**[1]LEGAL COMPLAINTS REVIEW OFFICER**
**ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2020] NZLCRO 111

Ref: LCRO 97/2019

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| **CONCERNING** | an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a determination of the [Area] Standards Committee X |
| **BETWEEN** | **DH**<br>Applicant |
| **AND** | **MB**<br>Respondent |

## DECISION

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

### Introduction

[1] Ms DH has applied for a review of a decision by the [Area] Standards Committee X (the Committee) to take no further action in respect of her complaint concerning the conduct of Mr MB, at the relevant time a lawyer and a director of [Law Firm A] (the firm), who acted for Ms DH's mother, Mrs RS on the purchase of a residential property (in 2001), the preparation of a will (in 2010), and a statutory declaration (in 2015).

[1] Mrs RS's property described in Schedule A of the Relationship Property Agreement: a car, stock (secured and guaranteed), market bonds, shares in a fund, bank accounts in New Zealand and overseas, jewellery, and household chattels.

[2] Ms DH, who lives in [Country A], is one of three children of Mr and Mrs RS – along with her sister DS, and her brother SS. Mr RS died in 1993. SS died the following year.

[3] In the late 1990s, Mrs RS commenced a relationship with Mr CP.

[4] On 11 January 2000, Mrs RS and Mr CP signed a relationship property agreement (RPA) in which they each listed their separate property. Another lawyer in the firm acted for Mrs RS on that matter.

[5] The following year, on 21 September 2001, Mrs RS, Mr CP and Ms DH purchased a residential section. On 29 October 2001, Mrs RS and Mr CP signed a building contract for the construction of a house on the section. I refer to the section, and house collectively as "the property". Mr MB acted on both matters.

[6] The ownership of the property, as recorded on the certificate of title, was Ms DH, a 711/1000 (71.1 per cent) share, and Mrs RS and Mr CP each as to a 289/2000 (14.45 per cent) share.

[7] Ms DH says the funds to acquire Ms DH's 71.1 per cent share came from Mr RS's estate held in a bank account in the [Country B], initially transferred to [Ms DH's] and her husband's bank account, and then to the firm.

[8] She says Mrs RS paid for her, and Mr CP's 14.45 per cent respective shares from the sale proceeds of shares similarly paid to the firm via her, and her husband's bank account. She says Mrs RS paid for a third of the contract price for the construction of the house, and [Mrs RS] and Mr CP borrowed the remainder.[2]

[9] On 6 May 2010 Mrs RS made a will, prepared by Mr MB, in which Mrs RS (a) appointed Ms DH executrix and trustee, (b) provided for Mr CP to have "rent free use and enjoyment" of the property for 12 months following Mrs RS's death, and (c) provided for the residue to be divided "among such of [Mrs RS's] children as survive" Mrs RS.

[10] Five years later on 7 May 2015, in order to qualify for a disability pension in [Country A], Ms DH asked (by email) Mrs RS to make a statutory declaration that Ms DH did not own the 71.1 per cent share of the property in Ms DH name.

[11] Mr MB sent a letter of engagement to Mrs RS on 18 May 2015 concerning the preparation of a "[d]eclaration re ownership shares" in the property. That day Mrs RS stated in her statutory declaration that although Ms DH was recorded as owner of a 71.1

[2] House contract price, $74,499.70: Mrs RS, $25,000; National bank loan, $50,000.

per cent share in the property, [Ms DH] "did not make any financial contribution to the purchase".

[12] Mrs RS died on 9 December 2018.

[13] Three months later, on 1 March 2019 Mr CP's lawyer informed (by letter) Ms DH that (a) Mr CP sought to negotiate a settlement of the division of shared property [Mr CP] and Mrs RS held at the time of Mrs RS's death, and (b) he had advised that Mr CP had "a strong case to vary the terms of [Mrs RS's] will under the Family Protection Act 1955".[3]

**Complaint**

[14] Ms DH lodged a complaint with the Lawyers Complaints Service on 12 March 2019, the essence of which was that by not providing Mrs RS with advice designed to "protect [Mrs RS's]/family property" Mr MB did not act competently.

[15] She said Mr CP had made a claim against Mrs RS's estate despite Mrs RS (a) having "done all [Mrs RS] c[ould]" to protect her property "based on" Mr MB' advice, and (b) believing Mr CP "was on board with all [Mrs RS's] wishes".

[16] Ms DH asked how it was possible that having consulted Mr MB on three occasions Mr CP was able to bring a claim against Mrs RS's estate.

[17] She said Mrs RS's money was held in a joint account with Mr CP and therefore passed to him on Mrs RS's death. She said she had paid $4,000 to the firm for the administration of Mrs RS's estate, and had no further funds to pay for legal advice to defend Mr CP's claim.

