

LCRO 14/09

**CONCERNING**

The Lawyers and Conveyancers Act  
2006

**AND**

**CONCERNING**

a review of a decision of a Complaints  
Committee of the Wellington District Law  
Society pursuant to Section 97 of the  
Law Practitioners Act and s 355 of the  
Lawyers and Conveyancers Act

**BETWEEN**

**COMPLAINANT G** of Waiterere

Applicant

**AND**

**LAWYER U**, of Upper Hutt

Respondent

**REPORT**

**Background**

[1] This is a review of a decision of the Complaints Committee of the Wellington District Law Society in respect of a complaint by Complainant G against Lawyer U. Complainant G complained to the Wellington District Law Society in respect of the manner in which Lawyer U conducted the administration of her son's estate. Complainant G was an executor of that estate.

[2] The son of the complainant (the deceased), was tragically killed in a car accident in 2004. At the time he was in a relationship. It appears that the deceased's partner attended to funeral arrangements, including a cremation. She also instructed Lawyer U to undertake the administration of the deceased's estate on the basis that he had died intestate.

[3] In fact the deceased had made a will which was held by Firm D. Firm D wrote to the complainant informing her of this fact in 2004 and noted that Lawyer U had been instructed to deal with the estate. Complainant G was named in the will as an executor as was her other son (the co-executor). Complainant G met with a representative from

Firm D and it was resolved to forward the will to Lawyer U to administer the estate in accordance with its terms. The will revealed a clear wish by the deceased that he be buried.

[4] The executors of the will did not have a functional relationship. One of the causes of the difficulties that arose in the administration of the will appears to be the fact that Complainant G and her son (co-executor) were unable to communicate effectively in respect of estate matters. Similar difficulties appeared to exist in respect of the relationship between Complainant G and the deceased's partner.

[4] Complainant G complained about the way in which Lawyer U acted in the conduct of the estate. While the complaint had a number of strands the core of the complaint against Lawyer U was that:

- (a) Lawyer U acted on the basis of instructions from the co-executor and did not take instructions from her in respect of the conduct of the estate;
- (b) Lawyer U inappropriately involved the deceased's partner in the conduct of the affairs of the estate; and
- (c) Lawyer U inappropriately excluded Complainant G from the conduct of the affairs of the estate.

[4] Some of the matters raised in the complaint relate to the conduct of other parties, and in particular the deceased's partner. The Committee correctly did not conduct an examination of the conduct of the deceased's partner and noted that some of the matters complained about (and in particular the cremation) occurred prior to Lawyer U being involved.

[5] There were also a number of other issues raised such as matters concerning an emerald ring, and the deceased's tools of trade which did not directly involve Lawyer U and were peripheral to the main aspect of the complaint. The Committee did not deal with these issues. In this they were correct to focus on the professional conduct issues relating to Lawyer U.

[6] Another matter which was raised by Complainant G was the failure to ascertain the existence of the will in a timely way. While the Committee did not directly address this issue, it bears noting that it is not unusual for parties to be unaware of the existence of a will for a period of time after a death. In this case Firm D notified Complainant G some weeks after the death that she held a will. This is common

practice under which lawyers examine death notices to ascertain whether they hold any relevant wills. The Committee was justified in not pursuing this aspect of the complaint.

### **Nature of this Review**

[14] The role of the Lay Observer is to consider an allegation by a member of the public “concerning any District Law Society’s treatment of a complaint about the conduct of a practitioner” pursuant to s 97(1) of the Law Practitioners Act 1982. The primary focus of the enquiry is therefore on the proper consideration of the complaint and the material put before the Society and its Complaint’s Committee.

[10] By virtue of the reform of the law relating to the regulation of Legal Practitioners the office of Lay Observers ceased to exist on 1 February 2009. By virtue of s 355 of the Lawyers and Conveyancers Act 2006 any inquiries which are incomplete as at that date are to be completed by the Legal Complaints Review Officer, a statutory Office created on 1 August 2008. In completing the inquiry the Legal Complaints Review Officer has the duties and powers that the Lay Observer would have had under the Law Practitioners Act 1982. It is on this basis that this inquiry is being undertaken. In conducting this review I therefore effectively stand in the shoes of the Lay Observer.

### **The Inquiry of the Committee**

[11] Complainant G made her initial complaint on 18 April 2008. It appears that she was assisted in formulating her complaint by a Mr A. She also provided to the Society supporting documentation. The complaint was forwarded to Lawyer U to respond to. He responded by a brief letter of 19 May 2008. Complainant G was given an opportunity to reply to that response. She did so by letter of 16 June 2008. That letter was forwarded to Lawyer U who briefly responded to it on 7 July 2008. That letter was again provided to Complainant G for comment. She commented on it on 7 August 2008. The file was then handed to the Complaints Committee for its consideration. At some time prior to 9 September the Complaints Committee of the Wellington District Law Society considered the matter and determined to take no further action. That decision was notified to Complainant G by letter dated 9 September. On 10 September the Law Society received further correspondence from Complainant G (dated 1 September) which contained information relation to the cremation of the deceased. The letter was referred to the convenor of the Complaints Committee who determined that no further action was necessary.

