

**CONCERNING**

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the Auckland Standards Committee 5

**BETWEEN**

**IJ**  
Of Auckland  
Applicant

**AND**

**SO**  
of Auckland  
Respondent

**DECISION**

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

[1] The review Applicant is Mr IJ (the Applicant) who sought a review of a decision by the Standards Committee declining to uphold his complaints against Ms SO (the Practitioner).

[2] The original complaints were that the Practitioner:

- appeared to have misled the Court regarding the suitability of the Applicant's sister, L, as welfare guardian;
- appeared to have misled her client;
- had a conflict of interest; and
- had caused unnecessary legal expense for the Applicant.

[3] The Practitioner, acting for Age Concern, filed an application to the Court for orders under the Protection of Personal and Property Rights Act 1988 (PPPR) in respect of the Applicant's mother, Mrs G.

[4] Orders were sought for the appointment of a welfare guardian and property manager. The proposed appointee for welfare guardian was L who had agreed to the appointment should orders be made by the Court. The Public Trust had consented to being appointed as property manager. At the time of the application the Applicant held the powers of attorney, both as to property and welfare.

[5] The application was made by Ms M, a community support worker. In her affidavit Ms M set out her knowledge of the wishes of Mrs G, and she expressed concerns about the Applicant's role in relation to his mother having revoked powers of attorney for personal care and welfare that had been held by her daughter, L, and having assumed these powers himself. She questioned whether Mrs G had the capacity to have taken this action, and questioned whether this was contrary to the wishes of Mrs G. The application was made on the basis that Mrs G wholly or partly lacked competence to manage her own affairs in relation to the property.

[6] In a further affidavit Ms M recorded her understandings about the Applicant's intention to sell his mother's home, that there was a mortgage over the property which secured a loan that had been taken out by the Applicant, and which would be repaid from the proceeds of sale, actions which the deponent questioned might not be in Mrs G's interests.

[7] The Applicant opposed the application made by Ms M. He sought similar orders in favour of himself, or in favour of himself and L jointly. His supporting affidavit contested the suggestion that the debt registered against his mother's property secured a loan that was his.

[8] For the purposes of this review, it is not necessary to set out the detailed events which occurred in the following 16 or so months, other than to note that by 21 January the Age Concern applications had been withdrawn, and the Court made appointments in favour of another person who had been proposed by the Applicant.

[9] The Applicant was much offended by the allegations against him, particularly those involving financial matters. He claimed to have had incurred

significant legal expenses in respect of court applications which he noted were not successful in the event, contending that it was known to the Practitioner to have no prospect of success, adding that it was based on erroneous allegations in Ms M's affidavit concerning financial transactions with his parents. He filed a number of complaints against the Practitioner with the New Zealand Law Society.

[10] The Applicant alleged that the Practitioner had misled the Court concerning L's suitability as an appointee as he considered that his sister was disqualified for health reasons from being appointed under the PPPR, and that the Practitioner had misled the Court by filing an application for her appointment.

[11] It was further alleged that the Practitioner had misled her client in two respects, first by failing to inform her client of the unsuitability of L for appointment, and second in failing to have disclosed her knowledge that the money given to the Applicant by his mother and her partner was a gift and not a loan. (This referred to the supporting affidavit of Ms M concerning the Applicant's financial transactions with his mother and her partner.)

[12] The allegation of conflict concerned the Practitioner acting in a proceeding where evidence would need to be given by the Practitioner's firm.

[13] The final complaint alleged that the Practitioner's conduct was responsible for the prolongation of the proceedings over the seventeen months, and the significant costs incurred by him, and by his mother's estate as a result.

#### **Standards Committee Decision**

[14] The Standards Committee declined to uphold any of the complaints. It noted the Practitioner had discussed the conflict issue with a member of her firm, and had considered the NZLS Ethics Committee decision of 1 June 2000, and that both she and her colleague had concluded there was no conflict with the law practice making an application on behalf of Age Concern to protect the financial affairs of the Applicant's mother. The Committee considered that the Practitioner's explanation had merit and that there was no conflict of interest.

[15] The Standards Committee did not consider that the Practitioner had misled the Court or her client, noting that the medical conditions suffered by L had been disclosed in her own affidavit.

[16] Concerning the allegation that the Practitioner appeared to have caused unnecessary legal expense for the Applicant, the Committee noted that the

complaint was based on his view that proceedings had been filed unnecessarily. The Committee referred to Twaddle J's judgment, particularly his observation that it was the Applicant who had prolonged proceedings by persisting in his application to be appointed property manager, either solely or jointly, an application that His Honour said plainly lacked merit. The Committee decided it was unnecessary to take any further action in the circumstances.

