LCRO 57/2011

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| **CONCERNING** | an application for review pursuant to section193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a determination of the Auckland Standards Committee 2 |
| **BETWEEN** | **MR AND MRS GQ** |
| | Applicant |
| **AND** | **MR TO** |
| | Respondent |

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

## Preliminary comments

[1] This is a review of the Standards Committee decision dated 24 February 2011 in respect of a complaint lodged by Mr and Mrs GQ concerning the conduct of Mr TO. The Standards Committee decision refers to Mr GQ only as the complainant and he is the sole complainant listed in the complaint form, although it was signed by both Mr and Mrs GQ. The review application has been filed by both of them and they have specifically noted that the complaint is by both of them. They have therefore both been included in this decision as the Applicants.

[2] In its decision, the Standards Committee made a number of errors in its recitation of the facts which Mr and Mrs GQ have noted in their application for this review. I have noted those and where I have recorded facts which differ from those as recorded by the Standards Committee, then the record of the facts herein will constitute a modification of the Standards Committee decision in this regard.

**Background**

[3] The facts giving rise to the complaint by Mr and Mrs GQ are well known to the parties, and recorded in the Standards Committee decision. However, it is necessary to briefly summarise the facts to provide context for this decision.

[4] Mrs HA (Mrs GQ's mother) first consulted Mr TO in January 1997. At that time, she instructed him to prepare a will for her. He received further instructions from her again in December 2003 to effect changes to her will, and a draft of the changes was sent to her at that time.

[5] In August 2004 she requested amendments to that draft which were made, and the will was signed in September 2004.

[6] In January 2006 she again made contact with Mr TO to instruct him to prepare Enduring Powers of Attorney for her. She wished to appoint her son GR as her Personal Care and Welfare Attorney, and GR and Mr TO as her Property Attorneys. GR and Mrs GQ (Mrs) were Mrs HA's only two children.

[7] At the time of making those Powers of Attorney, Mr TO met GR for the first time.

[8] In July 2008, Mr HA advised Mr TO that Mrs HA had been placed in residential care.

[9] Shortly thereafter, Mr and Mrs GQ became aware of the appointment of Mr HA and Mr TO as Attorneys, and on 19 August 2008, Mr GQ sent Mr TO a fax in which he advised that in a telephone conversation with his wife, Mrs HA had advised his wife that she wanted to alter the "present setup".

[10] The question as to whether Mrs HA had capacity to make decisions became relevant, both as to whether she had the capacity to alter the existing documentation and as to whether it was necessary for the Property Attorneys to assume management of her affairs.

[11] In April 2008 a Supports Needs Assessment of Mrs HA had been carried out by the Auckland District Health Board, and it was noted that Mrs HA suffered from dementia. The report does not state the degree of dementia suffered by Mrs HA and otherwise noted Mrs HA's desire to stay in her own apartment for as long as possible.

[12] Following the communication from Mr GQ, Mr TO sought a report from Mrs HA's family doctor (Dr X) who had provided medical care for Mrs HA over the previous ten years. In his report dated 24 August 2008, Dr X recorded his view that Mrs HA was incapable of managing her own affairs. His opinion was provided on the basis of a specific Mental State Test conducted by him in April 2008.

[13] On the basis of Dr X's report, Mr TO formed the view that he needed to ascertain in more detail the nature of Mrs HA's financial arrangements with Mr GQ which she had mentioned at the times that she had consulted with Mr TO with regard to her wills. As a result, correspondence passed between Mr TO and Mr GQ in which Mr TO asked for further details of the financial arrangement on several occasions.

[14] Mr GQ resisted providing this information, for the reason that he did not want this information being provided to Mrs GQ's brother.

[15] On 4 December 2008, Mr TO made formal demand of Mr and Mrs GQ for repayment of the funds. A further demand was made on 13 January 2009, and having received no reply, Summary Judgement proceedings were issued on 5 February 2009.

[16] In October 2008 Mrs HA had visited Mr HB, a solicitor with the firm of ACS, with her friend Mrs H, with a view to revoke the Powers of Attorney. Mr HB has deposed that this followed an earlier visit by Mr and Mrs GQ. However, when Mr HB received the assessment made by Dr X he did not action the

revocation. The GQ's attempted to have Mrs HA assessed again by a Dr Y, but Mr HA would not consent to that.