[12] One striking aspect of this inquiry is the brevity of the responses from Lawyer U. A practitioner is of course not required to respond to a complaint unless compelled to do so by the Complaints Committee (which did not occur here). Complainant G provided a long letter of complaint on 18 April. While it is fair to say that some parts of it focussed on matters which were not the concern of Lawyer U, other aspects of it made substantive allegations. Complainant G provided correspondence and documents in support of those allegations.

[13] In his letter of 19 May Lawyer U provides no substantive explanation to those allegations but simply states that the executors failed to agree which made the administration of the estate difficult. He also noted difficulties with disposal of the remains of the deceased, and noted difficulties in respect of costs.

[14] In her response to that letter (dated 16 June 2008) Complainant G observed that Lawyer U had not answered the questions put to him. She then restated the key issues as she saw them.

[15] In response to this Lawyer U, by a brief letter of 7 July, focussed on the cremation of the deceased's remains and noted that his firm was not involved in the matter until significantly after this had occurred.

[16] In response to this Complainant G again complained (by a letter of 7 August 2008) that she had received very little by way of explanation and traversed aspects of her complaint again.

[18] The Committee in its decision set out the complaints of Complainant G as it saw them. In general terms it framed the issues as follows:

- (a) The alleged failure of Lawyer U to locate the deceased's will and thereby determine his wishes as regarded the disposal of his remains.
- (b) Lawyer U did not listen to Complainant G's wishes and instead took instructions from the deceased's partner and members of the family in respect of the disposal of the ashes.
- (c) The second executor took estate property.
- (d) A family heirloom ring had been misappropriated by the deceased's partner.

- (e) When information was sought from Lawyer U he responded that he would take instructions only from the executors jointly and only when questions of payment had been cleared up.
- (f) Complainant G felt ignored by Lawyer U even though she was the mother, next of kin, and an executor of the estate”.

[24] The Committee did not deal specifically with each of the issues. Rather it disposed of the complaint in general terms by attributing the events to the breakdown of the relationship between the executors and the failure to discover the will immediately on the death of the the complainants son. The Committee noted that the cremation was arranged prior to Lawyer U receiving instructions. The Committee also noted that estate accounts had been provided by Lawyer U and asked Lawyer U to confirm the accounts as accurate.

[25] As has been observed previously in this report some of the issues identified were properly disposed of as not raising issues of professional conduct in relation to Lawyer U. In particular the allegations that the second executor took estate property and that the deceased's partner had taken an heirloom ring seemed not to involve conduct of Lawyer U and were properly put to one side.

[26] Similarly as was noted earlier, there was nothing particularly unusual in the will not coming to light immediately and any delay in this regard was not attributable to a lack of diligence by Lawyer U. The Committee was justified in putting this aspect of the complaint to one side.

[25] The Committee did not appear to turn its mind to the fundamental issue at the root of this complaint. That issue was whether Lawyer U excluded Complainant G from the conduct of the estate. That issue is reflected in the Committees own identification of the nature of the complaint (in its paragraphs 5 and 6 of the Society's letter of 9 September in particular and hinted at in paragraph 2).

[26] This estate was clearly difficult to administer in light of the breakdown of the relationship between the executors. These difficulties were compounded by the fact that the estate had modest assets, which appear to have been exceeded by its liabilities. However, even against that background it was incumbent on Lawyer U to keep as Complainant G informed about the progress of the estate and involve her in the decisions relating to the estate. He was also required to

take instructions in respect of the conduct of the affairs of the estate only from the executors.

[26] The complaint and subsequent correspondence clearly alleged that Lawyer U had not kept as Complainant G informed about the affairs of the estate as they progressed and also that he took instructions either from one executor only, or from the deceased's partner.

[27] Lawyer U's responses were cursory and did not adequately address those allegations. While the Committee was correct to dismiss some aspects of the complaint which, on the material available, could be seen not to involve questions of the professional conduct of Lawyer U, this does not appear to be the case in respect of the core of the complaint.

[28] It appears that the evidence which was before the Committee is sufficient to require Lawyer U provide a response to the issues raised. If it appears that Lawyer U has breached an obligation or duty the Committee will then have to consider whether or not this is of a nature to require a disciplinary response. That is a matter for the peers of Lawyer U (and the lay observers) on the Standards Committee (which has succeeded to the role of the Complaints Committee).

### **Recommendation**

[48] In accordance with s 97(8) of the Law Practitioners Act 1982 I recommend that the Standards Committee appointed under s 356 of the Lawyers and Conveyancers Act investigate following issues:

- (a) Did Lawyer U take, and act in accordance with, proper instructions from both of the executors of the estate of the deceased?
- (b) Did Lawyer U inappropriately involve Ms A in the conduct of the affairs of the estate of the deceased?
- (c) Did Lawyer U inappropriately exclude Complainant G from the conduct of the affairs of the estate of the deceased?
- (d) If the answer to any of (a) to (c) is yes did the conduct amount to a professional breach of sufficient gravity to warrant the taking of further steps?

**DATED** this 12th day of March 2009

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D Webb  
**Legal Complaints Review Officer**

In accordance with s 97(6) of the Law Practitioners Act 1982 copies of this decision are to be provided to:

Complainant G as complainant  
Lawyer U as the person about whom the complaint was made  
The New Zealand Law Society as the successor of the Wellington District  
Law Society