LCRO 04/2010

CONCERNING	An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 1
BETWEEN	**MS JOHNSTONE** of Wellington Applicant
And	**MS DENNY** of Wellington Respondent

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

DECISION

[1] The Applicant sought a review of a Standards Committee decision declining her complaint against the Practitioner. She expressed some concern about the way that the Standards Committee had described parts of her complaint. However, her major disagreement with the Committee's decision was how it had assessed the Practitioner's performance at a Mediation Conference, with reference to how the assets were dealt with at that time as reflected in the settlement agreement that she subsequently came to regret. The Applicant explained that she experienced considerable distress in respect of both the separation and resolving of relationship property matters, and that a whole day of mediation had added to that stress. She had relied significantly on the Practitioner protecting her interests, and felt that the Practitioner had not protected her interests as well as she ought to have done, and had failed to achieve a settlement that was fair.

[2] The Applicant said she was reasonably satisfied with the Practitioner's performance up to the time of the mediation, with one exception. That exception related to the fact that the settlement agreement that was finally reached was substantially less than an opening offer that had been made by the former husband many months earlier. The Applicant submitted that the Practitioner had led her to believe that she would get a better outcome, and she blamed the Practitioner for the loss of the difference. For these reasons the Applicant considered that she ought not be required to pay the outstanding balance of fees of $2,000 claimed by the Practitioner.

[3] The review hearing was attended by the Applicant and her Support Person, and also by the Practitioner. The Applicant had a full opportunity to discuss the various matters of concern to her. The Practitioner had the opportunity to respond and also to clarify some parts of the information.

The complaints

[4] In support of her complaints against the Practitioner the Applicant mainly focused on three main assets which in her view had not been dealt with fairly and had left her somewhat disadvantaged. The first of these was a debt owed by a third party in connection with the sale of a horse. The Settlement Agreement imposed a 'best endeavours' obligation on the husband to pursue the debt, to keep the Applicant informed and pay her a half share when the debt was recovered. The Applicant complained that this was too "open-ended", and that after twelve months her former husband had taken no steps to recover the debt and had not kept her informed. She was uncertain as to what steps could be taken. In her view the Practitioner should have ensured that she was paid a sum equivalent to her share of that debt, instead of leaving her with a right to half of an unpaid debt.

[5] The Practitioner explained that this was a 'bad debt' and being a relationship debt, there was no basis for insisting that the Applicant should be paid her half share in cash. The Practitioner said that the Applicant severed the professional relationship after the settlement and she had received no further instructions concerning that debt. The Applicant did not dispute the uncertainty concerning the recovering of the money.

[6] Given that repayment of the debt appears to have been uncertain, I would have some difficulty in finding fault with the Practitioner's services in failing to have

negotiated the outcome suggested by the Applicant. Division of relationship property takes into account not only assets but also debt. While there was no evidence that any consideration had been given to the Applicant receiving a lesser sum to satisfy this part of the property division, nor was there any indication that she would have been satisfied to have received a lesser amount. In the circumstances it seems not unreasonable that the risk of whether or not a payment was made should be borne equally between the parties. The Practitioner had no further obligation to the Applicant after the professional relationship ended and in my view cannot be faulted for failure to have followed up on the matter.

[7] The second asset related to a number of ball gowns. The Applicant explained that she and her daughter owned a business involving the hiring of ball gowns. The Settlement Agreement provided that her former husband received a half share of the value of the gowns. What should have happened, she explained, was that he should have received a half of her half share. The total value of all the ball gowns was, she said, $6,000. The Settlement Agreement provided for a 50/50 division, with each of the parties being credited with the sum of $3,000. According to the Applicant her former husband should have received a sum of $1500. She thought that she had provided all of the relevant information to the Practitioner.

[8] The Practitioner responded that she relied on the Applicant to provide information and details concerning the assets. She had sought from the Applicant information about her share of the assets and said that information, including the value of the gowns, had been provided to her by the Applicant as representing her (the Applicant's) share of the assets of the business. The Practitioner denied having been informed that the business asset represented the total value rather than only the Applicant's share; she said that she had asked the Applicant to provide details of her assets and had relied on the information provided by the Applicant as representing the Applicant's share of the property.

[9] The accounts given by the Applicant and the Practitioner suggested that there may have been a miscommunication between them concerning this matter. I do not accept that the error is entirely the responsibility of the Practitioner. There was information of two lengthy meetings having taken place prior to the mediation, with the Practitioner, the Applicant and the Applicant's father, where the assets were discussed. It would be surprising if the discussion had not included the business asset. There is no indication that any misunderstanding by the Practitioner was corrected by the

Applicant. Lawyers are inevitably reliant on their clients to provide details of assets and a Practitioner could reasonably assume, when gathering information from a client about their property, that the client's information will relate to relationship property and identify where any part of it is in fact owned by a third party. Notwithstanding this error, I do not think that the overall circumstances would justify a finding of fault on the part of the Practitioner.