*(1) Property – purchase in September 2001*

[18] Ms DH said despite her request, the firm had not provided her with any file notes made by Mr MB in September 2001 when the property was purchased.

[19] She explained that although the title to the property recorded Ms DH having a 71.1 per cent share, and Mrs RS and Mr CP each having a 14.45 per cent share, Mrs RS paid for the purchase of the property "entirely with [Mrs RS's] own funds". She said Mrs RS and Mr CP subsequently borrowed $50,000, repayment of which was guaranteed by [Ms DH] and her husband, to pay for the construction of the house.

[3] Referring to the RPA, Mr CP's lawyer said that Mr CP was not in a position to purchase Mrs RS's share in the property hence [Mr CP's] preference was to reach a negotiated settlement: section 61 of the Property (Relationships) Act 1976; see the RPA at cls 7 and 8.

*(2) Will, May 2010*

[20] Ms DH said as with the purchase of the property nine years earlier, the firm informed her that Mr MB had not made file notes of his advice to Mrs RS when taking [Mrs RS's] will instructions – in particular, whether Mr MB advised Mrs RS "to further protect her/family property with regards to a relationship challenge in the future".

*(3) Mrs RS's statutory declaration, May 2015*

[21] Ms DH claimed Mrs RS's declaration "questions whether in fact the money [belonged]" to Ms DH, or to Mrs RS "in terms of a challenge". She questioned whether the declaration should have referred to the RPA, and Mrs RS's will.

[22] She said Mrs RS's declaration that the property purchase money belonged to Mrs RS, which had been paid from [Ms DH's] bank account, was "proof" that Mrs RS intended to (a) "protect [Mrs RS's] estate from a relationship property claim", and (b) enable ownership of the property to pass to [Ms DH] and her sister on Mrs RS's death.

[23] As with the property purchase, and Mrs RS's will, Ms DH said any file notes made by Mr MB recording his "recommendations" to Mrs RS were not available.

**Response**

[24] Following an initial assessment by the Lawyers Complaints Service (Complaints Service), Ms DH's complaint was dealt with through its Early Intervention Process which I refer to later in this decision.

**Standards Committee decision**

[25] The Standards Committee delivered its decision on 26 June 2019 and determined, pursuant to s 138(1)(f) of the Lawyers and Conveyancers Act 2006 (the Act), to take no further action on Ms DH's complaint.

*(1) Relationship property agreement, will*

[26] In declining jurisdiction to consider the matter, the Committee stated that the Courts, not Standards Committees, were the appropriate forum to determine "allegations about the deficiencies" in the RPA, or "any role played by Mr MB in those alleged deficiencies".

[27] Referring to r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), the Committee observed that it did not follow that because Mr CP had challenged Mrs RS's will, "despite [Mrs RS] signing an agreement contracting out of the Property (Relationships) Act 1976", Mr MB was "at fault", or the success of Mr CP's claim was "guarantee[d]".

*(2) Assistance sought*

[28] The Committee stated that the complaints process under the Act "does not afford Ms DH or the estate an alternative forum to litigate" allegations such as those made by her.

[29] Equally, the Committee said it was not its role to provide legal advice to Ms DH, as executrix of Mrs RS's will, about "upholding [Mrs RS's] wishes" by "pronounc[ing] on the validity of estate claims or the sufficiency of any agreement" which were matters for the courts to determine.

**Application for review**

[30] Ms DH filed an application for review on 15 July 2019 in which she largely repeats her complaint allegations. She says the Committee erred by not taking into account that Mr MB did not act competently for Mrs RS. She says this resulted in her incurring "considerable costs" due to Mr CP's claim against Mrs RS's estate which had damaged her relationship with him, and her sister.

[31] She seeks an apology from Mr MB, financial compensation for litigation costs incurred, and a review of the firm's fees by taking into account attendances that would not have been required had the firm not misfiled the RPA subsequently produced by Mr CP's lawyer. She says she is "out of pocket some $10,000" paid for legal fees in her endeavours to reach a settlement with Mr CP.

[32] She repeats that because money held in Mrs RS's and Mr CP's joint bank accounts passed to Mr CP, she had incurred legal costs of $8,000 with the firm in the administration of Mrs RS's estate. She says because she had complained about Mr MB, the firm was no longer able to act on that matter.

*(1) Relationship property agreement*

[33] Ms DH reiterates that her main complaint is that the RPA, which the firm misfiled, was not referred to (a) by Mr MB when he later acted for Ms RS concerning her

will (May 2010), and statutory declaration (May 2015), and (b) on Mrs RS's later estate file.

