LCRO 003/2017
LCRO148/2017

CONCERNING	two applications for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	two determinations of the [Area] Standards Committee [x]
BETWEEN	**JENNIFER McDONNELL** Applicant
AND	**LA** Respondent

DECISION

The name of the Applicant is published as per this decision, the names and identifying details of the other parties in this decision have been changed.

Introduction

[1] Ms McDonnell has applied to review two related determinations by the [Area] Standards Committee [X] (the Committee).

[2] The Committee's first determination dealt with a complaint by Ms LA about Ms McDonnell's conduct whilst acting in the administration of Ms LA's late father's estate (Mr A). The Committee made a finding of unsatisfactory conduct against Ms McDonnell and imposed a fine together with other consequential orders (the liability determination).

[3] The Committee's second determination ordered publication of a summary of the matter including Ms McDonnell's name. The Committee also ordered Ms McDonnell to pay compensation to Ms LA (the publication determination).

[4] This decision deals with both applications for review. The events to which they relate occurred in late 2014 and throughout 2015.

Background

[5] Mr and Mrs A were the parents of five adult children, including Ms LA.

[6] Both had executed wills in 2010.

[7] At the same time Mrs A, under enduring powers of attorney, appointed Ms LA as her attorney as to both property and welfare.[1]

[8] By late 2014 Mrs A had capacity issues. Ongoing residence in a specialised care unit was anticipated.

[9] On 7 October 2014, Mr and Mrs A and their adult daughter S visited Ms McDonnell to discuss estate planning arrangements, including updated wills.

[10] Mr A was scheduled to have surgery later in October 2014.

[11] Mr A had investments in his name, valued at approximately $220,000. There were also bank accounts in the couple's joint names, in the amount of approximately $130,000.

[12] The couple's significant jointly owned asset was a licence to occupy a retirement apartment (the licence to occupy). This was said to be worth approximately $300,000.[2]

Estate planning and will instructions:

[13] Mr A's estate planning instructions to Ms McDonnell were that all property should be treated as relationship property and divided equally. He informed Ms McDonnell that he intended transferring the couple's joint bank accounts into his name.

[14] Mr A told Ms McDonnell that he wanted to ensure that there would be sufficient available from his estate for Mrs A's anticipated care requirements.

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[1] The power of attorney as to welfare came into effect in March 2015.

[2] There have been different values ascribed to the licence to occupy by Ms McDonnell — from $210,000 to $300,000. It was finally set at approximately $300,000. There are no disciplinary issues arising out this — it appears that there was some genuine uncertainty about the value in the early part of 2015.

[15] In his will, Mr A directed that his estate was to be divided equally between his five children. He executed his will on 10 October 2014 (the 2014 will).

[16] Mrs A gave Ms McDonnell instructions for a will, in similar terms to Mr A's, but this was not finalised due to concerns about Mrs A's capacity.

[17] Mr A did not recover from his October 2014 surgery and passed away on [Date] 2014. He did not finalise the transfer of the joint accounts into his name before he passed away.

[18] Ms McDonnell was instructed to act in the administration of Mr A's estate.

[19] The executors of Mr A's will were his three daughters, including Ms LA.

[20] The executors were initially concerned that if Mr A's 2014 will was administered, Mrs A would not be entitled to a WINZ rest home care subsidy (the WINZ subsidy).[3]

[21] However, Ms McDonnell advised them that by applying relationship property principles to the distribution of Mr A's estate, this could bring Mrs A within the WINZ subsidy threshold; if not straight away, then much sooner than if Mr A's will was administered and distributed according to its terms.

[22] During the course of administering Mr A's estate, Ms McDonnell produced two asset schedules: one in March 2015, which reflected a distribution in accordance with relationship property principles (the first asset schedule); and a second in October 2015 which reflected the position provided for in Mr A's will (the second asset schedule).

[23] As 2015 progressed, the executors disagreed about the administration of Mr A's estate, with Ms LA on one side and her two sisters on the other.

[24] One executor resigned, and as between the two remaining executors (including Ms LA) and the other beneficiaries, agreement was reached in May 2016 as to the distribution of Mr A's estate.

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[3] In a letter to the executors dated 17 March 2015, Ms McDonnell advised them that the then-current WINZ asset threshold for the rest home care subsidy, was $218,423, together with a pre-paid funeral account of $10,000 and an ability to gift $30,000 over a five-year period. I accept that this was accurate.

Complaint

[25] Ms LA lodged a complaint with the New Zealand Law Society Complaints Service (the Complaints Service) on 12 May 2016. The substance of her complaint was that:

(a) the first asset schedule produced by Ms McDonnell was incorrect. It took 15 months to rectify and caused profound and lasting family disharmony;

(b) Ms LA incurred costs in moving in order to protect herself from death threats from one of her siblings. These threats were connected to her position in relation to her father's estate;

(c) the delay and incorrect first asset schedule increased legal fees;

(d) there were potential consequences for Mrs A's WINZ subsidy;

(e) the final legal fees of $25,000 were "totally ridiculous" but Ms McDonnell had agreed on a reduction to $8,000; and

(f) Ms McDonnell caused extreme stress by providing incorrect advice.

Response

[26] Through her then counsel Ms RT, Ms McDonnell provided a response to the complaint in a letter to the Complaints Service dated 5 July 2016. It was accompanied by extensive supporting documentation.