[17] On 19 February 2009, Ms TN, who had been instructed by ACS, wrote to Mr TO advising that she had been instructed by Mr and Mrs GQ to make application to the Family Court under the Protection of Personal and Property Rights Act 1988 for revocation of the Powers of Attorney and at the same time requesting the support of Mr HA to have Mrs HA assessed by Dr Y. That assessment was carried out ultimately in February 2009 and resulted in confirmation that Mrs HA did not have sufficient mental capacity to either revoke the existing Powers of Attorney or to make new appointments.

[18] As a result of Summary Judgement proceedings having been filed with the District Court, Mr GQ produced a document dated 7 October 2008 signed by Mrs HA which recorded the basis on which funds had been provided to Mr and Mrs GQ by Mrs HA. That document contained an acknowledgement that the funds which Mrs HA had made available to Mr and Mrs GQ were to be treated as a loan and were "to be settled as part of the wind up of her estate". By this it was meant that the loan would be off set against Mrs GQ's share of her mother's estate.

[19] Mr GQ had previously advised Mr TO that the arrangement had been documented "at a time when [GS] thought [A] was still competent, and prior to [them] having any information that [A] was not competent". GS was a solicitor who had been previously instructed by Mrs HA who was referred to by her christian name of A.

[20] That document was used by Mr and Mrs GQ to defend the proceedings instituted in the District Court by Mr TO and Mr HA as Attorneys to recover Mrs HA's funds from Mr and Mrs GQ.

[21] Discovery in the District Court proceedings was delayed due to Mr GQ's ill health, and before discovery was effected, Mrs HA died on 7 November 2008. Following issue of Probate of Mrs HA's last will which appointed Mr TO as executor, he became substituted as the plaintiff in the District Court proceedings against Mr and Mrs GQ. At the time of the complaint, these proceedings

remained on foot, primarily for the purpose of ascertaining the balance due to the estate.

[22] The Family Court proceedings were ultimately discontinued on the basis that all costs were borne by Mrs HA's estate.

[23] Mrs GQ has indicated that she reserves her position to apply to have Mr TO removed as executor of Mrs HA's will, and in addition, has alleged that Mr HA has not accounted for funds in Mrs HA's personal bank account. It is anticipated that Mr TO may apply to the High Court for directions as to how to proceed with administration of the estate given that Mrs GQ has indicated that she will not accept that administration of the estate has been properly completed without these funds being fully accounted for.

**Complaint**

[24] Against this background, Mr and Mrs GQ complained to the Complaints Service of the New Zealand Law Society on 1 October 2010.

[25] The core of their complaint is identified as being the fact that the costs of administering Mrs HA's affairs and her estate are seriously out of balance with the value of the estate. The value of the Estate has been estimated by Mr GQ as being $635,312.00 against which estimated costs of $110,190.00 have been incurred.

[26] The complaint concerning costs involves a criticism of the conduct of Mr TO in the following ways:

1) That Mr TO failed to obtain a credible assessment of Mrs HA's mental capacity to ascertain whether she was capable of revoking the Powers of Attorney or not. Mr and Mrs GQ argue that if a credible assessment had been obtained, they would not have needed to bring the Family Court proceedings.

2) That Mr TO had failed to undertake a proper assessment of Mrs HA's financial position at the time the wills and the Powers of Attorney were made. They assert that this was a result of the secrecy surrounding completion of the documents. They also assert that

having received these instructions, Mr TO was obliged to carry out an estate planning process which would have resulted in Mrs HA confirming satisfaction with the financial arrangement with Mr and Mrs GQ. There would then have been no necessity for the District Court proceedings.

3) That Mr TO should have been satisfied with the information provided by the GQ's which they assert was sufficient to enable him to come to the view that it was unlikely that the proceedings would result in the amount due to Mrs HA being increased to such an extent as would cover the costs involved in bringing the proceedings. They refer to this as the "business man's test" by which I assume it is meant that Mr and Mrs GQ contend that Mr TO should have made a commercial decision not to pursue the District Court proceedings as it was unlikely that such would result in a finding that the amount due to the estate would exceed the costs of establishing the figure to any great extent.

