regarding her ability to sign the listing agreement for her house on 12 May 2010?
- Did Mr ZY attempt to conceal the listing of the property from Mr NU, thereby destroying the trust between Mr NU and Mr ZY?

- Was Mr ZY's statement to the Police misleading and made for improper purpose?

[27] The Committee delivered its decision on 22 August 2012. The Committee determined that no further action was necessary in respect to each of the complaints enquired into.

[28] In considering the capacity issue the Committee concluded that:

- (a) Mr ZY was a lawyer of 43 years experience. He had a large client practice and considerable experience dealing with clients in Mrs EL's position. The Committee accepted that from Mr ZY's knowledge of Mrs EL and his experience, he was justified in concluding that she had the capacity to make a decision to sign the agreement.
- (b) Had Mrs EL lacked the capacity to sign the listing agreement herself at the meeting, the personal care and welfare power of attorney would have come into effect and Ms HX would have been able to make the decision that Mrs EL would not be able to live in her house again and Mr ZY, using the power of attorney he held could have legitimately signed the listing agreement.
- (c) The failure to obtain medical advice was understandable given Mr ZY's experience but in any event, the conclusion was one that could have properly been reached.
- (d) The overriding principle of the disciplinary regime in the Lawyers and Conveyancers Act 2006 is the protection of the public. The Committee considered that the failure to obtain medical advice was not contrary to Mrs EL's interests nor did it result in wrong or improper steps being taken in relation to her affairs.

[29] Addressing allegation that Mr ZY had attempted to conceal the listing of the property from Mr NU, the Committee determined that:

- (a) Whilst regrettable that Mr NU was not informed about the listing earlier, Mr ZY's failure to do so, did not constitute unsatisfactory conduct.
- (b) The Committee was unable to conclude as to whether the failure to communicate on a particular issue, had contributed to a breakdown of trust between the parties.

- (c) There were other exchanges which persuaded the Committee to the view that Mr ZY had formed an impression that Mr NU was not able to represent Mrs EL's interests.
- (d) Mr ZY, in protecting the interests of his client, was entitled to act in a robust and forthright manner.

[30] In respect to the statement Mr ZY had made to the Police, the Committee concluded that :

- (a) Mr ZY was in possession of facts that would have been relevant to the complaint and was entitled to make a statement.
- (b) Although it was inferred by Mr NU that Mr ZY initiated the Police complaint, the Committee accepted his denial of this.
- (c) The statement to the Police was not misleading or made for improper purposes.

Application for review

[31] Mr NU filed an application for review on 10 September 2012. He submits that:

- (a) Nine complaints were lodged. The Committee elected to deal with only four.
- (b) In respect to the four complaints considered, the Committee:
 - (i) Had neglected to properly consider whether Mr ZY had failed to pay sufficient heed to signs that should have alerted him to the fact that Mrs EL was incapable of providing instructions.
 - (ii) Erred in concluding that words used by Mr ZY (particularly his choice of parsimonious) were not intended to be disrespectful.
 - (iii) Erred in concluding that Mr ZY's statement to the Police was not misleading.
 - (iv) Paid insufficient attention to the fact that Mr ZY was obliged to share information with Mr NU.
 - (v) Was unfair in its suggestion that Mr NU had served his cause poorly in organising the revocation of the power of attorney.

- (vi) Drew conclusions concerning Mrs EL's will, when it lacked information to do so.
- (vii) Should have properly reached conclusion on the facts presented that Mr ZY had failed to clarify Mr NU's understanding as to Mrs EL's wishes before embarking on a sale of the property.

[32] Mr NU considers that the foundation of his case rests on two limbs. He submits that Mr ZY had an obligation to advise him that he had been appointed as a property attorney. He complains that the Committee failed to address that issue. Further, he submits that the Committee should have concluded that it would have been prudent for Mr ZY to have organised a medical report before decisions were made to sell the property.