[34] For that reason, Ms DH says "[w]e were all therefore approaching" the administration of Mrs RS's estate "without the knowledge" of the RPA.

[35] Ms DH says the RPA, the purpose of which was to identify Mrs RS's assets and "protect them now and in the future from any other person in a relationship", was not updated. She says of Mrs RS's assets listed in the RPA only the family furniture remained.

*(2) Property purchase, September 2001*

[36] Ms DH repeats the firm does not have any notes made by Mr MB of his discussions with Mrs RS about ownership of the property when purchased in September 2001.

[37] She says Mrs RS's "gift" of "15% of the value" of the property to Mr CP was not recorded as Mr CP's "full and final portion" of the property. She says by not categorising the property as an "investment property", Mr MB failed to "mak[e] [the property] unavailable" to a claim by Mr CP.

[38] She says in order to sell the property, at her cost she may have to apply to the Court "to remove Mr CP".

*(3) Mrs RS's will, May 2010*

[39] Ms DH says Mrs RS's will (a) omitted naming [Ms DH], and her sister as beneficiaries, and (b) did not explain "why" Mrs RS left Mr CP "15% of the [property] value", and "permitted [Mr CP] to stay in the house [for] 12 months" after [Mrs RS's] death.

[40] She repeats the firm similarly does not have any file notes made by Mr MB on this matter particularly concerning "the possibility of a future claim" by Mr CP.

*(4) Statutory declaration, May 2015*

[41] Ms DH says Mrs RS's May 2015 statutory declaration to assist her to acquire a disability support pension and for "no other function", was "not supposed to undermine

any of the other documents including the Title", or "disinherit either [her sister] or [her]self".

**Response**

*(1) Mr CP's claim*

[42] On behalf of Mr MB, his counsel, Ms WH submits "it does not follow" there was a lack of competence by a lawyer who acted for a deceased spouse or partner on the preparation of an RPA where a claim is made by a surviving spouse or partner against the deceased spouse's or partner's estate.[4]

[43] In Ms WH's submission, in a relationship of "long duration", such as Mrs RS's and Mr CP's relationship of 20 years, there "is always a risk of a family protection or relationship property claim being made by the surviving partner" irrespective of whether the property concerned was included in the RPA.

*(2) Relationship property agreement, January 2000*

[44] Ms WH says another lawyer in the firm, not Mr MB, acted for Mrs RS on the preparation of the RPA.

[45] She explains that despite the RPA (January 2000) predating the purchase of the property (September 2001), if Mrs RS's beneficial interest "c[ould] be tracked in origin to the property defined as [Mrs RS's] separate property" in the RPA, it is arguable that Mrs RS's share in the property, which was held by Ms DH, "is separate property".

[46] Ms WH says there may have only been one copy of the RPA, and if so was possibly held by Mr CP's lawyer, or returned to Mrs RS. In her submission it is "unlikely" the file would have been archived then destroyed when permitted, with an original document on the file. She says in any event, there was a copy on Mrs RS's estate administration file.

[47] She says the firm had not informed Ms DH an original copy of the RPA had been "misfiled", and there is no evidence "to suggest" that was so.

[4] Ms WH (Director of [Law Firm A]), submissions (1 August 2019).

*(3) Mrs RS's will, May 2010*

[48] Ms WH submits it is "incorrect at law" for Ms DH to suggest that Mrs RS's will "could have prevented a family protection or relationship property claim".

[49] In Ms WH's submission there is no evidence in support of Ms DH's claim Mr MB "failed to provide adequate advice". Ms WH explained that (a) in 2001 Mr MB "believe[d]" the shares in the property held by Mrs RS, Mr CP and Ms DH "legitimately reflected the beneficial ownership of the property", and (b) because Mrs RS and Mr CP held equal shares, "there would be no reason to consider" an RPA at that time.[5]

[50] Ms WH says Mr MB, whose areas of legal practice concerned property, commercial, trusts, and estate matters, was "a competent and experienced legal practitioner of good standing". She says in May 2010 when Mr MB prepared Mrs RS's will, he had been in practice for more than 25 years.

*(4) Mrs RS's May 2015 declaration*

[51] In Ms WH's submission, Mrs RS's declaration (a) records Mrs RS's instructions to Mr MB, namely, "the true position in respect of the share in the property registered in Ms DH's name", and (b) was intended to assist Mrs RS "achieve a resolution of [Ms DH's] predicament", and record that Ms DH's share was, in effect, held in trust by Ms DH for Mrs RS.

[52] Ms WH says Mr CP's claim against Mrs RS's estate arises out of ownership of the property. She says Mr MB's recollection is that before Mrs RS made the declaration, he met with [Mrs RS] and Mr CP on two occasions. She says Mrs RS instructed Mr MB that Ms DH's share in the property was "funded from [Mrs RS's] own funds channelled through Ms DH's bank account".