4) That having Mr HA as the Welfare Attorney and one of the Property Attorneys, gave Mr HA virtual control over Mrs HA's affairs, resulting in funds being depleted with no proper accounting and him being in a position to take other actions with regard to Mrs HA with which Mr and Mrs GQ did not agree.

5) That by allowing Mr HA to be both a Property and Welfare Attorney, Mr TO had surrendered his independence and failed in his duty to protect Mrs HA's interests.

**The Standards Committee Decision**

[27] The Committee addressed each of the areas of complaint and determined to take no further action in respect of these pursuant to section 138(2) of the Lawyers and Conveyancers Act 2006. This section provides that a Standards Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the

Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

[28] The Committee addressed the issues under the following headings:

*Enduring Powers of Attorney*

The Committee accepted Mr TO' submission that he was not able to (by reason of client privilege), or had any obligation to, disclose to Mr and Mrs GQ the existence of the Powers of Attorney. The Committee also accepted Mr TO' submission that the choice of who was to be appointed as Attorney was a matter for Mrs HA and that he was obliged to follow her instructions. He also submitted that Mrs HA had not at any time when she had sufficient capacity to do so, advised him that she wished to revoke the appointments.

*Family Court Proceedings*

The Committee's considerations centred around the issue of costs which was the core of Mr and Mrs GQ's complaint. The proceedings became irrelevant following Mrs HA's death, but the actions of the parties were relevant in determining who should meet the costs of these proceedings. The Committee accepted that the issues argued by Mr TO and Mr HA were relevant, and that in any event the issue of costs had been resolved by consent orders.

*District Court Proceedings*

The Committee accepted that Mr TO had an obligation as Executor (and initially as Attorney although this was not noted by the Committee) to commence the District Court proceedings to recover the funds owed to Mrs HA and in the process to establish what was owed.

*Administration of Estate*

The Committee did not consider that there were any aspects of the administration of the estate by Mr TO which raised any professional standards issues.

**Application for Review**

[29] Mr and Mrs GQ have applied for a review of the Standards Committee decision. As noted, they have corrected a number of factual errors in the decision.

[30] In the application for review they identify the issues which they consider need to be focused on as follows:

1) The costs, being the matters identified in [26] above.

2) The Powers of Attorney. In this regard they again assert that had proper inquiries been made at the time the Powers of Attorney were documented, there would have been no need for the District Court proceedings and its consequential costs.

3) The Family Court proceedings. They refer to the refusal to allow the assessment by Dr Y and assert that had matters been dealt with as proposed by Ms TN, legal costs would have been minimal.

4) Discovery. The GQs object to Mr TO' insistence on full discovery to ascertain the true value of the sum owed by the GQ's to Mrs HA.

**Review**

[31] The review proceeded by way of an Applicant only hearing in Rotorua on 8 December 2011. This was attended by Mr and Mrs GQ. The reason why an Applicant only hearing was scheduled was to discuss the various aspects of Mr and Mrs GQ's review application, as it seemed that a number of the issues raised by them related more to the actions of Mr HA, and to draw Mr and Mrs GQ's attention to the distinction between Mr TO' conduct as a lawyer, and his conduct as attorney and executor. It was also to provide Mr and Mrs GQ with the opportunity to identify and explain further the matters in the Standards Committee determination with which they were unhappy.

[32] Mr TO also attended the hearing primarily for the purpose of listening to the matters discussed, but did offer some comment by way of clarification of various matters.

[33] Following the hearing, he provided his detailed submissions by way of letter dated 15 December 2011. Mr and Mrs GQ have also provided further comments dated 15 December 2011 and 5 January 2012.

[34] Whilst Mr and Mrs GQ have stated that the focus of their complaint is on the additional costs incurred as a result of Mr TO' actions, it is also clear that they consider Mr TO facilitated the appointment of Mr HA as Attorney and supported actions taken by Mr HA which they perceive as being an attempt by Mr HA to gain a share of the assets which have been established by the Mrs E GQ and Mr E GQ Trusts partnership. They also disagreed with various actions taken by Mr HA as Attorney which they consider led to Mrs HA being placed in a rest home where she was unhappy.