[27] The substance of Ms McDonnell's response was:

(a) Mr A's 2014 will divided his estate equally between his five children;

(b) there was a dispute between the executors and acrimony within the family;

(c) the death threats made towards Ms LA had nothing to do with Ms McDonnell's conduct;

(d) there was an issue about the application of relationship property principles to Mr A's estate and whether his intentions should be followed, rather than the principle of survivorship;

(e) Mr A's children were all in agreement about the way in which Mr A's estate was to be distributed, but Ms LA challenged that agreement;

(f) eventually the family agreed on the way to distribute Mr A's estate.

(g) the "very root of the problem" was that the executors were trying to give effect to Mr A's wishes (as conveyed to Ms McDonnell before Mr A passed away) but reached an impasse when Ms LA and her executor sisters fell out;

(h) it is not uncommon for executors to decide upon the best way of giving effect to a testator's intentions when these have been made clear before death; and

(i) Ms McDonnell did not breach any rules of professional conduct.

[28] Ms McDonnell provided a letter of support from another of Mr A's children, who was also appointed an executor.

[29] On receiving her response, the Committee requested Ms McDonnell to provide her files to the Complaints Service and these were sent by her on 21 September 2016.

Further comment by Ms LA

[30] On 15 October 2016, Ms LA provided further comment:

(a) having researched relationship property law herself, she questioned the division of assets in the first asset schedule;

(b) Ms McDonnell did not discuss or provide advice about the election of options around assets and there was no certificate completed confirming the provision of such advice;

(c) there were potential implications for Mrs A's eligibility for a WINZ subsidy;

(d) the fees charged were "absurd";

(e) Ms McDonnell misled the family;

(f) when Ms LA queried the first asset schedule Ms McDonnell could not explain why asset division was to happen in that way;

(g) the death threats she received from her brother were very real and the Police took them seriously; and

(h) she incurred relocation costs and suffered immense personal stress due to the events surrounding the administration of her father's estate.

Further submissions from Ms McDonnell

[31] On 19 October 2016, Ms McDonnell's counsel provided further submissions including:

(a) a comprehensive summary of Mr A's instructions for his will and his assets;

(b) a timeline of initial attendances;

(c) Ms McDonnell's view that it was executor disharmony that led to delay and that she had acted in a timely and competent manner;

(d) discussion of the differing ways in which Mr A's estate could have been, and was eventually, distributed and the reasons for that distribution;

(e) the distribution of the estate was ultimately agreed to by the executors;

(f) legal fees were reasonable. Beach Law charged the estate $9,200 and three of Mr A's other children paid the balance of the fees; and

(g) Ms McDonnell was neither negligent nor incompetent.

The Standards Committee's liability determination

[32] The Committee delivered its liability determination on 18 November 2016 and determined, pursuant to ss 12(a) and (c) of the Lawyers and Conveyancers Act 2006 (the Act), that there had been unsatisfactory conduct on the part of Ms McDonnell.

[33] In reaching that decision the Committee determined that:

(a) Ms McDonnell did not turn her mind to, nor address the requirements of the Property (Relationships) Act 1976 (PRA) as to what should occur on the death of a spouse and the transmission of jointly held property;

(b) Ms McDonnell failed to identify the clear conflict between her duties to Mrs A and her duties to the executors of Mr A's estate;

(c) Ms McDonnell was in breach of r 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) by acting for both parties (Mrs A and the executors);

(d) Ms McDonnell should have arranged for independent legal advice for both the executors and for Mrs A;

(e) there was nothing to indicate that any advice was provided about the election of options under the PRA or the need for independent advice as to Mrs A's legal rights;

(f) the file notes from Ms McDonnell's file do not support the submissions made on her behalf, (and even if they did, Ms McDonnell had taken no steps to sever the joint tenancies);

(g) the deprivation of assets from Mrs A in the manner contemplated may not have allowed her to obtain a WINZ subsidy in any event;

(h) Ms McDonnell incorrectly applied the law of survivorship and the provisions of the PRA, which set this matter off on the wrong track at the outset;

(i) there is nothing to indicate Ms McDonnell advised the executors of the correct legal position;

(j) even if all the executors agreed that the estate should be divided in a different manner, then a deed of family arrangement should have been prepared with all relevant parties receiving independent legal advice;

(k) the inadequate advice at the outset has contributed to the family disharmony and the delay in this matter;

(l) Ms McDonnell did not administer the estate in a timely manner; and

(m) Ms McDonnell was in breach of r 3 of the Rules, and the way in which she handled this matter fell below the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent lawyer.

[34] In particular, the Committee said the following:[4]

> [12] … [I]t appears from all the relevant material that Ms McDonnell was under the misapprehension that any property jointly held was relationship property that fell to be distributed equally between the estate and Mrs A.
>
> [13] However, this is not the correct legal position in that any property that was jointly owned would have passed to Mrs A by way of survivorship. The [PRA] does not prevent such a transmission but simply creates inchoate rights for, in this case, the estate of Mr A to make a claim for an interest in the property transmitted to Mrs A.
>
> [14] It is apparent that Ms McDonnell did not turn her mind to nor address the requirements of the [PRA] as to what should occur in the event of the death of a spouse and the transmission of the jointly held property to the surviving partner.

[35] In light of a fee settlement reached by the parties, the Committee took no further action in this regard.

[36] The Committee ordered that Ms McDonnell was:

(a) censured pursuant to s 156(1)(b) of the Act;

(b) to pay a fine of $8,000 to the New Zealand Law Society (NZLS); and

(c) to pay costs of $1,200 to the NZLS.