[53] Ms WH explains that had Mr MB known in 2001 that Ms DH had not contributed financially towards the purchase of the property, he would have "advised" Mrs RS to enter into a "Deed of Debt", with an "annual gifting programme" in accordance with "the IRD policy of the time".

**Review on the papers**

[54] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows

[5] Ms WH says the evidence suggests Mrs RS did not gift a 15 per cent share in the property to Mr CP – they were joint borrowers to build the house; and Mrs RS's estate had few assets.

a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[55] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

**Nature and scope of review**

[56] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[6]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[57] More recently, the High Court has described a review by this Office in the following way:[7]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[58] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been

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[6] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[7] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

to consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

**Preliminary**

[59] The Complaints Service dealt with Ms DH's complaint through its Early Intervention Process (EIP). This involves a Standards Committee conducting an initial assessment of a complaint and forming a preliminary view as to outcome.

[60] If the Committee's preliminary view is that the complaint lacks substance, a Legal Standards Officer (LSO) will inform the lawyer concerned of the Committee's preliminary view, inviting response. Any response is noted in a file note and provided to the Committee, which then completes its inquiry into the complaint.

[61] On 24 June 2019, in response to a message left by an LSO, Ms WH at the firm informed (by telephone) the LSO that Mr MB had retired. The LSO informed Ms WH that the Committee had reached a preliminary view that it would take no further action on Ms DH's complaint. In response to the LSO's invitation to respond, Ms WH stated she was content for the Committee to finalise this decision without a formal response from the firm.

**Issues**

[62] The issues I have identified for consideration on this review are:

(a) Did the Committee, and does a Review Officer on review, have jurisdiction to consider Ms DH's complaints about Mr MB' conduct:

(i) In January 2000, assuming Mr MB acted on the preparation and signature of the RPA?

(ii) In September 2001 when Mr MB acted on the purchase of the property (land, and construction of house)?

(b) Did Mr MB owe professional duties to Ms DH at the times he acted for Mrs RS:

(i) In May 2010 on the preparation and execution by Mrs RS of her will?

(ii) In May 2015 on the preparation and taking of Mrs RS's statutory declaration?

(c) If so, did Mr MB act competently on the will, and declaration matters?

**Analysis**

*(1) RPA, January 2000; property purchase, September 2001 – issue (a)*

*(a) Parties' positions*

[63] Ms DH says the RPA, which was signed in January 2000, was misfiled by the firm and therefore was not considered or taken into account by Mr MB when he acted for Mrs RS in September/October 2001 on the purchase of the property.

[64] Mr MB says another lawyer in the firm, not Mr MB, acted for Mrs RS on the preparation and signature by her of the RPA. He says there is no evidence that suggests the firm misfiled the RPA.

*(b) Discussion*

[65] Although it appears another lawyer in the firm, not Mr MB, acted for Mrs RS on the preparation of the RPA, Mr MB acted for Mrs RS on the purchase of the property, albeit he also seems to have acted for Mr CP, and Ms DH on that matter.[8]

[66] Both matters took place some years before 1 August 2008, the commencement date of the Act.

[67] In that regard, the transitional provisions of the Act concerning complaints and disciplinary proceedings provide in s 351(1) that a Standards Committee may consider a complaint only if the conduct complained of could have led to disciplinary proceedings under the Law Practitioners Act 1982 (the LPA).

[68] Furthermore, s 351(2) prevents a Standards Committee from considering a complaint in respect of conduct of a lawyer which took place "more than six years" before the commencement date of s 351, namely, 1 August 2008. In particular, s 351(2) provides that:

> (2) Despite [s 351(1)], no person is entitled to make under this Act—

[8] See the RPA: the witness to Mrs RS's signature was Ms EK, not Mr MB; Ms EK, email to Ms DH (5 August 2019); and Ms DH, submissions to the LCRO (10 August 2019).

> (a) a complaint that has been disposed of under the [LPA];[9] or
>
> (b) a complaint in respect of—
>
> (i) conduct that occurred more than 6 years before the commencement of [s 351]; or
>
> (ii) regulated services that were delivered more than 6 years before the commencement of [s 351]; or
>
> (iii) a bill of costs that was rendered more than six years before the commencement of [s 351] …

[69] For that reason, I decline jurisdiction to consider Ms DH's complaints insofar as they concern any part Mr MB may have played in the preparation of Mrs RS's RPA, and his conduct acting on the purchase of the property.

