

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the Waikato Bay of Plenty Standards Committee No. 2

**BETWEEN**

**MRS JB**

of North Island

Applicant

**AND**

**MR RW**

of North Island

Respondent

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

**DECISION**

[1] The review Applicant is Mrs JB (the Applicant) who sought a review of a Standards Committee decision that declined to uphold complaints against Mr RW (the Practitioner).

[2] The complaints had concerned the Practitioner's professional services in relation to the administration of the estate of the Applicant's mother, as well as legal advice given in relation to a family trust, the M Trust. For the purpose of this review it is not necessary to set out the details of the background which is somewhat complex, but essentially concerned delay on the part of the Practitioner in finalising the estate, that the Applicant had not been appointed as a trustee of that trust in accordance with her mother's will, and that the Practitioner had not administered the estate assets as agreed.

[3] The Standards Committee's view was that the complaints arose essentially out of what the Committee described as the "totally dysfunctional" relationship between the

Applicant and her sister who were joint executors. The Committee noted that the Practitioner was bound to act on their joint instructions and was often caught in the conflict between the sisters, and that the failure to be able to get clear instructions materially affected progress in the administration of the estate. The Standards Committee noted that there had been “complete disagreement” between the sisters at almost every turn and a complete unwillingness on their part to work together. The Committee expressed the “clear view” that the difficulties with the administration of the estate could not be attributed to the Practitioner but rather to the personal animosity of the two executors. (The Applicant’s sister is referred to throughout as “S”.)

[4] The grounds for the Applicant’s review application were set out in her letter of 21 April 2011. This largely focused on agreements that had been reached in relation to the estate jewellery that she was still awaiting to receive. She contended that the Practitioner had not handled her late mother’s estate jewellery in accordance with the terms of a signed Deed of Arrangement, and a subsequent mediated agreement which recorded procedural arrangements in relation to that Deed. She included details of these agreements in her correspondence. The outcome she sought was that the Practitioner return the jewellery to the valuer to have it divided as per the agreements, and that she would collect her share from the valuer.

[5] A review hearing was conducted on 1 December 2011, and attended by both the Practitioner and the Applicant. This provided an opportunity to discuss the four “review issues” which were identified as:

- a) The Practitioner’s failure to have ensured that she was a trustee of the M Trust in accordance with her mother’s will;
- b) The way that the Practitioner administered the deceased estate;
- c) That the Practitioner had not provided all the financial information concerning the estate or the family trust; and
- d) That the Practitioner had not dealt with the jewellery in accordance with the agreements.

### **The Applicant as Trustee of the M Trust**

[6] In her will the deceased had stated that the Applicant and S were to be appointed as trustees to the M Trust. The deceased had been a trustee of that Trust together with a Mr H. (Mr H is an accountant who also prepared the relevant accounts). The

complaint was that the Practitioner had not taken steps necessary to carry out the instructions of her mother's will to appoint her as a Trustee.

[7] The Deed of Trust gave the power of appointment to the survivor of either the deceased or Mr H. This means that despite the direction in the will, the deceased had no power of appointment. At the review hearing the Practitioner explained that he had prepared Deeds of Appointment for the Applicant and S but that Mr H had declined to sign those documents after discussion with the Practitioner.

[8] The reason for Mr H's refusal to confirm the appointments related to the difficult relationship between the sisters. The M Trust owned a number of valuable properties which were to be sold, and Mr H envisaged that finalising documents for settlement of the sales of the properties was likely to be jeopardised. Mr H's caution in approving their appointments as trustees is amply explained in correspondence. The decision appears to have been a pragmatic one, made by the individual who had the power of appointment.

[9] What is clear is that the power of appointment did not lie with the Practitioner. Although he prepared Deeds of Appointment for the Applicant and S, it was not within his power or responsibility to compel the appointer to approve the appointment of the Applicant and S as trustees. There is nothing to suggest any wrongdoing on his part in failing to have the Applicant appointed as trustees. I find no support for this complaint.

[10] The evidence showed that the Applicant and S were nevertheless included in all decision making concerning Trust matters. That the Practitioner included them is apparent from all of the (significant volume of) correspondence to both of the sisters (copies were on the Standards Committee file). That is to say, there is nothing to indicate that the Practitioner, when engaged in Trust matters, did not include both the Applicant and S in the correspondence.

### **Administration of the estate**

[11] The Applicant explained that the estate assets were small but that there had been unreasonable delays in finalising matters which she perceived to a large extent to be the fault of the Practitioner.