Compensation and publication

[37] The Committee sought submissions from the parties on the issues of compensation and publication.

[38] On 29 November 2016, Ms LA provided her submissions as follows:

(a) A schedule of her actual costs ($19,091.52).

(b) The damage to her family has been "irreversible".

(c) She was strongly in favour of publication, including Ms McDonnell's name.

(d) Ms McDonnell was a trusted lawyer and yet caused a "snowballing" of events which ultimately led to death threats.

(e) She sought protection for Ms McDonnell's current and future clients.

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[4] Standards Committee determination, 18 November 2016 at [12]–[14].

(f) The threats and the family disharmony were a direct result of Ms McDonnell's unprofessional advice and misinterpretation of the law.

[39] On 2 December 2016, Ms McDonnell's counsel responded on her behalf. She submitted that Ms McDonnell did not oppose publication if the parties' identifying details were removed. Counsel submitted that if Ms McDonnell's identity was to be published it would have a significant adverse effect on her and her family. Ms McDonnell was in the process of selling her practice and did not want the complaint to impact on the incoming principal.

[40] On 16 December 2016, further submissions were received from Ms McDonnell's counsel on the issue of compensation. It was argued that none should be awarded because:

(a) the costs in Ms LA's schedule were not caused by Ms McDonnell, were not reasonably foreseeable and were too remote;

(b) Ms McDonnell was sympathetic to Ms LA's position, but she did not make or cause the threats; and

(c) the claim for legal fees was for fees that would have been incurred in any event.

Application to review the Committee's liability determination

[41] Ms McDonnell filed an application for review of the Committee's liability determination on 23 December 2016. The Committee's penalty determination had not by then been released.

[42] In relation to the liability finding, Ms McDonnell submitted:

(a) she acted in a timely and competent manner;

(b) the Committee was wrong to find that she was under a misapprehension about the distribution of relationship property;

(c) the Committee was wrong to find that she did not turn her mind to the requirements of the PRA;

(d) the Committee was wrong to find that she incorrectly applied the law of survivorship and the provisions of the PRA;

(e) the Committee was wrong to doubt her account of the instructions she received from Mr and Mrs A;

(f) the Committee did not adequately take into account the instructions she received from Mr and Mrs A;

(g) the Committee did not adequately take into account the instructions she received from the executors;

(h) the Committee was wrong to find that she failed to act appropriately by failing to sever the joint tenancies to avoid the operation of survivorship;

(i) the Committee was wrong to find that the advice she provided was a cause of delay, without giving appropriate consideration to the circumstances in which she gave advice and the reasons for the delay that arose;

(j) the contraventions found by the Committee were technical and did not warrant a finding of unsatisfactory conduct and/or a censure; and

(k) the fine imposed by the Committee was excessive.

[43] The outcome sought is reversal of the finding of unsatisfactory conduct and the related orders.

Response by Ms LA

[44] Ms LA responded to Ms McDonnell's review application on 8 February 2017, as follows:

(a) she disagreed with Ms McDonnell's grounds for review;

(b) she does not consider the estate was dealt with in a timely or competent manner;

(c) Ms McDonnell made several assumptions rather than apply the law;

(d) if accurate legal advice had been given at the start, the estate would have been resolved within the estimated six months; and

(e) she was appointed under Mrs A's EPOA and at no stage was she given advice about her mother's options.

The Standards Committee's publication determination

[45] The Committee delivered its publication determination on 27 June 2017 and determined that the facts of the matter should be published, including Ms McDonnell's identity, but with no publication of the identity of the other parties involved.

[46] It further ordered Ms McDonnell to pay Ms LA $1,500 for stress and anxiety, to be paid within 30 days of the date of the determination.

[47] The Committee's reasons included:

(a) the NZLS Board had approved the publication of Ms McDonnell's name if the Committee thought it appropriate;

(b) the need to protect consumers of legal services outweighed the interests and privacy of Ms McDonnell, her family and the incoming principal of her former practice; and

(c) the claims made by Ms LA for compensation in relation to various costs are more properly determined in a civil forum.

Application for review of Committee's publication determination

[48] Ms McDonnell filed an application to review the Committee's publication determination on 8 August 2017. She submitted:

(a) the Committee was wrong to find that publication of her details was appropriate given her circumstances;

(b) the Committee's procedure was unfair because it commenced an own-motion investigation and did not allow her to update her submissions before it made its decision on publication;

(c) the Committee did not take adequate account of the fact that the weight of the considerations justifying publication have diminished as she has taken steps to give effect to her retirement; and

(d) the Committee's decision is premature pending the outcome of her application to review the Committee's liability determination.

[49] The outcome sought is the overturning of the order for publication and that the order for payment of compensation be stayed until the review of the Committee's liability decision is completed.

[50] Ms LA was invited to comment on Ms McDonnell's review application. She submitted she was concerned about timeframes and she relied on her earlier submissions setting out her views.

[51] Both parties filed further written submissions before the hearing of Ms McDonnell's applications for review.

Nature and scope of review

[52] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[5]

> … 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.

[53] More recently, the High Court has described a review by this Office in the following way:[6]

> 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.

[54] 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 to:

(a) consider all of the available material afresh, including the Committee's decision; and

(b) provide an independent opinion based on those materials.

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

Statutory delegation and hearing in person

[55] As the Officer with responsibility for deciding these two applications for review, I appointed Mr Robert Hesketh as my statutory delegate to assist me in that task.[7]

[56] As part of that delegation, on 22 November and 20 December 2017 at Auckland, Mr Hesketh conducted a hearing at which Ms McDonnell appeared with her counsel Ms CD and Ms LA appeared with her husband as her support person.