*(2) Ms DH – non-client, beneficiary – issue (b)*

[70] Ms DH, one of Mrs RS's daughters, and a beneficiary under Mrs RS's will, claims Mrs RS's May 2010 will and Mrs RS's May 2015 declaration, on which Mr MB acted, are "totally inadequate to protect [her]self and [her] sister" from Mr CP's relationship property and family protection claims.

[71] This raises the preliminary question whether Mr MB also owed professional duties to Ms DH, and if so, whether Mr MB breached any of those duties.

*(a) Client*

[72] The term "client", although not defined in the Act or the Rules, is included in the meaning of "retainer" in r 1.2, namely, "an agreement under which a lawyer undertakes to provide or does provide legal services to a client, …". In that sense, "client" is described as, and appears in a number of the Rules as the recipient of legal services from a lawyer.

*(b) Professional rules*

[73] The Lawyers: Conduct and Client Care Rules, as the name suggests, concern the way in which lawyers must (a) conduct themselves, and (b) act for their clients. Although the rules do not represent "an exhaustive statement of the conduct expected

[9] Section 351(3) specifies the circumstances where a complaint is treated as having been disposed of under the LPA.

of lawyers", they do "set the minimum standards that lawyers must observe and are a reference point for discipline".[10]

[74] The Rules conveniently fall into three broad categories: (a) those rules which directly concern the provision of legal services by lawyers to their clients;[11] (b) those rules which concern lawyers' dealings or interactions with other lawyers, and third parties; and (c) those rules which concern the rule of law and administration of justice (rule 2), and lawyers' overriding duties to the High Court (rule 2.1).[12]

[75] Mrs RS, not Ms DH, was Mr MB' client in May 2010 when Mrs RS made her will, and in May 2015 when Mrs RS made her declaration. Ms DH did not receive legal services from Mr MB on those matters.

[76] As such, Mr MB did not owe Ms DH the professional duties and obligations lawyers owe their clients when acting for them. Such duties include to act competently (r 3); to treat clients with respect and courtesy (r 3.1); to respond to client inquiries promptly (rr 3.2, 7.2); to provide clients with client care and service information (rr 3.4, 3.5 (and rr 3.4A, 3.5A in relation to barristers sole); to be independent (rr 5, 5.2, 5.3, 5.4); to protect and promote clients' interests to the exclusion of third parties' interests (r 6); to consult clients (r 7.1); to hold clients' information in confidence (r 8); and to charge clients fees that are fair and reasonable (r 9).

*(c) Non-client obligations*

[77] Apart from the rules referred to above which concern the rule of law and administration of justice, and lawyers' overriding duties to the High Court, generally, a lawyer acting for a client would not owe a duty to a person who was an opposing party in litigation, or on the opposite side of a transaction.

[78] That is unless, for example, where a lawyer provides an undertaking to hold or pay funds, or to do something concerning the transaction, or to provide a certificate as to certain facts and circumstances.[13] A lawyer acting for trustees provides a further

[10] Rules, Schedule, Notes about the rules.
[11] See s 4 of the Act, on lawyers' fundamental obligations: s 4(b) includes "be independent" when acting for their clients; (c) "…act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients".
[12] See s 4 of the Act, on lawyers' fundamental obligations: s 4(a) includes "uphold the rule of law and facilitate the administration of justice in New Zealand"; … (d) "protect [clients'] interests" subject to "overriding duties as officers of the High Court".
[13] For example, on a conveyancing transaction, payment of rates, water charges; provide a certificate for e-dealing purposes in Landonline.

illustration of the limited professional duties owed by a lawyer to a beneficiary for whom a lawyer does not act.[14]

[79] For that reason, "the existence of a duty" owed to a non-client has been described as "exceptional".[15]

*(d) Sufficient personal interest in the complaint*

[80] Section 132(1) of the Act provides that "any person may complain", amongst other things, "about (a) the conduct— (i) of a [lawyer] or former [lawyer]", or "(b) the standard of service provided, in relation to the delivery of regulated services,— (i) by a [lawyer] or former [lawyer]".

[81] To the extent the Act imposes some constraint on who "may complain", under s 138(1)(e), a Standards Committee, or a Review Officer on review "may, in its [or his/her] discretion decide to take no action or, … no further action on any complaint if, in the opinion of the Standards Committee [or a Review Officer],—… (e) the complainant does not have sufficient personal interest in the subject of the complaint".[16]

[82] In the context of the administration of a trust, or a deceased estate under a will, section 160 of the Act provides that "any person interested in any property out of which a trustee, executor, or administrator has paid or is entitled to pay" a bill of costs, in respect of which "[the] trustee, executor or administrator has become chargeable", is entitled to "complain about the amount of the bill" pursuant to section 132(2) of the Act.

