

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

GH

Applicant

AND

CY

Respondent

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

DECISION

Introduction

[1] Mr GH has applied for a review of the determination by [Area] Standards Committee to take no further action in respect of his complaints about Mr CY. The essence of the Standards Committee determination is stated as follows:¹

By way of general observation, the issues raised by Mr GH about his mother's will and estate are issues that should or could be considered by a Court and not a Standards Committee. The Court, unlike the Committee, will have the ability and opportunity to test the evidence and ultimately determine the various issues.

Background

[2] In 2015, Mr CY acted for Mr GH's sister, N GH, when she purchased an apartment in [City]. Subsequently in May 2016, Mr CY acted for Mr GH's mother, Mrs GH, in the preparation and execution of a new will. Mrs GH died shortly thereafter.

¹ Standards Committee determination (7 November 2016) at 2.

[3] In 2000, Mr T had prepared a will for Mrs GH and her husband when they lived in [Town]. Mr T had acted for Mr and Mrs GH for some time and was regarded as the family lawyer. The wills were identical and provided that testator's estate should pass to the survivor of them. If the survivor did not survive for the period of one month, the will provided that their three children were to be executors of the will and the estate was to be divided into 12 parts – two parts to go to N, five parts to Mr GH's other sister (V) and five parts to Mr GH.

[4] Mrs GH's husband died in 2008 and, shortly after that, Mrs GH went to live with N in [City]. It seems to be accepted that Mrs GH contributed \$250,000 to N to assist with the purchase of the apartment in 2015. Mrs GH had told Mr GH that she was a part owner of the property but that does not seem to be the case.

[5] The will prepared by Mr CY was significantly different from the 2000 will. In this will, Mrs GH appointed N and Mr CY executors of the will. It provided that N was to have a life interest in the family home in [Town] and, following her death, the property was to be divided equally between Mrs GH's grandchildren. The residue of the estate (after payment of all debts) was to be divided equally between Mr GH, N and V.

[6] Mr GH says that the value of Mrs GH's estate, other than the [Town] home, was approximately \$500,000 before Mrs GH went to live with N. He says that from then on N was the only person who operated his mother's bank accounts and there was virtually nothing at the time of her death.

[7] Mr GH lodged a caveat to prevent the issue of probate and the court ordered probate to be applied for in solemn form. Mr GH advises that litigation concerning the validity of the will has ensued and has yet to run its course.

Mr GH's complaints

[8] Mr GH made four complaints about Mr CY to the New Zealand Law Society Lawyers Complaints Service (the Complaints Service):

- (a) Mr CY made five unsolicited phone calls to Mr GH, four of which were terminated when Mr GH answered. In the final call, Mr GH says Mr CY yelled at him and disrespected his late mother. In another call Mr CY was bullying and again yelled at Mr GH.

- (b) Mr GH asserts that his mother did not have capacity to make the 2016 will and that Mr CY had suggested this to N as a means of helping her avoid the need to disclose what had happened to Mrs GH's assets.
- (c) Mr CY was a "party" to Mrs GH writing the cheque for N's purchase.
- (d) Mr CY had a conflict of interest as he was N's property lawyer and is now named as an executor of Mrs GH's will, which, Mr GH says, "leaves everything to N".

The Standards Committee determination

[9] The Standards Committee dealt briefly with Mr GH's complaints and it is simplest to include all but the first and last paragraphs of the discussion by the Committee:

In his response, Mr CY has denied inappropriate dealings with Mr GH, or that he was disrespectful of [Mrs GH] after her death. He says that he did give some advice to [N] (his co-executor) as to her ability to exclude people from the property if she wished. He said that he asked Mr GH not to contact [N] directly, rather that contact should be through him due to the nature of some of the allegations Mr GH was making against his sister [N].

The Committee concluded that Mr CY did not have a conflict of interest as he was acting solely for [Mrs GH] at the time he prepared her will. As there was no evidence provided by Mr GH that [Mrs GH] lacked the ability to instruct Mr CY, or lacked the ability to understand the terms of her May 2016 will, the Committee agreed that this issue could not be considered further by the Committee and was more appropriately dealt with in the context of Court proceedings about [Mrs GH's] will.

In terms of the allegations about Mr CY's conduct when dealing with Mr GH, given the conflicting information provided by Mr GH and Mr CY, and the fact that there is no corroboration of Mr GH's allegations, the Committee is not satisfied that the claims can be made out.

[10] As noted above, the Committee determined to take no further action in respect of Mr GH's complaints.