[33] In response, Mr ZY submits that:

- (a) Mr NU's review application presents as a revisiting of the matters put before the Committee.
- (b) Mr ZY had only exercised his power of attorney on limited occasions.
- (c) Mr ZY had exercised proper judgement when advising Mrs EL, and had arranged for a medical assessment at an appropriate time.
- (d) The Committee was not obliged to respond to every complaint.
- (e) Mr NU was utilising the complaints process for collateral purpose.
- (f) The Committee had a substantive amount of information before it.
- (g) There was nothing raised on review which would warrant interference with the Committee's exercise of its discretion.

[34] Further submissions were received from both parties.

Review on the papers

[35] Mr NU and Mr ZY agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

The role of the LCRO on review

[36] The role of the 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 judgment for that of the Standards Committee, without good reason.

[37] In *Deliu v Hong* it was noted that a review is:²

... 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.

[38] I note that the submissions filed by the parties both at the complaint stage and on review have been extensive. No stone has been left unturned. Whilst that process has ensured that there is comprehensive information before this Office and I have no concerns that would prompt me to call for further submissions or clarification on any issue from either party, a perhaps inevitable consequence of that approach has been that the scope and extent of the complaint has on occasions been expanded to embrace matters that were not initially put before the Committee.

[39] The task of the LCRO is to review Standards Committee decisions. Whilst the LCRO may seek further information, and pursue his own inquiry, that is not a licence for the LCRO to engage in considering complaints that were not at first step, put before the Committee.

[40] The submissions filed include a comprehensive narrative of events, together with extensive comment on the parties' motivations. The submissions are permeated with allegation that the other has acted in bad faith, and both the Committee and this Office have been invited to draw conclusion that the parties' obligations to care for an elderly and infirm lady, were compromised by self interest.

[41] Despite the issues that arose over the sale of Mrs EL's home, Mr ZY and Mr NU both acknowledge that they had previously enjoyed a positive working relationship. The events which precipitated the breakdown of that relationship, occurred over a brief period of time, and focused initially on the important issue as to the nature of the instructions Mrs EL had provided in respect to her house.

² *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

[42] Mr NU had been a close friend of the EL family for fifty years. He had performed his role as property manager effectively. It would be doing a disservice to Mr NU to not observe that what emerges from the comprehensive submissions he has filed is not just a single minded determination to litigate the complaint but a sense that he feels genuinely aggrieved that his longstanding relationship with Mrs EL was so abruptly terminated on the basis of allegation that he was unconcerned for Mrs EL's welfare.

[43] That being said, it is not the task of this Office on review, to speculate on the motivations of individuals involved in the dispute, or to immerse itself in the intricate narrative, but rather to focus on the issues of disciplinary conduct, and to review the Committee's findings.

Analysis

[44] The Standards Committee identified four issues for the focus of its enquiry. Mr NU complains that the Committee neglected to address five other matters he had raised. An examination of the initial complaint filed indicates that whilst there was a degree of overlap in respect to some of the complaints, in large part the complaints raised are discrete matters. I consider it would have been preferable if the Committee had addressed each of the complaints individually, rather than to have focused on the four issues that they considered were of most importance. Mr NU does acknowledge that he considers that there are two critical elements to his complaint.

[45] A failure of a Committee to address a particular aspect of the complaint can be cured on review. I propose to address each of the issues raised.

Issue 1- Capacity

[46] Central to Mr NU's complaint is allegation that Mr ZY should, around mid May 2010, have been aware that there were signals that should reasonably have alerted him to concerns as to whether Mrs EL had sufficient capacity to understand the decisions she was making, and in particular, the decision as to whether to sell or retain her home.

[47] Mr NU does not, quite properly, suggest that Mr ZY should have assumed responsibility for making a decision as to Mrs EL's capacity, but rather that he should have taken steps earlier than he did to obtain a medical opinion.