[83] There are circumstances where a complaint by a beneficiary about the conduct of a lawyer who prepared a client's will has been upheld.[17]

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[14] *Davis v Mancer* [2015] NZHC 3005 at [26]. Also see discussion in *SY v LT* LCRO 001/2018 (December 2019) from [72]. As discussed later in my analysis, there may also be occasions when a lawyer owes a duty, other than a professional duty, such as a duty of care in negligence, to persons for whom the lawyer does not act.

[15] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4.3], referring to *Burmeister v O'Brien* [2010] NZLR 395 (HC) at [234].

[16] See *JR v ST* LCRO 57/2015 (December 2016) at [62] to [95]: whether a lawyer, who had "no connection with the proceedings" had "sufficient personal interest" in the lawyer's complaint that another lawyer had made errors commented on by a Judge but had apologised to the Judge. The Review Officer in *JR v ST* found that the complainant lawyer had "overstated the position", and the application was dismissed on its merits.

[17] *AG v ZT* LCRO 159/2010 (February 2011) at [26] and [27]. Upheld by the High Court in *Woods v Legal Complaints Review Officer* [2013] NZHC 674. Because the client's ownership of the property was as a joint tenant, on the client's death ownership passed to the surviving owner, not the beneficiary. Held by the Review Officer, upheld by the High Court on review, that the lawyer's failure to check how the ownership was recorded on the title fell short of "best practice" which constituted unsatisfactory conduct under ss 12 (a) and (b) of the Act.

[84] Although Mr MB acted for Mrs RS on the will, and declaration matters, unlike the decision from this Office referred to above, as Mrs RS's daughter, and a beneficiary under Mrs RS's will, I consider that Ms DH has sufficient interest in both matters to enable her to make the complaint she has about Mr MB' conduct acting on those matters.

*(2) Mrs RS's will, May 2010; statutory declaration, May 2015 – issue (c)*

*(a) Mrs RS's will, May 2010*

*(i) Ms DH*

[85] Ms DH refers to two errors made by Mr MB in Mrs RS's will (a) by not naming her and her sister Eve as beneficiaries, and (b) by not explaining why Mrs RS made provision for Mr CP to live in the property for 12 months following her death.[18]

[86] She says this led to Mr CP's lawyer claiming Mrs RS had a "legal and moral" duty to provide for Mr CP under the Property (Relationships) Act 1976, and the Family Protection Act 1955. She explains that even though Mr CP's 14.45 per cent share in the property was gifted to him by Mrs RS, his claim included Mrs RS's 14.45 per cent share of the property, and the 71.1 per cent share held by Ms DH.

*(ii) Mr MB*

[87] Mr MB says (a) he "believe[d]" the shares in the property held by Mrs RS, Mr CP and Ms DH "legitimately reflected the beneficial ownership of the property, and (b) because Mrs RS and Mr CP held equal shares, "there would be no reason to consider" an RPA at that time.[19]

[88] He says it is "incorrect at law" for Ms DH to suggest that Mrs RS's will "could have prevented a family protection or relationship property claim". He says there is no evidence in support of Ms DH's claim he "failed to provide adequate advice" to Mrs RS.

*(iii) Discussion*

[89] Ms DH claims that when acting for Mrs RS on the preparation of Mrs RS's will, by not protecting Mrs RS's property from a potential relationship property/family protection claim by Mr CP, Mr MB failed to act competently.

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[18] Ms DH, email to Lawyers Complaints Service (14 May 2019) – Ms DH explained that her brother SS died in 1994.

[19] Ms WH says evidence suggests Mrs RS did not gift a 15 per cent share in the property to Mr CP – they were joint borrowers to build the house; and Mr RS's estate had few assets.

[90] By 2010, when Mrs RS provided Mr MB with her will instructions, Mrs RS and Mr CP had been together since at least January 2000 when they signed the RPA.

[91] Having received Mrs RS's instructions, it is reasonable to expect that Mr MB's advice would have included his consideration of Mrs RS's relationship property matters.

[92] However, Ms DH says she was not present when Mrs RS instructed Mr MB, and does not know (a) whether Mrs RS was accompanied by Mr CP, and (b) what Mrs RS and Mr MB discussed.

[93] In particular, she does not know whether they talked about relationship property issues, including clause 4 of the RPA which concerns the "interming[ling]" of separate property "with any share the property", and estate protection.

[94] As noted earlier, Ms DH says when requested by her, the firm was unable to produce any file notes made by Mr MB recording Mrs RS's instructions, and his advice to Mrs RS.

*(b) Mrs RS's statutory declaration, May 2015*

*(i) Parties' positions*

[95] Ms DH similarly claims Mr MB, when preparing Mrs RS's May 2015 declaration, did not advise Mrs RS or her that (a) the declaration could increase the risk of a possible relationship property, and family protection claim by Mr CP, or (b) Mrs RS establish a gifting programme to [Ms DH] in respect of the 71.1 per cent share in the property.