Application for review

[11] Mr GH gave three reasons for applying for a review of the Standards Committee determination:²

² Application for review (23 November 2016) part 7.

1. The Standards committee missed a key point that Mr CY was originally my sister N GH's lawyer from early 2015 so there was clear evidence of a "conflict of interest".
2. Letters of collaboration to the bullying behaviour of CY together with Ten (10) confirmed instances of false details provided by CY clearly identified in the response email to the NZLS [Area] Standards Committee have either been ignored or not provided to the review team.
3. The [Area] Standards Committee seems to be more keener to protect their own than providing an objective review of the complaint.

[12] Mr GH supported his application with further detail:

- (a) He asserts that Mr CY had made "five unsolicited bullying calls fully knowing that the opposition client (myself) could in no way provide evidence of his bullying unprofessional abuse". He says that Mr CY rang him four times on the day before his mother's funeral and in each case the call was terminated. In the last call he says Mr CY was unprofessional and disrespected his mother. He says:

his prime purpose seems, to me is to bully us into submission on behalf of his client our younger sister N GH who we believe requested him to do so, so she and only she can benefit 100% from our deceased parents' estate. Note he also called my older sister the same day but was unable to contact her.

- (b) He says the Committee "missed a crucial point when they concluded that Mr CY did not have a conflict of interest. Mr CY prepared a 'death bed' will for my mother on the instruction of my sister N GH who was already Mr CY's client".
- (c) He also draws attention to the signature on the will "which is only initialled twice by my mother (and not signed which is her usual practice) and without a medical certificate of medical mental capacity".

[13] Mr GH then makes some detailed comments on the Standards Committee determination.

*Collaboration*³

[14] Mr GH referred to the following paragraph by the Standards Committee:⁴

³ Although Mr GH alleges that Mr CY "collaborated" with N, it is expected that he refers to the need for "corroboration" of his allegations as expressed by the Committee.

In terms of the allegations about Mr CY's conduct when dealing with Mr GH, given the conflicting information provided by Mr GH and Mr CY, and the fact that there is no corroboration of Mr GH's allegations, the Committee is not satisfied that the claims can be made out.

In response, Mr GH says:⁵

Essentially the NZLS is saying I am lying and their member Mr CY is not! I would like to state again that I did not take the decision to complain to the NZLS lightly about his bullying and disrespectful manner. In fact I discussed this with my lawyer who recommended I do so.

[15] Mr GH says it was impossible for him to get corroborating evidence as he was in his car when the calls came through. He says he:⁶

... hoped the Law Society would use logic instead of stipulating "impossible to obtain" requirements ...

If the Standards Committee used Logic it would ask why did he make so many unsolicited calls to a grieving son going to his mother's funeral other than to Bully and Intimidate.

[16] Mr GH says he provided the Complaints Service with details of 10 "untruths" by Mr CY in response to Mr CY's denials of bullying and disrespectful behaviour.

Will and conflict of interest

[17] Mr GH refers to the paragraph in the Standards Committee determination which says that "Mr CY did not have a conflict of interest as he was acting solely for [Mrs GH] at the time he prepared her will."

He says the Standards Committee "clearly missed a clear point" that Mr CY was N's lawyer prior to undertaking preparation of Mrs GH's last will and arranging for her to sign it and have it witnessed.

[18] Mr GH refers to the following sequence of events:⁷

- a. Mr CY is N's lawyer for her purchase of a 800k apartment in central [City] in 2015 ...
- b. Then Mr CY accepted a \$275k cheque from our mother's estate for N to pay for part of her apartment
- c. Mr CY then together with N prepared a "deathbed" will without medical certificate of mental capacity and initialled twice by my mother (and not signed which is her usual practice)

⁴ Above n 1, at 2.

⁵ Letter from GH to LCRO (28 September 2016) at 2.

⁶ At 2.

⁷ At 3.

d. Mr CY now continues to represent N

He concludes: "This is a massive conflict of interest missed by the NZLS."

Review

Delegation

[19] The review progressed by way of an applicant only hearing in [City] on 13 July 2017 attended by Mr GH. Mr CY was not required to attend and did not exercise his right to do so.

[20] The hearing was conducted by Mr Vaughan acting as a delegate duly appointed by the Legal Complaints Review Officer (LCRO) pursuant to clause 6 of schedule 3 of the Lawyers and Conveyancers Act 2006. The LCRO has delegated Mr Vaughan to report to me and the final determination of this review as set out in this decision is made following a full consideration of all matters by me after receipt of Mr Vaughan's report and discussion.