[35] This perceived association with Mr HA has led Mr and Mrs GQ to complain about actions of Mr HA as if these were the actions of Mr TO, and in the process, Mr TO has become embroiled in what would seem to be a long standing antipathy between Mr and Mrs GQ and Mr HA.

**The Solicitor as Attorney/Executor**

[36] It is important at this initial stage to make some comment about the distinction between Mr TO' role as Attorney/Executor and his role as a solicitor. That distinction has been commented on in previous LCRO decisions. In K v E LCRO 37/2009, the LCRO referred to *Hansen v Young* [2004] 1 NZLR 37 as providing authority for the observation that the role of a solicitor to an estate is distinct from his role as Executor and Trustee. In that decision, the LCRO noted that when making funeral arrangements, a solicitor is acting as the Executor of the estate. That is not to say that Mr TO' conduct cannot be considered by the Standards Committee or the LCRO, but the distinct roles need to be born in mind. A failure to carry out a function which is clearly that of an Executor will not mean that any professional standards have been breached.

**The Wills**

[37] Mr TO had made three wills for Mrs HA. The first was made in 1997, the second in 2003 and the third in 2004.

[38] On the 1997 and 2004 occasions, Mr TO advises that he suggested to Mrs HA that he should enquire of Mr GQ what the nature of her holdings were. On both occasions however Mrs HA had instructed him that she did not want him to do so.

[39] However the information that Mrs HA had was not sufficient for any person acting as her Executor or Attorney to proceed without establishing the details of the arrangement.

**Powers of Attorney**

[40] In January 2006, Mrs HA instructed Mr TO to prepare the Enduring Powers of Attorney in which she appointed Mr HA and Mr TO her joint and several Property Attorneys, and Mr HA as her Personal Care and Welfare Attorney.

[41] Mr and Mrs GQ allege that there was a degree of coercion by Mr HA in having these Powers of Attorney made. Mrs GQ advises that immediately following her visit to Mr TO office, Mrs HA expressed regret at what she had just signed. Mrs GQ alleges that her brother "bullied" Mrs HA into providing the Powers of Attorney. Whether that is the case or not, this review must focus on Mr TO' conduct.

[42] At that time, there was no question that Mrs HA had full capacity to give instructions. Mrs HA provided the instructions direct to Mr TO. He deposes in his affidavit dated 17 February 2010, that he discussed the effect of the documentation with Mrs HA prior to her completing it. He also sent her a copy of the documents by post on 11 January 2006.

[43] Although Mrs GQ advises that her mother had told her that she was unhappy at what "she had been made to sign" Mrs GQ did not mention this to her husband at the time or make further enquiries as to what it was that Mrs HA had signed. Nor did Mrs HA show her the documents when copies were forwarded to her by Mr TO.

[44] Mr and Mrs GQ submit that Mr TO should not have allowed Mrs HA to provide the Powers of Attorney to her son as this created a conflict of interest.

Only one person can be appointed as a Personal Care and Welfare Attorney. Contrary to what Mr and Mrs GQ submit, it is extremely common for a member of the donor's family to be appointed as Welfare Attorney. No conflict arises through the appointment itself. Where a conflict arises, is in the exercise of the power. In that regard, it is the actions of the donee that are to be brought into question, not those of the lawyer carrying out his clients instructions.

[45] Mr and Mrs GQ proceed on an assumption that Mr TO had a professional obligation to advise Mrs HA against appointing her son as Attorney and if he had done so, that Mrs HA would have taken his advice. They refer to Law Society recommendations that a beneficiary (although this is a term associated with a will) should not be appointed an Attorney. It would perhaps have been useful to seek further information with regard to these recommendations, but it is not uncommon for a family member to be appointed as Attorney. In any event, a lawyer must abide by his clients instructions. Assuming Mr TO did not make any comment on the wisdom of appointing Mr HA as Attorney, it is unlikely in the absence of any aggravating factors that this would result in a finding of unsatisfactory conduct against him. The appointment of an Attorney is not particularly complex, and indeed it is the donor who is best placed to make an assessment of the suitability of the proposed Attorney. Mr TO would have had little knowledge, if any, of the views of Mrs GQ about the suitability of Mr HA as Attorney. What he did know is that Mrs HA instructed him to prepare the documents to give effect to the appointment.