[96] By not doing so, Ms DH claims Mr MB did not act competently, and failed in his duty of care to Mrs RS, and her.

[97] Mr MB submits that Mrs RS's declaration (a) records Mrs RS's instructions of "the true position" concerning the 71.1 per cent share in the property registered in Ms DH's name, and (b) was intended to assist Mrs RS "achieve a resolution of [Ms DH's] predicament", and record that Ms DH's share was, in effect, held in trust by Ms DH for Mrs RS.

*(ii) Discussion*

*Mrs RS's declaration*

[98] As noted in the introduction, on 7 May 2015, in order to qualify for a disability

pension in [Country A], Ms DH asked Mrs RS to state that (a) "the only reason [Ms DH's] name [was] on the Title deed [was] to protect [the property] from claims in the event of [Mrs RS's] death or … permanent mental incapacity", and (b) [Ms DH] and her husband "in no shape or form paid for the property or have any benefit in the property, financial or otherwise".

[99] In her statutory declaration dated 18 May 2015, Mrs RS declared that although Ms DH was recorded as owner of a 71.1 per cent share in the property, Ms DH "did not make any financial contribution to the purchase", and [Mrs RS] "alone" paid the section purchase price.

[100] She stated that for "asset protection purposes to try to avoid those funds being deemed to be shared relationship property" with Mr CP, at the time of the purchase of the property she (a) "thought it would be safer for those funds to be paid into a bank account in [Ms DH's] name rather than any bank account in [her] name", and (b) for that purpose transferred the purchase money to Ms DH's bank account.

[101] Lastly, Mrs RS declared that Ms DH, having made no financial contribution herself, "[was] effectively holding [the 71.1 per cent] share upon trust" for Mrs RS. For that reason, Mrs RS stated Ms DH had in [Ms DH's] will bequeathed the 71.1 per cent share in the property to [Mrs RS].

*Ms DH*

[102] Ms DH says when preparing the declaration for Mrs RS, Mr MB lost the opportunity to protect Mrs RS's property, and subsequently Mrs RS's estate, from a possible relationship property/family protection claim.

[103] She says following Mrs RS's death, Ms WH, although not aware of the RPA, advised her the declaration was an "issue" which could lead to a claim by Mr CP of half of Mrs RS's estate.

[104] She says Mrs RS made the declaration "to achieve a positive outcome", namely, to enable [Ms DH] to obtain a disability support pension in [Country A]. Not "to put at risk the 71.1% share [Ms DH] held for her sister and [Ms DH]".

[105] To that end, Ms DH refers to her emails to Mrs RS (a) on 7 May 2015 that the property was not to be treated as [Ms DH's] "investment property until [Mrs RS's] "death" or "permanent mental disablement", and (b) on 8 May 2015 reiterating that she and her husband "don't own any part of the said property and never have".

[106] As noted earlier, Ms DH explains that the 71.1 per cent share of the property held by her was paid for out of funds in her father's estate held in a bank account in the [Country B], initially paid into her and her husband's New Zealand bank account, and then to the firm.

[107] Ms DH says Mrs RS's 14.45 per cent share was paid for from the sale proceeds of shares in her father's estate, again initially to her and her husband, and then to the firm. She said Mr CP did not pay for his share which was gifted to him by Mrs RS.

[108] She says unlike when the firm acted on the RPA (in 2000), the property purchase (in 2001), and the will (in 2010), Mr MB made notes "where the funds" for the purchase of the property in September 2001 "came from and how payments were made".

*Mr MB*

[109] Mr MB says the main aspect of Mr CP's claim against Mrs RS's estate arises out of ownership of the property.

[110] He says he met with [Mrs RS] and Mr CP on two occasions before Mrs RS made the declaration. He says Mrs RS's instructions were that Ms DH's share in the property was "funded from [Mrs RS's] own funds channelled through Ms DH's bank account".

[111] Mr MB says had he known Ms DH had not contributed financially towards the purchase of the property, he would have "advised" Mrs RS to enter into a Deed of Debt, with an "annual gifting programme" in accordance with "the IRD policy of the time".

*Consideration*

[112] Mr MB acted for Mrs RS again in May 2015 when he received Mrs RS's instructions, and prepared and took Mrs RS's declaration which Ms DH had requested Mrs RS provide.

[113] Ms DH claims that by not advising Mrs RS the declaration would leave [Mrs RS] exposed to a possible relationship property/family protection claim by Mr CP, Mr MB did not act competently. She says Mr MB's file notes of Mrs RS's instructions were, in effect, recorded in Mrs RS's declaration, just as Mrs RS's will instructions were recorded in Mrs RS's will five years earlier.