The telephone calls

[21] Despite Mr GH's dissatisfaction with the Standards Committee's determination, there is no corroborating evidence of the nature of the calls by Mr CY. Mr GH produced his telephone records to support his complaint. These show the caller number and the duration of the call. Mr GH identifies the caller number as being Mr CY's office number.

[22] Mr CY says the reason he made several calls to Mr GH, is that they were calls to Mr GH's cell phone which terminated immediately. This is confirmed by the telephone records provided by Mr GH. Mr CY assumes the calls were terminated as Mr GH moved outside cellphone coverage and Mr GH acknowledges he was travelling in his car at the time.

[23] The evidentiary test to be applied before there can be an adverse finding against a lawyer is whether certain events were more likely than not to have occurred. It is more likely than not that Mr CY's explanation is correct.

[24] Mr GH complains that Mr CY yelled at him when they did speak. There is a conflict in the evidence given by Mr GH and Mr CY as to the content of the telephone calls that can not be resolved.

[25] The complaint about the telephone calls can not be sustained.

The will

[26] Mr GH is critical of the fact that Mr CY did not obtain a medical assessment of his mother before having her execute the May 2016 will.

[27] Mr CY's duty was to carry out Mrs GH's instructions, and allegations of collusion between Mr CY and N remain unsupported.

[28] These issues are not issues to be addressed in the context of a complaint about a lawyer's professional duties. They call into question the validity of the will and potentially present other causes of action. These are matters to be decided by the Court.

The alleged conflict of interests

[29] Mr GH's complaint that Mr CY was conflicted is premised on a view that once a lawyer has acted for a client, he or she retains an ongoing duty to promote and protect the interests of that client, and that duty will prevent the lawyer acting for any other person in circumstances where the interests of the first client are affected.

[30] That view is mistaken. A lawyer's duty to protect and promote the interests of a client does not continue forever. It lasts for as long as the lawyer is actively involved in matters on behalf of the client.⁸ In matters involving family, particularly, there is no reason why a lawyer cannot act for members of the same family at different times on instructions which may detrimentally affect other members of the family who have also been clients of the lawyer. That is a matter for the lawyer's discretion, but there is no ongoing duty to the client for whom the lawyer has previously acted.

[31] In any event Mrs GH's will benefited N, so there was no conflict between their interests.

The "untruths"

[32] Mr GH listed what he refers to as 10 untruths in Mr CY's letter to the Complaints Service in response to his complaint.⁹ With due respect to Mr GH, the "untruths" amount to nothing more than disagreements between Mr GH and Mr CY as

⁸ See Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 186.

to the facts. By way of example, Mr GH disagreed with what Mr CY said Mr GH had been asking for in terms of information about Mrs GH's will.

[33] It is unclear what Mr GH considered the "untruths" added to his complaints, but there is no need to endeavour to resolve the factual differences. Proof either way as to who was correct does not (in these circumstances) mean a person's evidence should be discounted altogether. They add nothing to the evidence in support of Mr GH's complaints.

An overview

[34] The major issue at the heart of this complaint relates to the validity of the will which Mr CY prepared and arranged for Mrs GH to sign. As matters stand, much of what Mr GH has presented amounts to unsupported conjecture on his part. Mr GH advised that litigation was under way in this regard and in the course of that litigation there will be a great deal of evidence before the Court which will be led and about which witnesses will be cross-examined. For example, there may be evidence as to the source of the instructions for Mrs GH's new will. Mr T has assumed that the will was "prepared, probably on the deceased's daughter's instructions".¹⁰ The daughter referred to is N GH.

[35] At the review hearing, it was put to Mr GH that the litigation will produce much more evidence in relation to these matters which may result in a greater understanding of the issues involved and how they are to be dealt with. Mr GH agreed.

[36] Having considered the material available to the Standards Committee and on review, and following a hearing with Mr GH, there is insufficient evidence to support an adverse finding against Mr CY. If further evidence becomes available as the litigation proceeds, Mr GH may make this available to the Standards Committee in support of the same, or similar, complaints in the future. In that case, the Committee will not be precluded from reconsidering Mr GH's complaints.

Decision

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

⁹ Letter from CY to Complaints Service (15 September 2016).

¹⁰ Letter from T to CY (20 July 2016).

DATED this 2ND day of August 2017

D Thresher
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr GH as the Applicant
Mr CY as the Respondent
[Area] Standards Committee
New Zealand Law Society