## **Review**

[17] The Applicant's main ground for seeking a review of the Standards Committee decision surrounded the complaint of conflict of interest, from which the other complaints arose.

[18] An Applicant-only hearing was conducted in January 2012 at the request of the Applicant who wished to be personally heard. He had been informed that the matter could be determined on the papers, but exercised his right to be heard and was at liberty to do so. The Practitioner was not required to attend as I had formed the view that she had fully answered the complaints and that her attendance was unlikely to add anything further. The Practitioner had the opportunity to attend the hearing but elected not to come.

[19] The review hearing traversed all of the matters of concern to the Applicant which extended well beyond the formal complaints he had made, the Standards Committee decision or the scope of my review. I accept however, that the many elements underpinning his grievance are all interrelated and it seemed reasonable that he should have an opportunity to explain the overall context from which the grievances had arisen.

[20] I have now considered all of the information and evidence. This includes the entire Standards Committee file which contains documents relating to the Age Concern application, and includes copies of the affidavits filed by the Applicant into Court. I have also given consideration to matters raised by the Applicant at the review hearing.

## **Considerations**

### *Misleading the Court*

[21] The Applicant contended that the Practitioner had misled the Court by proposing an appointee for the power of attorney who she knew could never

have been appointed under the PPPR because she wasn't suitable in terms described by the Act.

[22] The decision as to the suitability for appointment lies wholly within the judgment of the Court. It is difficult to see how it could be said that the Practitioner misled the Court in this matter because the evidence makes clear that all relevant information about the proposed appointee was put before the Court. L had declared her health issues in her affidavit, as well as her other personal details, and this would have enabled the Court to have made his own assessment had that opportunity arisen. The Applicant noted that the question of L's suitability was never examined by the Court because the Age Concern application was eventually withdrawn. That is immaterial to this complaint. There is no evidence whatsoever that the Practitioner misled the Court. The affidavit she filed in the Court was properly accompanied by supporting information known or believed to be relevant. There is no substance to this complaint.

#### *Misleading Client*

[23] The complaint that the Practitioner misled her client was a repetition of the above complaint. The suitability of a proposed appointee was a decision for the Court. There is no evidence that the Practitioner misled her client.

[24] In relation to the allegation that the Practitioner misled her client in relation to information concerning his financial involvement with his mother, the Practitioner's client had prepared an affidavit (for Ms M) in which concerns had been expressed about the Applicant's conduct or proposed conduct. There is nothing to show that Ms M did not genuinely hold the beliefs to which she deposed.

[25] Nor is there evidence that the Practitioner was in possession of information that contradicted Ms M's affidavit in respect of her evidence concerning the financial arrangements between the Applicant and his mother and her partner. A member of the Practitioner's firm had given independent advice to Mrs G and her partner in 1996 in relation to an advance from the ANZ bank which was secured by a mortgage. They had also prepared a one-page document intended to record the arrangement, and also the fact that Mrs G and her partner had declined to follow the advice of the law firm to formally record the financial transactions between them and the Applicant. The document is dated 16 May 1996, and signed by the Mrs G and her partner. It is in the form of a letter of

acknowledgement, wherein they made certain acknowledgements in relation to loan agreements with the ANZ Bank, and the allocation of those funds, and other matters.

[26] The Applicant's interpretation of that document was that the money advanced to him by his mother and her partner was not a loan but a gift. With reference to this document the Applicant contended that the Practitioner knew or ought to have known that the affidavits that she had prepared on behalf of her client (referring to a loan) misrepresented the true facts surrounding the financial transaction, namely that the mortgage registered against the property owned by his mother and her partner did not secure any loans made to him.

[27] I record that this document was perceived differently by others whose interpretation was that a large part of the advance was for the Applicant's benefit, and secured by a mortgage over the property owned by his mother and her partner, with the Applicant responsible for the interest payments. In my view there is nothing in the document to suggest the advance was intended as a gift. In any event, the Court was well able to consider the nature of the transaction and decide whether the perceptions and concerns of the Applicant as expressed in her affidavit were, or were not, well founded.

[28] In the context of a complaint in a disciplinary forum, there is nothing to support the complaint that the Practitioner misled her client. I also note that Ms M's affidavit deposed to her personal knowledge of Mrs G's wishes in relation to this matter.

#### *Conflict of Interest*

[29] The above letter of acknowledgement also became the focus of the complaint of the conflict of interest against the Practitioner. The nub of this complaint was that someone from the Practitioner's firm would be giving evidence in relation to that document (the mother and her partner no longer having competency to do so), and a lawyer who is to give evidence in litigation cannot at the same time represent the parties. This prohibition is expressed in Rule 13.5.2 of the Lawyers and Conveyancers Conduct and Client Care Rules 2008, and expressed as follows:

"If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer or a member of the lawyers practice is to give

evidence of a contentious nature, the lawyer must immediately inform the Court and, unless the Court directs otherwise, cease acting.”