[114] However, as when Mr MB prepared Mrs RS's will, apart from the information produced by the parties, including Mrs RS's declaration, no written evidence has been

produced of discussions between Mr MB and Mrs RS, and advice Mr MB may have provided before preparing, and then taking Mrs RS's declaration.

[115] In particular, any discussion (a) about the likelihood of a relationship property claim by Mr CP as a consequence of Mrs RS making the declaration, and (b) if so, how best to structure her affairs to reduce or minimise such perceived risk.

*(d) Conclusion*

[116] When acting for Mrs RS on Mrs RS's will, and statutory declaration matters, it could be expected Mr MB would have discussed relationship property matters with Mrs RS, and provided her with advice on both occasions.

[117] Although, concerning the statutory declaration matter both Ms DH and Mr MB have produced Ms DH's emails to Mrs RS, which effectively contained Mrs RS's instructions, and Mr MB' letter of engagement, no file notes, letter or email to Mrs RS recording Mr MB' discussions with Mrs RS, including any relationship property advice provided by Mr MB, have been produced.

[118] Concerning Mrs RS's will, in response to the case manager's request, at my direction, for any letter, or email Mrs RS may have sent to Mr MB, or any letter or email he may have sent to Mrs RS, or any memo or file notes he may have made containing his advice, Ms WH advises that "given the age of the will file" it had been destroyed.[20]

[119] It is unfortunate that there appears to be no written evidence of any advice provided by Mr MB to Mrs RS. Especially, since Mrs RS's death, with Ms DH having received notice of Mr CP's claim, the issue of relationship property is now of such importance to Ms DH and her sister in the context of administration of Mrs RS's estate.

[120] However, the fact Mr CP has given notice of his claim against Mrs RS's estate is not of itself an answer to Ms DH' allegation that Mr MB failed to act competently for Mrs RS on these matters.

[121] If I am to be satisfied that Mr MB' conduct has been deficient to the extent that merits a disciplinary response, the evidence to support that finding must be sufficiently strong to meet the requisite standard of proof. In disciplinary proceedings such as this the standard of proof is the civil standard, the balance of probabilities, to be applied flexibly according to the nature of the case.[21]

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[20] Email, Ms WH to LCRO (25 June 2020).
[21] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

[122] In these circumstances where Ms DH has not produced evidence in support of her allegation that when acting for Mrs RS on the preparation of Mrs RS's will and statutory declaration, that Mr MB did not advise Mrs RS to protect her property from any potential relationship property/family protection claim by Mr CP, and how that might be achieved, I am unable to decide whether or not:

(a) Mr MB met his professional duty owed to Mrs RS to act competently (r 3); and/or

(b) Mr MB's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer (s12(a) of the Act).

*(d) Negligence*

[123] In conclusion, I make the observation that Ms DH's allegations about Mr MB' competence, and that he failed in his duty of care to Mrs RS and her, may also raise the issue of whether there was negligence by Mr MB when acting for Mrs RS on the will, and declaration matters.

[124] Negligence, known as a "civil wrong" or a "tort", is a cause of action that is well-understood by traditional civil courts. Its ingredients include a duty of care, a breach of that duty, and a measurable loss that has been caused by the breach of duty.

[125] Findings of negligence may only be arrived at after comprehensive – sometimes expert – evidence has been given. Issues that often arise in claims of negligence include whether a person has breached their duty of care, or whether there is a connection between the alleged loss and the breach of duty. Arguments frequently arise about whether any loss has been suffered.

[126] However, neither a Standards Committee, nor a Review Officer on review is equipped to make findings of negligence. The default position for a Standards Committee is to conduct their hearings on the papers. Similarly, a hearing before a Review Officer may also, in the Review Officer's discretion, proceed on the papers. Evidence is not heard, and parties are not cross-examined. An analysis of the type outlined above is simply not possible with that process where negligence is claimed.

[127] If a judge makes a finding that a lawyer has been negligent or has breached some other legal duty, then depending upon the particulars of that finding this may give rise to a conduct issue which could then be the subject of a separate disciplinary inquiry through the Complaints Service.

**Decision**

[128] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed but modified by providing that pursuant to s 138(2) of the Act that any further action on the complaint is unnecessary or inappropriate.

*Anonymised publication*

[129] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and absent of anything as might lead to their identification.

**DATED** this 29TH day of June 2020

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**B A Galloway**
**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 DH as the Applicant
Mr MB as the Respondent
Ms WH as the Representative for the Respondent
Mr LT, Mr UP and Ms JA as Related Persons
[Area] Standards Committee X
New Zealand Law Society