[46] Without diminishing the comments in the previous paragraph, it is also noted that the documents were prepared in 2006, prior to the commencement of the Lawyers and Conveyancers Act 2006. Any disciplinary proceedings against Mr TO would therefore need to satisfy the requirements of the transitional provisions contained in section 351 of the Act. These provide that a complaint about conduct that took place prior to the commencement of the Act may only be made if proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982. To commence proceedings under that Act, the conduct complained of required a degree of egregiousness far greater than a failure to follow or advise on a Law Society recommendation. In this regard I express some reservations as to whether the recommendations that Mr

GQ refers to contain the statements as submitted by him. However, for the reasons expressed, I have not sought further information on those.

[47] Mr and Mrs GQ advise that they consider there were various persons who would have been suitable to act as Mrs HA's Welfare Attorney. However, it must be remembered that Mrs HA instructed Mr TO that she wished to appoint her son as Welfare Attorney. Mr TO met Mr HA for the first time at that stage. He presumably had no knowledge of the relationships between the family members and it is not the role of a solicitor being instructed to prepare Powers of Attorney to embark upon an interrogation of the client with a view to providing an opinion as to whether the solicitor considers the appointment to be appropriate or not. Indeed, it would be somewhat presumptive of a lawyer to offer any such advice unless the lawyer had a long association with the client and was thoroughly familiar with family relationships.

[48] Mr and Mrs GQ assert that when taking instructions for the Property Power of Attorney, Mr TO should have also undertaken an exercise to establish full details of Mrs HA's assets and liabilities. They consider that this is part of a lawyer's general obligation to protect and promote his or her client's interests, an obligation which is referred to in the preface to the Conduct and Client Care Rules. They assert that even if that duty did not arise when the Powers of attorney were established in 2006, then the duty to do so arose on 1 August 2008 when the Lawyers and Conveyancers Act 2006 came into force.

[49] They consider that if he had done so he would have been advised by Mrs HA that she was satisfied with the arrangement that she had with the GQ's, and this would have removed any need for the subsequent enquiries which the Attorneys undertook.

[50] It seems that the enquiry which the GQ's consider Mr TO should have undertaken should have however been limited to making enquiries of Mrs HA as to the nature of the arrangement. Mr TO was however already aware that Mrs HA did not have this information. Any enquiry would therefore have needed to have been an enquiry of Mr and Mrs GQ, which was made subsequently but resisted by them.

[51] A client who instructs a lawyer to prepare a Power of Attorney does not expect the lawyer to undertake a general estate planning exercise as Mr GQ suggests. It is generally a limited retainer to do exactly what is requested of the lawyer, namely to prepare the Powers of Attorney. Even in these circumstances where Mrs HA was relatively naive in such matters, it would have been inappropriate for Mr TO to embark upon such an exercise. Indeed, if he had done so, he stood to be accused of expanding his brief way beyond what he had been asked to do and incurring inappropriate costs.

[52] In any event, Mr TO had previously made enquiries of Mrs HA as to the nature of the arrangement between her and Mr and Mrs GQ and she had declined suggestions from him that he should enquire further.

[53] Finally, even if he had enquired, and had been told that Mrs HA was satisfied with the arrangement, that would not have meant that there was subsequently no duty on him as Attorney and Executor to investigate the nature of the arrangement. It would have been no answer to an allegation that he had failed in his obligations for him to say that he took no steps in this regard because Mrs HA herself had been satisfied.

[54] Finally, the steps which Mr and Mrs GQ contend Mr TO should have taken would have applied to any person being appointed as an Attorney, and it is doubtful that a failure to take such steps attaches to Mr TO' role as solicitor. It was a function of his role as Attorney, and consequently no professional standards issues would attach to any shortcomings, if indeed there were any.

