

LCRO 02 /08

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 2

BETWEEN **COMPLAINANT A** of Auckland

Applicant

AND **LAWYER X** of Auckland

Respondent

DECISION

Background

[1] This is a review of a decision of the Auckland Standards Committee 2 in respect of a complaint by Complainant A against Lawyer X. Complainant A complained to New Zealand Law Society in respect of conduct by Lawyer X in relating to certain work he undertook for her Complainant A's mother.. The work in issue was undertaken between November 2006 and September 2007. Complainant A's mother died on 28 February 2008. All parties now accept that all relevant times Complainant A's mother was neither mentally competent to conduct her own affairs nor to execute legal documents. The extent to which this was known at the time the work was undertaken is relevant to this review. Lawyer X took instructions from Complainant A's mother which included the revocation of an enduring power of attorney in favour of Complainant A and the execution of a will which changed a former will by replacing Complainant A as trustee and executor with Lawyer X.

[2] The issues at the outset of this application for review were whether Lawyer X acted properly in taking instructions from Complainant A's mother in the face of her mental incompetence, and also whether it was appropriate for Lawyer X to invoice the estate of Complainant A's mother for work done. In the course of the hearing Lawyer X

indicated that he was prepared to remit the bill dated 25 September 2007 for \$1 743.76. Complainant A accepted that in light of this costs were no longer in issue. Accordingly the only matter for determination is whether Lawyer X was in breach of his professional obligations in taking instructions from Complainant A's mother and assisting her with the execution of the revocation of the enduring power of attorney and will.

[3] The application for review was received on 19 November. The Auckland Standards Committee 2 provided its file to this office. The application was forwarded to Mr x on 19 November 2008. Lawyer X was invited to respond to the application. On 26 November 2008 Lawyer X was invited by this office to respond to a number of specific questions in relation to the matters in issue. He elected not to respond in writing. On 10 December a telephone conference was held at which the matter was postponed to give the parties an opportunity to consider whether the matter could be resolved by negotiation. This was unsuccessful and the matter was heard with both parties present on 17 February 2009.

The Standards Committee Determination

[4] The Auckland Standards Committee 2 resolved to take no further action on the matter. It did so in reliance on section 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). That section provides that a Standards Committee may "decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Standards Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate". The reasons upon which the Committee reached this conclusion were briefly stated in its decision as "Lawyer X appears to have acted appropriately and was entitled to charge his client if he believed she had the requisite mental capability".

This Review

[5] By s 202 – 204 of the Act the Legal Complaints Review Officer has wide powers to review the inquiry of the Standards Committee and to undertake enquiries of his or her own. In this matter the review was conducted substantially on the basis of the application made to this office, the file of the Standards Committee, and the evidence and statements of the parties made at the hearing.

[6] This review concerns conduct which occurred prior to 1 August 2008 and as such the applicable rules are those in force at that time. In particular, s 352 of the Lawyers and Conveyancers Act 2006 states that penalties may only be imposed in

respect of conduct which could have been imposed for that conduct at the time the conduct occurred. The relevant standards are set out in s 106 of the Law Practitioners Act 1982 which provides that disciplinary sanction may be imposed where a practitioner is found guilty of misconduct in his professional capacity, or conduct unbecoming a barrister or a solicitor (the provisions relating to negligence and to criminal convictions are not relevant here). Further guidance can be obtained from the Rules of Professional Conduct for Barristers and Solicitors which were the applicable rules at the time in question.

[7] The threshold for disciplinary intervention under the Law Practitioners Act 1982 is therefore relatively high. Misconduct is generally considered to be conduct:

of sufficient gravity to be termed 'reprehensible' (or 'inexcusable', 'disgraceful' or 'deplorable' or 'dishonourable') or if the default can be said to arise from negligence such negligence must be either reprehensible or be of such a degree or so frequent as to reflect on his fitness to practise.

(*Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990). Conduct unbecoming is perhaps a slightly lower threshold. The test will be whether the conduct is acceptable according to the standards of "competent, ethical, and responsible practitioners" (*B v Medical Council* [2005] 3 NZLR 810 per Elias J at p 811).

Taking instructions prior to receipt of psychologist's report

[8] Lawyer X stated in his response to the original complaint by letter of 1 September 2008 that he met Complainant A's mother through an acquaintance at church. At the hearing he stated that Complainant A's mother presented as a normal and competent aged person. She had concerns regarding the management of her affairs by Complainant A. These concerns were, it appears, confirmed by the siblings of Complainant A's mother. At some time in early November 2006 Lawyer X attended on Complainant A's mother and assisted her in the preparation and execution of a revocation of enduring power of attorney. That document is dated 2 November 2006 and has Lawyer X's details at its foot.

[9] Complainant A became aware of the existence of this document on 21 November 2006 when it was handed to her by her mother, at the rest home where she was residing. Complainant A states that at this time she contacted Lawyer X and advised him of her mother's mental condition and subsequently that day faxing to Lawyer X a psychiatrist's opinion (by a Dr X) of 31 August 2006 which indicated that

Complainant A's mother was no longer mentally competent. At the hearing Lawyer X accepted that he had received that document.

[10] Lawyer X gave evidence that he believed Complainant A's mother to be competent when he took instructions in early November (prior to the receipt of the psychologist's report). There is no evidence to contradict this. While wider circumstances (such as the age of Complainant A's mother and the fact that she was resident in a rest home) may have been enough to warrant further enquiries being made, this does not amount to a professional breach. In light of this it can also be observed that it was appropriate for the account for services prior to 21 November 2006 to be rendered and paid.