[57] The process by which a Review Officer may delegate functions and powers to a duly appointed delegate was explained to the parties by Mr Hesketh. They indicated that they understood that process and took no issue with it.

[58] Mr Hesketh has reported to me about the hearing and we have conferred about the complaint, the application for review and my decision. There are no additional issues or questions in my mind that necessitate any further submissions from either party.

Analysis:

Preliminary observations

[59] It is important to summarise several relevant and important legal and professional conduct principles which have a bearing on the issues which arise in this application for review.

A will

[60] A will is "a document executed in prescribed form evidencing the intentions of the will-maker to take effect on his or her death". Further, "there is a strong presumption that a will-maker intends to dispose only of property of which he or she is free to dispose".[8]

[61] A will may be challenged after the will-maker has died, under the Family Protection Act 1955 (the FPA), the Law Reform (Testamentary Promises) Act 1954 (the TPA) or the Property (Relationships) Act 1976 (the PRA). Issues of capacity or duress may also be grounds for challenging a will.

[62] A will may not be challenged before the death of the will-maker.

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[7] Lawyers and Conveyancers Act 2006, sch 3, cl 6.
[8] Nicky Richardson *Nevill's Law of Trusts, Wills and Administration* (12th ed, LexisNexis, Wellington, 2016) at [14.1.2].

Survivorship and the Property (Relationships) Act 1976

[63] Jointly owned property (real and personal) passes to a surviving spouse on the death of one of them. This is known as the principle of survivorship. It is well-known and well-understood by lawyers who practise in the fields of estate planning and administration. It requires no detailed legal explanation in this decision.[9]

[64] Jointly owned property can include bank accounts in joint names, as well as land (or a right to occupy land) where the ownership is as joint tenants.

[65] A will-maker is not required to specify in their will that jointly owned property will pass to their survivor, as it is a rule of law. It follows that a will-maker cannot, in their will, gift what they perceive to be their interest in jointly owned property.

[66] A will-maker may gift property (real or personal) owned by them, to any other person. There is no legal principle of ownership which prevents that.[10]

[67] A surviving spouse may bring a claim against the estate of their deceased partner under the PRA, in lieu of taking whatever has been gifted to them (if anything) in their partner's will. To do so the surviving spouse must, within a specified time, formally indicate that they are taking that step.[11]

[68] Similarly, a deceased's estate may apply for leave to bring a claim under the PRA against the deceased's surviving partner, or against the estate of their deceased partner. Strict time limits apply. The threshold for granting leave is high.[12]

[69] A surviving spouse wishing to challenge their deceased partner's will may also do so under either of the FPA or the TPA.

Executor and trustee roles and duties

[70] The terms "executor" and "trustee" are often used interchangeably, although not necessarily accurately. Generally, a person will appoint one or more people to be both executors and trustees of their will.

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[9] In relation to land owned by (say) two spouses as joint tenants, see *Hinde McMorland and Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [13.004] — an important feature of a joint tenancy is that "on the death of one joint tenant his or her interest is extinguished and accrues to the surviving joint tenant[s] by virtue of the right of survivorship".

[10] As noted above at [61], a will may nevertheless be challenged.

[11] See generally Part 8 of the Property (Relationships) Act 1976. A challenge by a surviving partner to their deceased's partner's will under the PRA is known as "exercising Option A", referring to s 61 of the PRA.

[12] Property (Relationships) Act 1976, s 88(2).

[71] In very simple terms, the executorship role under a will involves taking steps to secure Probate from the High Court and identify the estate pool. Once that has been completed, the trusteeship role involves distribution of the estate.[13]

[72] The duties of an executor are clear and unambiguous. An executor must administer the provisions of deceased person's will so as to ensure that the wishes of the deceased person, as set out in their will, are carried out:[14]

> Let others attack that document if they wish. It is not for him or her to aid and abet them and their design of rewriting the testator's directions a little nearer to their heart's desire. It is not for him unwarrantedly to thwart them.
>
> …
>
> The obligation to perform these duties arises within the special fiduciary relationship which exists between a trustee as a fiduciary to whom property is entrusted, and the beneficiaries entitled to that property.

[73] Whatever personal views an executor may have about the terms of a will — for example whether it is fair — are irrelevant. Their role is to give effect to the terms of a will for which Probate has been granted.

[74] This can create difficulties where an executor is also a beneficiary in the will, and as a beneficiary has concerns about the will's fairness. In those circumstances consideration is often given to that person renouncing their executorship, so that there is no conflict between that role and entitlement as a beneficiary.

[75] Difficulties may also arise if an executor is simultaneously an attorney for a beneficiary or potential beneficiary, and there are issues of fairness in connection with the will. Again, consideration ought to be given for the executor to renounce their executorship.

[76] If there is more than one executor, they must act unanimously if they are to carry out their duty to administer the will according to its terms. Executors do from time to time disagree about the meaning of a provision in a will, or about an aspect of its administration. It is the role of the solicitor acting in the administration of the estate to advise the executors and obtain (if possible) their unanimous instructions.

[77] Until any disagreement between executors has been resolved, it will not be possible for the estate to be administered (at least in relation to the issue in dispute).

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[13] For convenience in this decision I will use the term "executor" to encompass the roles of executor and trustee.
[14] *Re Stewart* [2003] 1 NZLR 809 (HC).