[48] Whilst Mr NU advances argument that Mr ZY should have been cautious about taking instructions from Mrs EL, his position is challenged by the confronting

argument (addressed by the Committee) that around the same time he considered Mrs EL's ability to understand the consequences of her actions was likely significantly compromised, he prepared and arranged for Mrs EL to sign a revocation of Mr ZY's power of attorney. That argument engages consideration as to how Mr NU can responsibly advance argument that Mr ZY should have refused to act for Mrs EL, when he himself was taking instructions from Mrs EL.

[49] Mr NU submits that it was unfair of the Committee to be critical of him. He contends that he was entitled to place reliance on Mr ZY's expertise as a practitioner of long-standing. He argues that he was not intending, subsequent to Mrs EL revoking Mr ZY's attorney, to involve Mrs EL in any major decisions, but rather was advocating that the status quo be preserved.

[50] Argument as to Mr NU's motivations divert attention from the issue to be considered, that is whether Mr ZY's failure to organise a medical assessment, raises conduct issues.

[51] That being said, whilst it is the case that Mr NU's conduct is not at issue, his actions in arranging for Mrs EL to execute a revocation of Mr ZY's attorney are relevant as evidence of his views as to the capacity of Mrs EL to provide and understand instructions at the relevant time.

[52] Whilst Mr ZY's considerable experience is fairly said to be a relevant factor in considering the judgement he brought to bear, Mr NU emphasises that he had enjoyed a close relationship with Mrs EL over many years, and that he was devoted to her and close to her. Medical assessment as to Mrs EL's capacity was a matter properly left to the medical professions, but Mr NU, on the basis of the history of his engagement with Mrs EL, was well placed to form a view as to whether Mrs EL was exhibiting behaviour which would raise concerns about her ability to make informed decisions.

[53] 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.

[54] It has been noted that:³

... 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.

³ *HF v SZ* LCRO 186/2009 at [22].

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

[56] 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.

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

[58] 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.

[59] 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.

[60] It is clear that Mrs EL's health was, at the time Mr ZY took instruction on the sale of the house, failing. The examination as to Mrs EL's capacity is particularly focused on the period in May 2010, during which month she:

- (a) Advised Mr NU that she did not wish for her home to be sold.
- (b) Agreed to have her home placed on the market for sale.
- (c) Executed a revocation of Mr NU's attorney.
- (d) Executed a revocation of Mr ZY's attorney.

[61] The apparent contradiction in the instructions is explained by argument that Mrs EL's views were being materially influenced by others.

[62] Mr ZY took instructions to proceed with the sale of the property around 12 May 2010.

[63] Two medical reports and a computer record of Mrs EL's history at the rest home are on the review file. The rest home records provide evidence of her doctor's attendances.

[64] The first report, completed following an assessment of Mrs EL on 3 June 2010, concludes that Mrs EL was no longer wholly competent to manage her affairs, and partially lacking capacity to foresee the consequences of her decisions.

[65] The second report, dated 15 July 2010, concludes that there was relatively little doubt that Mrs EL was competent to make decisions when she executed powers of attorney in 1997 and 2007, but that she may have very likely lacked capacity at the time she signed documents in 2009.

[66] The medical reports identified that Mrs EL's capacity to make informed decisions was a matter of concern in June 2010.

[67] Mr NU exhibited the rest home records to counter argument that Mrs EL had expressed a view that she would need to sell her home in order to meet her financial commitments to her rest home care. What those records confirm is that:

- (a) On 18 June 2010 Mrs EL was telling her doctor that she was aware of the conflict surrounding the decision to sell her house.
- (b) On 18 June 2010 Dr SA appears to have formed the view that Mrs EL lacked testamentary capacity. I say "appears" as the record is incomplete.
- (c) On 30 March 2011, Mrs EL spoke with Dr SA regarding her intention to change her will. Dr SA reports that Mrs EL was "quite clear" as to why she wished to change her will. He states that he has "no doubt she knows what she is doing, and the reasons why".

[68] The rest home records make reference to an assessment letter that had been completed in November 2009. That evidence was not on the review file.