Taking instructions subsequent to receipt of psychologist's report

[11] Subsequent to 21 November 2006 Lawyer X continued to take instructions from Complainant A's mother notwithstanding the information provided to him in the form of the psychiatrist's report on that day. In particular on 24 November 2006 Lawyer X assisted Complainant A's mother by attending to the execution of a will. The will was witnessed by Lawyer X and by a legal secretary of his office. The will changed the effect of an earlier will only insofar as it removed Complainant A as executrix and trustee and replaced her with Lawyer X. As an aside it can be noted that by virtue of s 13 of the Wills Act 2007 clause 4 of the will entitling Lawyer X to charge the estate for work undertaken in administration would be void in light of the fact that he witnessed the will. It appears that Lawyer X witnessed the will because there were no other persons who made themselves available to witness the will at the rest home where it was executed. While it may have been an error of Lawyer X to witness a will in which a charging clause in his own favour existed, this is not of itself a professional breach.

[12] Lawyer X was asked in the hearing whether, at the time he attended to the execution of the will and witnessed it he was in receipt the psychologist's report of 31 August 2006. He confirmed that he was in receipt of the report at the time the will was signed and added that he knew the will would be contested. Lawyer X was also asked whether he knew Complainant A's mother was incompetent when the will was executed to which he responded "yes I did". Lawyer X conceded that "it may well not have been correct" to have assisted in the execution of the will in the face of the psychologist's opinion but he claimed Complainant A's mother appeared desperate. He also conceded that "having signed a will at a time when she was then discovered to be

incompetent was probably not the right thing to do". In explanation as to why he assisted in the execution of a will in such circumstances he referred to tensions within Complainant A's mother's family and said that he wished to "put the cat amongst the pigeons". The inference was that this new will would crystallise matters and force the family to address the issues in relation to the care of Complainant A's mother.

[13] Some time later Complainant A took advice in respect of the purported revocation of the power of attorney. On 7 December 2006 her solicitor Lawyer A of Auckland wrote to Lawyer X's firm and reiterated Complainant A's mother's incompetence to conduct her own affairs and referred to the psychiatrist's report of 31 August 2006. The purpose of that letter was to express the view that the enduring power of attorney which had been purportedly revoked was still valid and in force. Lawyer X responded on 8 December by writing to Complainant A as her mother's attorney indicating that he was not aware of the lack of capacity at the time of the revocation. He confirmed that his firm would take no further action in Complainant A's mother's affairs. Lawyer X did not mention that he held a will executed by Complainant A's mother. It appears that Lawyer X continued to accept instructions from Complainant A's mother and/or Complainant A's mother's siblings notwithstanding his statement that he would take no further part in her affairs.

[14] The existence of the new will did not bring matters to a head. It appears that Complainant A did not become aware of the existence of that will until after her mother's death. On that date Lawyer X wrote to Complainant A to inform her that he held a will and that he intended to take steps to complete the administration of the estate. That letter and the expressed intention to treat the will as valid and commence administration is concerning in light of his acknowledgement that he knew Complainant A's mother did not have the mental capacity to execute the will at that time. In this regard the suggestion that the purpose of the will was to "put the cat amongst the pigeons" while Complainant A's mother was alive is not convincing.

[15] A person who lacks mental capacity cannot effectively instruct a lawyer and the retainer is at an end: *Yonge v Toynbee* [1910] 1 KB 215 (CA), *Laws of New Zealand Lawyers and Conveyancers* s 67. A lawyer who is aware of the lack of capacity may not properly take instructions from that client.

[15] On 30 May 2008 Lawyer A raised the fact that the later will held by Lawyer X was invalid. Lawyer X immediately accepted the invalidity of the will by facsimile on 5 June 2008.

[16] I have found that Lawyer X attended to the execution of the will of Complainant A's mother knowing that she did not have the requisite mental capacity. Lawyer X's claim that his purpose was to bring matters relating to the care of Complainant A's mother to a head is not convincing. He did not disclose the existence of the will prior to the death of Complainant A's mother. Given that he initiated the administration of a will that he knew was executed by a person lacking capacity, the only tenable motivation for assisting in the drafting of the will was so that he, or his firm, could act as trustee and executor in respect of the will. It is now recognised by Lawyer X that because he witnessed the will he could not charge for his services in acting as trustee and executor.

[17] The execution of the will in the knowledge of the incompetence of Complainant A's mother amounts to misconduct by Lawyer X in his professional capacity. This is compounded by the subsequent action of Lawyer X in purporting to assume the role of trustee and executor under that will on the death of Complainant A's mother.

Decision

[18] The application for review is upheld pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Auckland Standards Committee 2 is reversed.

[19] It is also ordered, by consent, that the bill dated 25 September 2007 for \$1743.76 is cancelled.

Submissions on penalty and costs

[20] Pursuant to 211(1)(b) of the Lawyers and Conveyancers this office may exercise any of the powers that could be exercised by a Standards Committee in the proceedings in which the decision was made. Section 352 of the Lawyers and Conveyancers Act states that (because these events occurred prior to the coming into force of that Act) the penalty imposed must be one that could have been imposed at the time the conduct occurred. I am of the view that this is a matter which, at the time the conduct occurred, would have been referred to a District Disciplinary Tribunal and not to the New Zealand Law Practitioners Disciplinary Tribunal. As such the relevant penalties are those found in s 106(4) of the Law Practitioners Act 1982.

[21] This also appears to be a case in which it would be appropriate to make an order of costs against Lawyer X in favour of the New Zealand Law Society in respect of the conduct of the proceedings before this office. Such an order would be made in accordance with s 210(3) of the Lawyers and Conveyancers Act 2006.

[22] Lawyer X or his counsel is invited to make written submissions on penalty and costs within 10 working days of the date of this decision.

DATED this 20th day of February 2009

Duncan Webb
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:

Complainant A as Applicant
Lawyer X as Respondent
The Auckland Standards Committee 2
The New Zealand Law Society