[12] The estate assets had for the large part been transferred, by the will, to the M Trust and what remained were jewellery, shares and some personal effects. The will had appointed the Applicant and S as joint executors. It appears that S refused to sign the probate application and the parties both referred to her lack of co-operation in

administering the estate. There is abundant evidence that the sisters could not agree on almost any matter.

[13] The Practitioner acknowledged that he was the driving force behind a Deed of Arrangement intended as establishing a framework within which the sisters would be able to make decisions and execute documents required for completion of the estate. He explained that the Deed had come about because S had refused to sign the probate documents. The Deed of Arrangement was prepared by the Practitioner, and covered matters relating to the estate and also to the Trust properties.

[14] The Deed recorded Mr H as the only Trustee of the M Trust. The Applicant and S are identified as beneficiaries. The Applicant and S were also separately identified as Executors of their mother's estate. Notwithstanding that neither the Applicant nor S were shown to be trustees of the M Trust, in later parts of the Deed they are referred to as 'trustees' in terms of decision making processes. This may well have created confusion to a reader without some background knowledge.

[15] It appears that the Applicant had failed to appreciate that she was not in fact a legal trustee of the M Trust, a fact that she had discovered when she had contacted the IRD to make enquiries. The Practitioner acknowledged that this matter might have been made more explicit in the Deed, but he considered the responsibility for sorting out the trustees fell with Mr H. He added that the Applicant was aware that she had not signed a Deed of Appointment, and that she had received independent legal advice in relation to the Deed, and could have been in no doubt, in his view, as to its intention.

[16] The Deed may have been drafted with greater clarity but I see no wrongdoing on the part of the Practitioner in this matter. The Applicant received separate legal advice in relation to the Deed of Appointment, and the responsibility of explaining it lay with those advisers.

[17] Insofar as the Deed provided that the Applicant and S would be consulted on matters involving the M Trust, I noted (above) that from a practical perspective the Practitioner did involve both the Applicant and S in all relevant correspondence.

[18] Insofar as the Deed provided pathways for executors to carry out their duties of administration and finalising estate matters, further problems nevertheless arose which I address under the heading of "estate jewellery".

#### **Complaint relating to the Estate / Delay**

[19] *Property removed from deceased's house:* Concerns had been raised by the Applicant about whether property had been removed from her mother's house. She complained that the Practitioner had not acted with sufficient speed to change the locks. The Practitioner explained that he responded to the Applicant's concerns and had attended on the house with S, but there was no evidence that the house had been broken into, and he added that S had taken nothing from the house when he attended that property.

[20] The Applicant lives in J town, whereas S resides in R town where the deceased's house is also located. The Practitioner is also in R town. From a practical point of view this created some difficulties between the Applicant and S in matters of access and security. Whether and what property was removed from the house cannot be ascertained. However, it is difficult to see that it was the Practitioner's responsibility to secure the house if the executors themselves knew or suspected that the house was insecure. The Applicant pointed out that she was able to get the locks changed by a simple phone call, and one must wonder why she did not take this step in the first instance. The Applicant may have held a view of a lawyer's role in the estate administration which exceeded what lawyers normally do.

[21] *Financial and Accounting Details:* The Applicant denied having received the final estate accounts or accounts of the M Trust. The Practitioner said that these had been forwarded to Mr H who was the accountant for the estate and also for the M Trust. He said he had sent copies to both the Applicant and S.

[22] The Applicant also complained that the narration in the Practitioner's invoices had mixed up estate-related work with M Trust related work, and that there were different GST considerations such that the Practitioner ought to have separated these two streams of professional attendances. The Practitioner said that he had become aware of this, and had, at the request of Mr H, separated his attendances accordingly and had furnished new invoices that properly reflected the work done for the estate as oppose to the M Trust.

[23] I cannot see that this aspect of the complaint raises disciplinary concerns. The Practitioner has attended to the oversight. Given that the Applicant appeared not to have received copies of the accounts, the Practitioner agreed (at the review hearing) that he would provide another copy of the estate accounts to the Applicant.

[24] In relation to the accounts for the M Trust, I observe that Mr H was in fact the Trust's accountant, was in possession of all the financial information, and that the Applicant should request a copy of the Trust's accounts from him.

### **The Estate Jewellery**

[25] The complaints about delay primarily focused on the fact that there had not yet been a final distribution of the estate jewellery. This was clearly a significant concern for the Applicant.