[69] What the medical reports disclose, is that Mrs EL's capacity to make decisions was being compromised by her deteriorating health at the time the decision was made to sell the home. But the relevant question when considering Mr ZY's conduct, is whether there were sufficient indications of Mrs EL's diminishing capacity to have alerted him of the need to obtain a medical certificate.

[70] I have given careful consideration to all the arguments, and conclude that Mr ZY had not breached any of his professional obligations by taking instructions from Mrs EL. I do not consider that his conduct fell short of that expected of a competent and diligent practitioner. In reaching that conclusion, I place significance on a number of matters.

[71] Whilst a depth of experience does not provide impervious shield to allegation of lack of judgement, Mr ZY is entitled to advance argument that his years of experience working in the area of assisting elderly clients had given him an expertise in identifying situations where risk was presented that a client may have difficulty in understanding the instructions they were providing.

[72] Mr ZY had acted for Mrs EL and her late husband over a number of years. He was familiar with her affairs. He did not simply fill the role of attorney for Mrs EL. He was her lawyer. He had the benefit of a knowledge acquired over a lengthy period of time. He says that Mrs EL presented to him on 12 May 2010 as a client fully aware of her intentions and instructions. He says that when he received those instructions, Mrs EL had been expressing, over a period of time, concern at Mr NU continuing to remain in the role as her attorney.

[73] Whilst Mr NU advances argument that there were a number of matters that should have alerted Mr ZY to concerns that Mrs EL may have been deteriorating in her capacity, exhibited by matters such as loss of short term memory, the issues identified do not, in my view, reach the threshold of conclusively establishing that Mrs EL's capacity was so impaired as to alert Mr ZY to the need for immediate medical assessment.

[74] The conduct must also be considered by reference to the principles of the Protection of Personal and Property Rights Act (PPPR), which emphasise the presumption of competence, and the paramount consideration of ensuring the promotion and protection of the donor's best interests, whilst seeking at all times to encourage the donor to develop their competence to manage their own affairs.⁴

[75] Whilst Mr NU argues that Mr ZY should have been alerted to capacity issues in mid May 2010, in the preceding month Mr NU had concluded that Mrs EL was able to articulate a continuing desire to retain her home, and hard on the heels of Mr ZY taking instructions, Mr NU arranged for Mrs EL to revoke Mr ZY's attorney.

⁴ Protection of Personal and Property Rights Act 1988, s 97A.

[76] Whilst Mr NU had identified concerns regarding Mrs EL's deteriorating health, those concerns clearly did not extend to the point where he considered that Mrs EL's health issues were compromising her ability to provide him with instructions, although he was clearly of the view that Mrs EL's health was deteriorating.

[77] Mr ZY's views were not formed in isolation. He had the advantage of discussing Mrs EL's situation with her welfare attorney, a person in whom Mr ZY had confidence, and a person who Mr ZY considered had Mrs EL's best interests at heart. Whilst Mr NU had formed a view that Ms HX was motivated by personal interest, Mr ZY was entitled to make his judgement on the relevance and reliability of the information he was provided. Mrs EL's welfare attorney was confident that Mrs EL was well able to express her views.

[78] Nor did Mrs EL's decision to sell present as instructions which would, in themselves, alert a practitioner to the possibility of something being amiss. It is not uncommon for elderly persons who have been forced as a consequence of declining health to move into assisted accommodation, to have optimistic expectation that their circumstances will improve and allow them opportunity to return to their home. Nor is it uncommon for elderly persons in that situation to present as conflicted and vacillating in their positions, and to eventually arrive at what can be uncomfortable conclusion that it is best that their home be sold.

[79] This is not to speculate as to Mrs EL's motivations, but rather to acknowledge that when argument is advanced that instructions provided by Mrs EL must have been the product of adverse influence, that can do disservice to both Mr NU and Mr ZY. The fact that Mrs EL is said to have expressed differing views as to whether she wished to sell her home or not, does exclude real possibility that her positions whilst conflicting, when advanced were a reflection of her genuine and clearly understood views at the time.