[78] Resolving disagreements between executors can sometimes be impossible, particularly where there are conflicting interests of the type described above. In those circumstances, Court intervention may be required, and this can result in the removal and replacement of one or more of the executors.

[79] When a beneficiary or potential beneficiary mounts a challenge to a will under any of the PRA, FPA or TPA, it is open to the executor/s to enter into an agreement with the claimant and the other beneficiaries, to vary the terms of the will. This is generally done by way of a Deed of Family Arrangement, with each party separately represented and advised.

Lawyers' professional duties

[80] Invariably a lawyer will be instructed by the executor to provide the advice and carry out the transactional work involved in administering a deceased estate. The executor thus becomes that lawyer's client, but in their capacity as executor.

[81] If there is more than one executor, the lawyer can only act on the unanimous instructions of them all.

[82] In acting for a client — no matter what the issue might be — a lawyer must give that client clear, objective and competent legal advice based on the lawyer's understanding of the law.[15]

[83] A lawyer must only act in their client's interests and never be influenced by their own interests, or those of third parties. A lawyer cannot act for more than one client in a matter if there is a more than negligible risk that the clients' interests do not coincide.[16]

[84] Generally, a lawyer cannot act against a former client, particularly where there is a risk that confidential information may be compromised.[17]

[85] When accepting instructions from executors to act in the administration of an estate, consistent with their duty to give competent and objective advice a lawyer must advise the executors that their duty is to administer the will strictly according to its terms.

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[15] See generally rr 3 and 5.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[16] See for example rr 5, 5.3, 6 and 6.1.
[17] See r 8 and following.

[86] If a lawyer acting in the administration of an estate considers that the will may be susceptible to challenge, (either through their own assessment of the will or some indication given by a third party) then the lawyer must also advise the executors of this and give appropriate advice about whether to enter into a Deed of Family Arrangement with a claimant and the other beneficiaries, to vary the terms of the will.

[87] A lawyer instructed by executors to administer an estate cannot give any other person connected with the estate — beneficiaries or potential beneficiaries — any advice about their rights and entitlements, actual or potential, in relation to the estate. This would involve the lawyer acting for more than one client in a matter, where their interests would clearly not coincide.[18]

Issues on review

[88] It is not part of this review to consider the instructions Mr A gave Ms McDonnell when he spoke to her about his estate planning and his will on 7 October 2014 and determine whether the advice given by Ms McDonnell in response to those instructions raises any conduct issues. That was not the issue of complaint, nor is it an issue on review.

[89] The issue on review is whether Ms McDonnell's conduct as the lawyer acting in the administration of Mr A's estate has raised any disciplinary issues.

[90] For the reasons that follow, I agree with the Committee's assessment of Ms McDonnell's conduct in the administration of Mr A's estate, as being unsatisfactory.

[91] The two principal concerns for me relate to Ms McDonnell's competence in administering Mr A's estate, and her management of conflicts of duty.

[92] I will deal with each separately.

Did Ms McDonnell competently administer Mr A's estate?

Mr A's instructions

[93] In her letter to the Complaints Service dated 19 October 2016, Ms McDonnell's counsel said:

> [Mr A] instructed Ms McDonnell he wanted one half of the property that [he and Mrs A] owned jointly to pass to his children on death. He also instructed Ms McDonnell to maximise the amount that passed to his children, and to minimise

[18] Rule 6.1.

> the amount that went to [Mrs A], as he considered the amount that would be left for [Mrs A] would be sufficient for her needs.

Competence: discussion

[94] The starting point is to consider the assets jointly owned by Mr and Mrs A, and separately owned by Mr A, at the time of Mr A's death.[19] The position appeared to be as follows:

(a) Jointly owned property: the licence to occupy, some bank accounts and some household chattels.

(b) Property separately owned by Mr A: a $220,000 term investment, a bank account, a small foreign currency account, a motor vehicle and some chattels. As well, there was a refund due to Mr A for a cancelled cruise holiday for him and Mrs A ($8,800).

[95] The jointly owned property was destined to pass automatically to Mrs A by survivorship. Transactional work to give effect to this is generally routine.

[96] Mr A's estate, available for equal distribution to his five children (according to the terms of his 2014 will) comprised the items referred to in [94](b) above, minus funeral, debts and administration costs as provided for in Mr A's 2014 will.

[97] On 26 November 2014, Ms McDonnell met with the three executors and their brother; the fifth child (another brother) took part in the discussion by telephone.

[98] In effect, Ms McDonnell was meeting the executors and the beneficiaries: two quite distinct groups with different interests. Mrs A was not present, although I assume her interests were being looked after by Ms LA, as her attorney.

[99] Ms McDonnell submits that all five agreed that, despite the terms of Mr A's will, "all assets were to be treated as relationship property and divided equally … notwithstanding the survivorship principle which would normally govern spousal joint ownership of assets".

[100] It appears that the executors:

> were minded to reduce [Mrs A's] asset pool [to an amount which enabled her] to be eligible for the [WINZ subsidy]. This was not possible by applying survivorship principles, but was possible by applying relationship property principles to [Mr A's] estate.

[19] In putting it this way, when referring to "separately owned property" I am describing property Mr A could gift in his will. I am not referring to "separate property" as that is understood in the PRA.

[101] The approach contended for, to protect Mrs A's position, would have seen the five beneficiaries (of whom the executors were three), receive more.

[102] There is a concern with this approach. Namely, whether the executors were compromising their duty to administer Mr A's will according to its terms by preferring their own interests (even indirectly).