[26] The Deed of Arrangement had established a process for dealing with the jewellery, but S had triggered a disputes mechanism within the Deed which had led to a mediation agreement between the Applicant and S. This resulted in more specific agreements (in writing) about how the jewellery should be valued, divided and distributed. This provided that the jewellery would be valued by ADI who should attribute a value to the items and to divide them into two piles of equivalent value; neither the Applicant nor S was to have any contact with ADI during the process "except for the purposes of uplifting their respective piles of jewellery".

[27] Because insurance cover could not be secured for transporting the jewellery to ADI (in Auckland), the parties (via their respective solicitors) subsequently agreed to have the jewellery valued by a local jeweller. It appears that the items of jewellery were indeed valued by the jeweller, but it seems that the jewellery firm was unwilling to divide the jewellery into two piles, and also unwilling to retain possession of it and as a result the Practitioner found himself back in possession. The complaint was that the Practitioner had breached the agreement.

[28] The Practitioner was not present at the mediation meeting, and was not a party to the final mediated agreement, and therefore he could not have breached it. However, assuming that the Practitioner was aware of its terms, I have understood the essence of the complaint to concern the Practitioner's part in the terms of the agreement not being strictly observed.

[29] The Practitioner questioned the significance of strict compliance with the agreement. The Applicant explained that the purpose of arranging for the jewellery to be left with the valuer was to avoid any opportunity for her sister to sabotage the distribution. She added that when the jewellery came back into the possession of the

Practitioner, he had attempted to obtain S's consent to the distribution, which was exactly what she (the Applicant) had sought to avoid.

[30] The mediation agreement, while providing that the Applicant and S should uplift their respective shares from the valuer, did not provide for strict compliance with this part of the agreement. Given that the means of uplifting was so important to the Applicant, one might have expected this to be reflected in the agreement. As matters stood, the Practitioner did not comprehend the significance of the jewellery remaining with the valuers when he took possession of it at their request.

[31] The core of the matter was not that the Applicant disagreed with the division (she had indeed approved it) but that certain procedures had been agreed and not followed. She wanted the jewellery to be returned to the valuer so that she could uplift it. The Practitioner advised that he had brought the jewellery (and other estate assets) with him to the review hearing. He hoped to hand them over to the Applicant.

[32] There was some discussion about the opportunity for the Applicant to receive her share of the jewellery at that time and put the matter to an end. The Applicant agreed to receive it, albeit reluctantly for the reason that she felt that she had, once again, been "rolled over". In the event, the Practitioner obtained from his car the jewellery (which I note was in a security container), and also a box of photographs and other personal effects which the Applicant was also asked to take possession of.

[33] The Applicant was very unhappy that the box of photographs etc had been tampered with. She was dismayed to find that there were missing items which she described as maps, certificates and photographs. I understood that the Applicant was upset that S may have got hold of original photographs that she (the Applicant) had wished to have.

[34] It is understood that the Applicant had left these personal belongings of her mother at the Practitioner's premises, with instructions that her sister was not to go through the photographs without her being present. The Practitioner had no recollection of such an instruction. It appears that one of his staff members had allowed S to look into the box and identify those photographs that she wanted in the original, and those that she wished to have copies of. The Practitioner was able to confirm that S did not have access to that box without the Practitioner's staff member being present, and that any removal by S of original photographs could not have occurred until after copies had been made.

[35] It was clear that the Practitioner had no knowledge of the original content of the box, and there appears to have been no inventory of the content of the box. Again, with some reluctance, the Applicant took possession of the box and its contents, and with the assistance of the Case Manager all of the property was taken to the Applicant's vehicle.

[36] The review application was concluded at that point but I think it important to record that the Applicant remains much dissatisfied with all events that have surrounded the administration of her mother's estate. The Applicant did however, acknowledge the excellent work that the Practitioner had done in certain other related areas, and it is clear from all the documentation that the Practitioner's efforts were considerable in trying to steer his professional services through very stormy waters.

[37] Although the Applicant remains dissatisfied with many issues, in particular methods adopted in the processing of both the estate and the Trust, these were not matters that involve any professional failings on the part of the Practitioner who clearly had an unenviable job carrying out his professional responsibilities. The Practitioner and the Applicant were in agreement that the difficulties in the smooth facilitation of agreements lay with S. Because difficulties were ultimately caused by a third person, I am unable to see any proper basis for holding the Practitioner to account in a disciplinary forum.

[38] All these matters were fully discussed at the review hearing, at which time I also informed the parties that the Standards Committee decision would be confirmed.

### **Decision**

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2008, the Standards Committee decision is confirmed.

**DATED** this 1<sup>st</sup> 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:



JB as the Applicant  
RW as the Respondent  
The Waikato Bay of Plenty Standards Committee No. 2  
The New Zealand Law Society