[80] Despite Dr SA and Dr TT expressing concern regarding Mrs EL's capacity in July 2010, some months later, on 30 March 2011, Dr SA attended on Mrs EL at the rest home. His notes of that meeting record that he had spoken privately with Mrs EL, and that she had discussed with him her intentions to change her will. Dr SA reports that he had "no doubt that she knows what she is doing and the reasons why".⁵ If that presents as accurate account of Dr SA's position, then that highlights the difficulty of establishing certitude around issues of capacity when there is potential for such variation in degrees of lucidity.

⁵ [Rest Home] records, 12 November 2014.

[81] It is also material, that argument that Mr ZY was in breach of his professional obligations by virtue of his preparedness to act for Mrs EL in circumstances where it is questioned whether Mrs EL had capacity to provide instructions, cannot overlook the fact that Mr ZY was Mrs EL's appointed attorney in respect to property matters. He had authority to act.

[82] I do not consider that Mr ZY's conduct in failing to obtain a medical certificate earlier than he did, constituted conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Preparation of enduring power of attorney

[83] Mr NU contends that Mr ZY should have advised him that he held a power of attorney for Mrs EL, when preparing the attorney in favour of Mr NU in 2007.

[84] Mr NU considers that Mr ZY's actions fell below the level of competence and diligence expected of a practitioner.

[85] Mr NU argues that had he been put on notice, many of the difficulties that subsequently transpired could have been avoided.

[86] Mr NU also submitted that Mr ZY's attorney would logically have been extinguished, once Mr NU's attorney came into play. Mr ZY invited Mr NU to provide legal authority for the proposition that only one property attorney could be in place at any given time, and that the creation of an attorney, extinguished any existing attorneys. Mr ZY submitted that it was commonplace for more than one property attorney to be in place.

[87] Those arguments are addressed by reference to the relevant sections of the PPPR. Section 93 A of the Act provides that a donor may:

- (a) grant to "another" person an enduring power of attorney to act in relation to the donor's personal care and welfare....
- (b) grant to another person "or persons" enduring powers of attorney to act in relation to the donor's property affairs...

[88] Only one attorney may be appointed in respect of personal care and welfare. More than one attorney may be appointed to act in relation to the donor's property.

[89] The circumstances in which an attorney ceases to have effect are set out in S106 of the PPPR. Creation of a second attorney is not identified as a circumstance in which an earlier executed attorney shall cease to have effect.

[90] I consider it surprising that Mr ZY did not notify Mr NU that he was authorised to act as Mrs EL's attorney when completing the documentation to authorise Mr NU to act in identical role.

[91] The question is, did his failure to do so prompt any conduct issues?

[92] It is approaching the trite to emphasise that the responsibility of the attorney at all times, is to protect the interests of his donor. The potential for conflict, and possibility for confusion in the management of the donor's affairs, is self evident if attorneys purport to act independently of the other. There is obligation on property and welfare attorneys to consult each other regularly to ensure that the donor's interests are not prejudiced as a consequence of any breakdown in communication between them.⁶

[93] Mr ZY was appointed Mrs EL's attorney in 1997. Mr NU in 2007. It is possible that Mr ZY may simply have overlooked that he had held an attorney for Mrs EL for a number of years, when he attended to organising the attorney for Mr NU in 2007 and indeed Mr ZY accepts that may have been the case. No suggestion is made that Mrs EL was not fully capable of managing her affairs up to at least 2009. In those circumstances it is probable that Mr ZY would have had no need or occasion to consider exercising the attorney.

[94] I do not think that negative construction can be placed on Mr ZY's failure to advise Mr NU of his existing attorney. Both Mr NU and Mr ZY emphasise that they had enjoyed a constructive and positive working relationship before problems arose. Mr ZY expressed confidence in Mr NU, and appeared happy for him to assume responsibility for assisting Mrs EL in the management of her day-to-day affairs.