[10] The next item related to a Farmers' credit card and other debts. The Applicant was unhappy that she was obliged to apply some part of her share of settlement monies to clearing the credit card debt, costs for a family holiday, and vehicle repairs, which she considered should have been joint costs until the hearing.

[11] The Practitioner explained that these debts arose post-separation, and furthermore that the Applicant's former husband had been paying maintenance to the Applicant from the time of their separation. She disputed that she had failed in not ensuring that these debts were paid by the Applicant's former husband.

[12] I accept that debts accrued by one party after separation do not generally qualify as relationship debts. I can see no basis for a finding that the Practitioner failed to protect the Applicant with regard to post-separation debts.

[13] There were several other concerns raised by the Applicant. In her view the Practitioner had not performed well at the mediation. She contended that the Practitioner had been out of her depth and for that reason had failed to secure for her a living standard that she had enjoyed throughout her thirty-two years of marriage. The Applicant suggested that the Practitioner had not been equal to the negotiating manner of her husband's counsel. She added that the contras had not been correctly dealt with. She alleged that the Practitioner had been inadequately prepared for the mediation. She also alleged that the Practitioner had led her to believe that negotiation would lead to a better settlement.

[14] The Practitioner denied that she was unprepared for the mediation. She referred to two meetings she had had with the Applicant and her father, which involved extensive detailed discussion about the property and also discussed legal principles for division. The Practitioner said she had undertaken extensive research and considered that she was up to date with the relevant law. She said that she was fully prepared, and that she and the Applicant were aware of the assets and also the former husband's

position with regard to division. She had also taken the precaution of obtaining a last minute valuation of the matrimonial home in the climate of falling property prices.

[15] The Practitioner further explained that although the former husband's initial settlement offer turned out to be better than the final settlement, she said that the husband's position altered significantly over time (he had 'hardened up') after having secured the services of another lawyer. She said that when the original settlement offer was made there was no information about the relationship assets and that she had advised that the reasonableness of the offer could not be assessed in the absence of any information. She denied having told the Applicant that she could expect to get more. In her view it was prudent to delay accepting any offer until all information about relationship property had been disclosed.

[16] The Practitioner disagreed with the Applicant concerning her performance at the mediation. She said that the Applicant had overlooked the advantages she had obtained by the settlement, particularly as several assets taken by the husband had a high paper value but were, in reality, worth less or were nearly worthless. She said that adjustments were made in the course of the negotiations.

[17] I have understood from the Applicant's account that she was considerably distressed by the manner in which she had been questioned, perhaps interrogated, by the husband's counsel. She referred to the emotional distress she experienced and the fact that the mediation continued over the best part of a whole day. It may be that she had expected the Practitioner to 'protect' her from such questioning. The Practitioner responded that in her view the questioning had not been as aggressive as the Applicant had described, and she had not perceived the questioning as inappropriate.

[18] The manner in which lawyers engage in the mediation process may be seen as a matter of style rather than substance. The Applicant acknowledged that she was in a state of emotional distress; it appears that she had suffered (and still suffers) stress-related problems. This is not surprising and I accept that the Applicant may have felt vulnerable at the mediation. However I have found no evidence to support an allegation that the Applicant surrendered any part of her claims or rights because of the performance of the Practitioner. There is no reason to suppose that the Applicant would have obtained a greater settlement in any different circumstances.

[19] Furthermore, the Settlement Agreement contains clauses to the effect that the parties acknowledged that the effect and implications of the agreement were fully explained by their legal advisors, and acknowledgement that they fully understand the implications and effect of the agreement, and the further acknowledgement that they were under no legal disability, were of sound mind and that *"neither is under duress or undue influence and that each voluntarily signs this agreement of his or her own free will*". There would need to have been clear contradictory evidence to overcome these acknowledgements. There is nothing to show that the Applicant was pressed to sign the agreement and I note that she was accompanied by her father throughout. Furthermore, there was nothing to suggest that she would have been materially better off had the matter gone to Court.

[20] I have no doubt that the Applicant has endured a terribly stressful episode in her life, and this has been compounded by a reduced standard of living and a loss of financial security. It is clear from all of the evidence that reaching a final settlement was by no means easy, particularly in that the former husband hardened his position as time went on.

[21] Having perused the file of the Standards Committee, considered the information provided by the parties for the review and having heard from them, I could find no basis for the complaints. The evidence shows that the Practitioner took all proper steps in performing her professional services to the Applicant. Some time was spent explaining to the Applicant why the review application would not be upheld.

Outstanding fees

[22] Given that the Applicant had also sought cancellation of an outstanding bill of costs, I noted that the Applicant's charges appeared to have been very fair and reasonable for the work done. There was some further discussion concerning payment by the Applicant of the outstanding $2,000 she owes to the Practitioner. The parties then reached an agreement concerning payment of this account, the details of which are recorded in a separate Consent Memorandum.

Decision

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

DATED this 13th day of April 2010

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Hanneke Bouchier
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 Johnstone as the Applicant
Ms Denny as the Respondent
Cuba Family Law as a related party
Wellington Standards Committee 1
The New Zealand Law Society