[30] This allegation of conflict had been raised in the Court, both in the Applicant’s affidavit to the Court and also apparently in the submissions of his counsel. The Applicant’s counsel had also written to the Practitioner on 5 August 2010 as follows:

*“please confirm that (the law firm) will file evidence in response to the issues raised in (the Applicant’s) second and third affidavits regarding the 1996 ANZ mortgage and the letter of acknowledgement signed by (the Applicant’s mother and her partner). The mortgage transaction and letter directly contradict the inferences made by (the Applicant) in respect of any alleged monetary transactions between (the Applicant) and his mother and (her partner) and their understanding of the nature of these transactions.”*

[31] Counsel’s letter noted that neither Mrs G nor her partner could give evidence in the proceedings, and evidence would need to be given by the solicitor acting for them at the time to allow the Court to determine their intentions as regard the monetary transactions. If the law firm would not file evidence to address these issues, Counsel asked to be informed of the name of the solicitor who acted in the 1996 ANZ mortgage transaction and that person would be called to give evidence at any defended hearing.

[32] The Practitioner responded to that letter, expressing her disagreement that any conflict existed that would prevent her from acting for Age Concern. She informed the Standards Committee that she had discussed the conflict issue with her colleague, and that they had considered a ruling by the New Zealand Law Society Ethics Committee of 1 June 2000 concerning conflict of interest.

[33] The Applicant informed me at the review hearing that the Court had verbally told the Practitioner to address the allegation of conflict of interest. There is no evidence of a Court Direction to that effect. It was well within the power of the Court to further explore this matter had it held concerns but there is no suggestion of the Court having pursued this as a matter of concern.

[34] The conflict perceived by the Applicant and his counsel related to the possibility that evidence might be given by a member of the Practitioner’s law firm. The Practitioner did not perceive herself to be conflicted and apparently did not anticipate that anyone from her law practice would give evidence on the

matter. No-one from the firm was in fact called to give evidence. The Applicant states that the only reason for that was because the Applicant's client had withdrawn the application before the matter came again before the Court, but this seems unlikely since the conflict concerns appear to have been put before the Court at an earlier time but there is nothing to indicate that any further steps were taken, either by the Court or by the Applicant's counsel.

[35] I also observe that the prohibition contained in Rule 13.5.2 contemplates that evidence will be given in litigation, and I have some difficulty seeing that the application made by Age Concern could properly be described as "litigation", as it simply an application to the Court for orders under the PPPR. The Applicant views the matter differently, and perceived himself to be a defendant in a court proceeding against him. The Applicant is mistaken in this view.

[36] In the circumstances of the matter I can see no basis on which the Practitioner should have declined to act for her client.

#### *Unnecessary Legal Expense for the Applicant*

[37] This complaint is based on the Applicant's belief that the Practitioner should not have filed the application at all, or alternatively having filed it, should not have supported the application for orders in favour of L who he considered was not a suitable appointee.

[38] His view is that he incurred costs in defending a proceeding that ought not to have been filed, and considers that the Practitioner is responsible for these costs. He noted that after some seventeen months the Age Concern application was in fact withdrawn, and that the Court had confirmed the appointment of someone who he himself had proposed.

[39] In addressing the costs related complaint the Standards Committee referred to the decision of Mr Justice Twaddle of 21 January 2011, dealing with an application regarding costs award. In his judgment Twaddle J expressed his satisfaction that the application had been properly made. His Honour further observed that the unravelling process was not assisted by the Applicant's "*increasingly uncooperatively attitude towards the Public Trust*", and that the proceedings were made unnecessarily complex by the Applicant's own application to be appointed the sole, or joint, property manager, an application that the judge found lacked merit. His Honour concluded that the Applicant had not made out his claim for costs.



[40] Although this does not align with the Applicant's perception of the matter, there is no reason to suppose that the Judge was unaware of the nature of the application and the supporting information when he made this observation.

[41] While it was open to the Standards Committee to refer to the Court's observation on this matter, the Committee was nevertheless required to form its own view. I accept that there was a sufficient basis for the Standards Committee to have concluded that there was no evidence to support the Applicant position.

[42] I have been unable to see any basis for disciplinary concerns in respect of the Practitioner's attendance on her client in any matters relating to the applications under the PPPR. There is no basis for interfering with the Standards Committee decision. The application is declined.

### **Decision**

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

**DATED** this 15<sup>th</sup> day of February 2012

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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:

IJ as the Applicant  
SO as the Respondent  
The Auckland Standards Committee No. 5  
The New Zealand Law Society