[95] The dispute between the attorneys was not a dispute which had simmered over a lengthy period of time. The disagreement had as its primary focus initially, a difference of view as to the nature of Mrs EL's instructions in respect to her home.

[96] I do not agree with Mr NU that it was necessarily the case that matters would not have deteriorated if he had been made aware earlier that Mr ZY held a power of attorney. Nor do I agree that Mr ZY's failure to disclose the existence of the attorney

⁶ Protection of Personal and Property Rights Act 1988, s 99 A (7).

was the catalyst for the dispute. Both men held firm convictions as to what was best for their donor, and what their donor's wishes were. What the disagreement vividly illustrates is the difficulties that can occur when attorneys hold differing views of their donor's instructions.

[97] Impasse in those circumstances is most appropriately resolved by seeking the intervention of the Court, and that is precisely what Mr NU did. His decision to not proceed that application meant that the Court was not called on to resolve some significant issues.

[98] In considering the question as to whether any disciplinary consequences arise from Mr ZY's actions, it is important to note that Mr NU was not Mr ZY's client.

[99] Mr ZY emphasised that he exercised the attorney on limited occasions. That was clearly the case, but that does not provide answer to allegation that he failed to advise Mr NU of the existence of his attorney.

[100] Mr NU says that Mr ZY submitted that he had no obligation to inform him that he held an attorney. It is difficult to see how a donor's interests are advanced by an attorney holding firmly to view that they had no obligation to inform the other attorney. Acceptance of that proposition could lead to the entirely untenable situation where two attorneys, entrusted with responsibility to manage a donor's property, were acting entirely independent of each other.

[101] Mr ZY's response to this element of the complaint was not convincing. His couching of response in terms of argument that he had no duty to disclose presented as argument which presented at odds with the realities which would confront two attorneys, when acting for a single donor. My sense of the evidence was that Mr ZY did not fail to disclose evidence of his attorney earlier from a conviction that he was not required to do so, but rather more probably as consequence of simple oversight.

[102] In the circumstances, I do not consider that Mr ZY's failure to disclose was an oversight or error of sufficient import to merit a disciplinary response.

Offering to resign without authority

[103] Mr NU sought advice from Mr ZY as to whether he should consider withdrawing as Mrs EL's attorney. When seeking that advice, he also made request as to how it would be best for him to withdraw, if it was Mr ZY's recommendation that he do so.

[104] Mr ZY did not report back to Mr NU but arranged for Mrs EL to immediately execute a revocation of Mr NU's attorney. That revocation, drafted in Mr ZY's hand, recorded that Mrs EL was accepting Mr NU's offer to withdraw.

[105] Criticism is made of Mr ZY that he tendered Mr NU's offer to resign to Mrs EL, without authority to do so. He is accused of behaving unprofessionally.

[106] Mr NU's correspondence to Mr ZY gives clear indication that he was considering whether it was tenable for him to continue as Mrs EL's attorney. He notes the difficulty of him continuing to act, and observes that it was obvious that Mrs EL did not wish for him to continue to have regular contact with him. He notes that it would be undesirable for him to contact Mrs EL directly.

[107] Underpinning Mr NU's complaint is suggestion that Mr ZY took advantage of the situation to secure with undue haste Mrs EL's revocation, and to cloak that revocation in the guise of a resignation. He contends that Mr ZY should have referred back to him before taking steps. Mr ZY is accused of failing to follow proper process.

[108] I do not consider that any conduct issues arise from Mr ZY's actions in obtaining instructions from Mrs EL in respect to her decision to revoke Mr NU's power of attorney.

[109] Whilst Mr NU seeks advice from Mr ZY, his 17 May correspondence gives clear indication that he considered it would be difficult for him to continue as Mrs EL's attorney. He is sensitive to the need to ensure that Mrs EL is not troubled by the possibility of him withdrawing.