[103] It does not appear that Ms McDonnell raised this issue with the executors.

[104] In my view matters went off the rails from the meeting Ms McDonnell had with the five children on 26 November 2014. She confused Mr A's wishes as they were set out in his will, and which the executors were bound to carry out, with what she and Mr A's five children considered his actual wishes to have been.

[105] Whilst this was apparently done with Mrs A's position in mind, the approach represented a departure from the executors' duties and was being undertaken without Mrs A having any opportunity for independent legal advice about her position. I deal with that issue, further below.

[106] Matters were compounded by Ms McDonnell in her letter to the executors dated 1 December 2014. In that letter, Ms McDonnell said the following:

> The Will provides for the transfer of [Mr A's] Estate to his five children after payment of his funeral costs and all debts.
>
> [Mr A's] Estate consists of a one-half share of the following relationship property he shared with [Mrs A], being (estimate):
>
> | | | |
> |---|---|---|
> | 1 | [The licence to occupy] | $301,750.00 |
> | 2 | [Bank accounts] | $260,000.00 |
> | 3. | [Vehicle] | $25,000.00 |
> | 4. | Chattels | (little value) |

[107] Ms McDonnell was wrong to describe the licence to occupy as forming part of Mr A's estate. Mr and Mrs A were joint tenants of the licence to occupy, and as such the licence would automatically pass to Mrs A by operation of law.

[108] Ms McDonnell compounded her error and, in my view, added to the overall confusion about Mr A's estate, in an email to the executors dated 15 January 2015 where she said:

> [The licence to occupy] has been transferred to [Mrs A] by survivorship, though technically the estate has a half share. That will be accounted for in the ultimate division of assets between [Mr A and Mrs A].

[109] It was quite wrong for Ms McDonnell to say that "technically [Mr A's] estate has a half share" in the licence to occupy. She conflates relationship property principles (which, as the Committee observed, are no more than inchoate rights) with proper estate administration.

[110] Ms McDonnell persisted with this view until at least 23 June 2015, when she wrote to Ms LA and said:

> [Mr and Mrs A's] assets were held jointly and we, in consultation with the executors, have been proceeding with the administration of [Mr A's] estate on the basis that they each take half the assets, in accordance with their rights under the [PRA]. This is very much in the interests of [Mrs A] whose assets will be subject to assessment in applying for a rest home subsidy. We do not consider that there is a conflict between their respective interests.

[111] The correct legal position and proper legal approach was that Mr A's estate was entitled to seek leave to bring proceedings against Mrs A under the PRA. Given Mr A's estate planning instructions to Ms McDonnell about treating all property as relationship property and dividing it equally, she was obliged to give the executors advice about those instructions and their procedural consequences including the operation of the PRA, particularly as Mr A's will did not appear to reflect his instructions.

[112] Whether Mr A's estate would have taken that step is irrelevant; nor is the question of whether a court would have granted the estate leave to bring the proceedings. The issue is that because Mr A's will and estate did not match his estate planning instructions to Ms McDonnell, the executors required advice about options. Ms McDonnell did not provide that advice: she chose to adopt a course of advice that was inconsistent with Mr A's will and the executors' duty to implement it.

[113] It was also wrong for Ms McDonnell to categorically state that Mr A's estate had a half-share in the licence to occupy. A share, if any, could only ever be quantified by the Family Court after leave had been given to issue proceedings under the PRA (or by agreement between the executors, the beneficiaries and Mrs A recorded in a Deed of Family Arrangement, preceded by each party receiving independent legal advice).

[114] More fundamentally, it was wrong of Ms McDonnell to approach the administration of Mr A's estate as involving accounting which included the division of assets between Mr and Mrs A. Again, she conflated relationship property principles with estate administration.

[115] As to the bank accounts, it would appear that when Mr A passed away there were the following bank accounts:

(a) $40,000 joint term deposit.

(b) $78,148.16 joint term deposit.

(c) $220,000 term deposit in Mr A's name.

(d) $11,074.00 in a cheque account in Mr A's name.

(e) $1,129.95 in a foreign currency account in Mr A's name.

[116] As well, Mr A had paid a refundable deposit of $8,800 towards a cruise he and his wife had intended taking.

[117] It is clear that the term deposit in Mr A's name was available for him to gift in his will. It was not jointly owned property. The same can be said of the cheque account, the foreign currency account and the cruise deposit.

[118] As to the two other term deposits, these were in the joint names of Mr and Mrs A. It had been Mr A's intention, according to Ms McDonnell, to arrange for the transfer of those term deposits into his name. For whatever reason, Mr A did not do so.[20]

[119] This meant that the two term deposits, being jointly owned, passed (or should have passed) to Mrs A by the operation of survivorship.

[120] Again, Ms McDonnell could be expected to have advised the executors about proceedings by the estate under the PRA in relation to the two term deposits.

[121] The motor vehicle had a value ascribed to it of approximately $25,000. One of Mr A's two sons, by agreement with the executors and beneficiaries (when the matter was eventually settled), received that car, but to balance out the overall amounts each child received, that son received less cash than his siblings.

[122] Ms McDonnell arranged the transmission of the licence to occupy into Mrs A's name as well as some of the bank accounts. She had no choice but to do so.

[123] Mr A's 2014 will provided that his estate was to be divided equally between his five children.

[20] It is not entirely clear how Mr A intended to achieve this, given Mrs A's apparent capacity issues. I infer that Ms LA would have agreed to this as her mother's attorney as to property and would have executed the necessary bank documents on her mother's behalf.