**Litigation**

[55] Two sets of proceedings were involved in the matters which gave rise to the complaints by Mr and Mrs GQ.

[56] They contend that the District Court Proceedings would not have been necessary if the proper enquiries had been made by Mr TO at the time when the Powers of Attorney were completed. That issue has been addressed in [48] to [54] above.

[57] In addition they also argue that because the loan was to be set off against Mrs GQ's share of the estate, the proceedings were unnecessary. The document which they say supports this was the document dated 7 October 2008 which was only produced by Mr GQ as an exhibit to his affidavit dated 24 June 2009. There were certainly issues with regard to Mrs HA's capacity to understand this document, and irregularities in that Mr GQ had advised that the arrangement had been documented before 7 October 2008.

[58] In any event, the document dated 7 October 2008 contained a number of deficiencies which it would have been wrong for the Attorneys to accept as representing the terms on which the advance could continue. Such deficiencies include an absence of details of what first mortgage rates should be used, (fixed or floating, and which bank), the interest calculation period (weekly, monthly, annually), security (none provided although reference to first mortgage lending recommendations). In addition, the document was silent as to what was to occur should Mrs GQ predecease Mrs HA.

[59] For the purpose of this decision therefore, the commencement of the proceedings and continuation after the production of this document cannot be said to be without cause.

[60] In addition, although the proceedings were commenced as Summary Judgement proceedings for repayment of the loan, the amount due to Mrs HA's estate needed to be established, and for that purpose the discovery which Mr TO pursued was also relevant. It cannot be said that these proceedings were therefore without merit and that the costs of same should not have been incurred.

[61] Mr GQ also states that he had produced sufficient to enable a "business man's" decision to have been made not to pursue the matter further. From what I have seen, the information that Mr GQ had produced had not been substantiated by any other documentation, and it cannot be said that Mr TO pursued this matter without valid reason.

[62] Mr TO had a duty as Attorney, and subsequently as Executor, to take steps to identify accurately Mrs HA's assets. If he did not do that, he was

exposed to claims by the Trustees of the HA Trust as beneficiaries of Mrs HA's will, that he had not fulfilled his obligations in this regard.

[63] The other set of proceedings were the Family Court proceedings commenced by Mrs GQ. Although she says that she was named as the Applicant only to facilitate the proceedings on behalf of Mrs HA, her own counsel, Ms TNs, advised Mr TO that she had received instructions from Mr and Mrs GQ.

[64] It was not possible for Mrs HA to bring proceedings to revoke the Power of Attorney. If she had full capacity, proceedings would not have been necessary. The proceedings must therefore have involved a consideration of Mrs HA's capacity which she could not bring herself.

[65] However one views these proceedings, they were brought by Mrs GQ as Applicant, and it is somewhat odd for her to then assert that the appointed Attorneys should not defend their appointment. To do otherwise would, on the face of it, be abandoning the obligations that they had been appointed by Mrs HA to carry out.

**The bank account**

[66] This is a matter which I understand is before the Court and it is not therefore appropriate that I should consider the matter in any detail. However, I do make the preliminary observation, that in this matter Mr TO is acting as Executor, and if Mrs GQ considers that he has not met his obligations as an Executor, then she must pursue the remedies available to her through the Courts. It is not a matter which is properly addressed in a professional standards forum.

**Estate administration costs**

[67] As I understand it, no formal accounts have been rendered by Mr TO for the administration of the estate. The figure of $15,000.00 has been used by Mr GQ as an estimate. Until accounts are produced they cannot be the subject of a complaint. When the accounts are rendered, if Mrs GQ remains of the view that these are excessive, then she may choose to make a further complaint to

the Complaints Service.

**Summary**

[68] Having considered the various issues raised by Mr and Mrs GQ, it is my view that the determination of the Standards Committee was the correct conclusion for it to reach.

**Decision**

[69] Pursuant to Section 211 (1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee is confirmed, but modified as necessary to reflect the errors of fact contained within it.

**DATED** this 12th day of January 2012

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Owen Vaughan
**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 and Mrs GQ as the Applicants
Mr TO as the Respondent
The Auckland Standards Committee 2
The New Zealand Law Society