[110] Mr ZY takes instructions from his donor, who was also his client. He says that his client had been discussing with him for some time her desire to have Mr NU removed as her attorney. It would have been entirely reasonable for Mr ZY to have concluded, after considering Mr NU's correspondence, that he would need to take immediate instructions from Mrs EL. It is not for this office to second guess what those instructions were.

[111] I do not consider that criticism can be made of the fact that Mr ZY drafted the revocation, nor do I place weight on the fact that the document is framed in the form of Mrs EL accepting Mr NU's resignation. Possibility cannot be excluded that framing the revocation in those terms, was done with purpose to achieve Mr NU's objective of ensuring minimum discomfort to Mrs EL.

Failure to obtain certification.

[112] I do not consider that any disciplinary issues arise from this element of the complaint.

Charges to Mrs EL

[113] Argument that Mr ZY charged fees for work unrelated to his duties as an attorney, are properly addressed by the Court. If Mr NU had progressed his Court application, any competing arguments as to whether either he or Mr ZY had exceeded their authority could have been considered.

Failure to consult- welfare attorney and property attorney

[114] Mr NU makes complaint that Mr ZY failed to communicate with him on matters that he should, as Mrs EL's attorney, have been fully engaged in. I consider that there were occasions when Mr ZY could have communicated more effectively with Mr NU, but in considering Mr ZY's obligations to his client, his role as Mrs EL's attorney, and the particular circumstances of the dispute, I do not consider that any disciplinary issues arise from this element of the complaint.

Respect and Courtesy

[115] Both Mr NU and Mr ZY were able to express their views in forthright fashion, and clearly did, but the words complained of do not, considered in context, carry the degree of pejorative offence that Mr NU ascribes to them. I do not consider that any disciplinary issues arise from this element of the complaint.

Misleading and Deceptive Conduct- Making a statement to Police for Improper Purpose

[116] Mr NU complains that Mr ZY is guilty of errors of omission, and that he should have made greater effort to ensure that the Police were more comprehensively informed concerning Mrs EL's circumstances

[117] I accept that Mr NU believed that the intervention of the Police was both unnecessary and approaching the oppressive, but I do not consider that Mr ZY's account gives evidence of him engaging in misleading or deceptive conduct.

[118] Much of Mr ZY's statement is focused on him providing his view as to the appropriateness of Mr NU utilising Mrs EL's funds for payment of legal costs. Mr ZY was entitled to express his opinion, and stands by it. There is no evidence to establish that he was incorrect in his position, or that his view was advanced with intent to

deceive or mislead. The fact that Mr NU has a different view to that of Mr ZY does not undermine Mr ZY's view that he was providing accurate account.

[119] I have carefully considered the Committee's reasoning in reaching decision to take no further action on this aspect of the complaint. I have given equally careful consideration to the submissions filed by the parties on review.

[120] I see no basis to take a different view to the Committee.

Conclusion

[121] Mr NU has advanced a comprehensive argument to support his application to review the Committee's decision.

[122] To some extent, those submissions present as an attempt to relitigate his position in respect to the dispute over the management of Mrs EL's affairs. That is not intended as criticism of Mr NU. It is compellingly apparent that he carries a sense of genuine regret that his relationship with Mrs EL was brought to an end in the manner that it was. Argument that he was motivated by self interest is rejected, and offends he says both against his long history of providing support to Mrs EL, and his record of providing commendable service as her attorney. Most importantly, it affronts the loving and affectionate relationship he says he had enjoyed with Mrs EL over many years.

[123] Separating however the broader canvas of the dispute from the conduct issues addressed by the Committee and more expansively on review, I am satisfied that there is no basis for departing from the decision of the Standards Committee in this case.

Decision

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

DATED this 31st day of March 2016

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:

Mr NU as the Applicant

Mr ZY as the Respondent

CC as a Related Person

GG as the Respondent's Representative

The Standards Committee

The New Zealand Law Society