[124] It was from that starting point that Ms McDonnell ought to have advised the executors. It was wrong for her to have given the executors the impression that the licence to occupy and the joint funds could be taken into account as being at least *prima facie* available for administration as part of Mr A's estate.

[125] It appears that Mr A's 2014 will did not, in fact, reflect his estate planning intentions.

[126] Those instructions were that all property was to be treated as relationship property and divided equally, and that there was to be sufficient left in his estate to pay for the rest home care that it was anticipated Mrs A would require.

[127] There is a contradiction in Mr A's instructions to Ms McDonnell. On the one hand the 50:50 division referred to immediately above; yet he also apparently instructed Ms McDonnell to "maximise" the amount the five children received and "minimise" the amount Mrs A received. This suggests something other than 50:50 and does not reflect relationship property principles.

[128] It is not entirely clear what Mr A could have meant by the expression "treat all property as relationship property" for estate planning and will-making purposes.

[129] The unassailable position is that in his will, Mr A could only gift property that belonged to him. Jointly owned property was not available for gifting.

[130] Whether Mr A provided Ms McDonnell with a list of assets — jointly and individually owned — is also not clear. I would expect that a prudent lawyer giving estate planning and will making advice, would request such a list.

[131] Had this exercise been completed before Mr A executed his will on 10 October 2014, it would have revealed that he had available for gifting in his will: a motor vehicle, $220,000, a bank account, a modest foreign currency account and some personal effects.

[132] It also would have revealed that whatever her asset position before Mr A passed away, upon his death Mrs A would assume ownership of the licence to occupy and the joint bank accounts, giving her a net worth of close to $420,000 (depending upon the value ascribed to the licence to occupy).

[133] Whatever the final nature of Mr A's estate planning and will instructions to Ms McDonnell, and her advice to him about those instructions in October 2014, Mr A executed a very straightforward will in which his only beneficiaries were his five children, and his estate was limited to an investment of $220,000; another bank

account (approximately $11,000); approximately $120,000 from the joint bank accounts once he had arranged for them to be transferred into his name; a few chattels and a motor vehicle.

[134] This would have left Mrs A with the licence to occupy, transmitted to her by survivorship. As indicated, its initial indicative value was $210,000.

[135] When Mr A died, his estate crystallised at the investment in his name, the bank account and the motor vehicle: this, because he had not transferred the joint accounts into his name.

[136] This was seen as leaving Mrs A in the position that all were apparently wanting to avoid: her net asset position put her above the WINZ subsidy. Survivorship meant that she assumed ownership of the licence to occupy and the joint bank accounts.[21]

[137] Ms McDonnell's first asset schedule, which I next discuss, describes a relationship property pool of approximately $600,000. Half of that is approximately $300,000. The subsidy threshold was then some $218,000.

[138] As the Committee observed, even applying relationship property principles to the administration of Mr A's estate did not bring Mrs A below the WINZ subsidy threshold.

First asset schedule

[139] Ms McDonnell's first asset schedule was attached to her letter to the executors dated 16 March 2015. In that letter she said, again incorrectly:

> 3. [Mr and Mrs A] jointly owned property pursuant to the [PRA]. The effect of this is that they each own a one-half share of the total assets …. regardless of ownership. These monies need to be realised so that they can be divided equally.

[140] The first asset schedule was set out by Ms McDonnell as follows:

	Debit	**Credit**
Cruise refund		$8,800
Audi vehicle		$30,000
Foreign currency		$1,129.95

[21] As it happens, if Mr A had transferred the joint accounts into his name leaving Mrs A with only the licence to occupy, its eventual value was fixed at $300,000 and this would have put her over the threshold for a WINZ subsidy.

TECT refund		$449.65
[Joint cheque account]		[$11,113.01]
[Mr A's investment account]		$220,000
[Joint investment account]		$40,000
[Joint investment account]		$77,931.15
[Licence to occupy after deductions]		$210,000
Total assets		**$599,424.11**
[Mr A's estate]	**$299,712.06**	
Mrs A	**$299,712.05**	
	$599,424.11	

[141] I observe at this point, that the consequence of the value of the licence to occupy moving from $210,000 in the first asset schedule, to (eventually) $300,000 was that the so-called relationship property pool was closer to $700,000 than the almost $600,000 provided for in the first asset schedule.

[142] The first asset schedule compounds Ms McDonnell's fundamental error about what Mr A's estate was comprised of and what was available for distribution.

[143] Ms McDonnell was applying PRA principles in circumstances where she had not given the executors advice as to whether Mr A's estate should consider bringing proceedings under that Act, what that would involve and what the range of outcomes might be.

[144] Nor had Mrs A been given any independent advice about her position, including whether she agreed with this approach and her right to exercise Option A under the PRA.

[145] In a separate letter to Ms LA, also dated 17 March 2015, Ms McDonnell noted that Mrs A's enduring power of attorney as to welfare had been triggered and that Ms LA had "assumed obligations to assist [Mrs A] with her property and personal care". She further said:

> [Mrs A] is to receive a one-half share of the relationship assets she owned with your late father pursuant to [the first asset schedule].
>
> Some of the joint accounts, cheque account and investments have been transferred into [Mrs A's] sole name. Some of the liabilities have already been paid from the joint account.

[146] It is quite clear that estate liabilities (for example funeral expenses and the like) were to be paid from Mr A's estate. As set out above, Mr A's estate was limited to, in effect, the $220,000 investment in his name, $11,000 in another bank account and a motor vehicle. It is from that source of funds that estate liabilities were directed in Mr A's will to be paid and should have been paid. It appears that these were being paid from jointly owned funds.

[147] Apart from that, again Ms McDonnell was quite wrong to say that Mrs A would only receive one-half of the relationship property assets she and Mr A jointly owned. This completely misses two points:

(a) Ms McDonnell was administering an estate in which the deceased had owned property jointly with his wife and which must pass to her because of the operation of survivorship.

(b) In any event, applying PRA principles would still have left Mrs A in the position of being above the WINZ subsidy threshold.

[148] Yet, as indicated, Ms McDonnell's first asset statement proceeds on the basis of a pooling and halving of all assets.

[149] In an email to Ms LA dated 13 May 2015, Ms McDonnell said:

> One of my main priorities was to ensure the division of relationship property (on paper) so that Mrs A is entitled to the WINZ subsidy at the earliest point in time. [Relying] on the survivorship by joint ownership would have left her exposed to significant assets.

[150] At about this time Ms LA instructed a lawyer to advise her about her and Mrs A's positions.

[151] In November 2015, Ms LA's lawyer asked Ms McDonnell to provide "a revised statement of assets for the estate and confirm that you agree with the position [they had discussed by telephone]".

[152] The telephone discussion referred to in Ms LA's lawyer's letter was "issues around the ownership of assets of [Mrs A] and [Mr A's] estate".

[153] In that discussion the lawyers agreed that "[the licence to occupy] and other jointly owned assets would pass to Mrs A by survivorship [and] any other assets in Mr A's name would remain part of his estate" (being the $220,000 investment and the motor vehicle).

[154] Ms LA's lawyer also said the following:

> We agreed that there is little to be gained by making an application to the court under the [PRA], nor is there much point in [Ms LA] using the power of attorney to enter into a Property (Relationships) agreement. MSD have made it clear that they will not accept such actions/transactions as they consider them to be deprivation of assets.

[155] In essence, 12 months after she commenced administering Mr A's estate, Ms McDonnell was being asked to provide an asset schedule which correctly reflected his estate, and not one which endeavoured to circumvent WINZ subsidy requirements.

[156] Ms McDonnell prepared and circulated her second asset schedule, dated 29 October 2015.

[157] It showed that the value of Mr A's estate was approximately $271,000, made up of the cruise deposit refund, his motor vehicle and bank accounts in his name at the date of his death.

[158] Mrs A's net asset position was calculated as being approximately $415,000, made up entirely of the assets transferred to her by operation of survivorship — joint term deposits and the licence to occupy.

[159] Through her lawyer, Ms LA advised Ms McDonnell that she accepted that the second asset schedule was accurate. Her lawyer said:

> [I]n pursuing what she has always considered to be an unsustainable claim and a waste of time and money … [Ms LA] has consistently distanced herself from the arguments of [the other two executors] and the advice of [Ms McDonnell].

[160] In a further letter to Ms McDonnell dated 16 March 2016, Ms LA's lawyer said:

> The [first asset schedule] that you provided to [Ms LA] and her co-executors was incorrect from the outset and remained uncorrected for 12 months. No correct statement of assets was produced until after our telephone discussion late last year.
>
> … [Ms LA] has at all times distanced herself from the misconceived direction of the file.
>
> Please confirm that the estate will now be distributed. We see no reason for it to be held up any longer.

[161] Ms McDonnell's response, dated 6 April 2016, was as follows:

> The [first asset schedule] was prepared following initial instructions from all three executors to proceed with distribution of the estate on the basis that all relationship assets were to be divided equally. [Ms LA] then altered her position and required distribution on the basis that some of the property had passed by survivorship to [Mrs A] and the balance [of the] assets were then to be distributed equally.

[162] Whatever position the executors took when Ms McDonnell was first instructed to act in the administration of Mr A's estate, her first asset schedule should have reflected the administration and distribution of Mr A's estate according to proper legal principles of survivorship and will gifting.

[163] Had Ms McDonnell approached her task in that way, it would undoubtedly have led to discussions between the executors, the beneficiaries (including Mrs A) and their respective legal advisers as to any alternative and mutually agreeable administration and distribution of Mr A's estate.

[164] The proper outcome would have been a Deed of Family Arrangement.

[165] I deal below with the fact that no one appears to have been offered that opportunity by Ms McDonnell. Ms LA took the initiative in May 2015 and sought legal advice on behalf of herself and Mrs A.

Executor unrest

[166] As between the three executors, disharmony began to arise as between Ms LA and one of the other executors in January 2015. Ms McDonnell was made aware of this at the time.

[167] From approximately March 2015 Ms LA began to question steps being taken by Ms McDonnell and fees being charged.

[168] Ms LA made her concerns about the administration of Mr A's estate clearly known to Ms McDonnell in a lengthy email to her dated 21 May 2015. The email refers to Ms LA having received independent legal advice.

[169] The other two executors, on the other hand, seemed satisfied with how matters were progressing.

[170] In my view, at the point where executor unrest arose — something which can easily derail the administration of an estate, if not bring it to a halt — Ms McDonnell should have directed each to obtain independent legal advice.

[171] She could not favour one over the others, or vice versa. She had a duty to be even-handed in all of her dealings with the executors.

[172] By not directing the executors to receive independent legal advice, Ms McDonnell allowed matters to stall.

[173] It was not until Ms McDonnell wrote to Ms LA's lawyer in early July 2015 that she raised the possibility that the other two executors may need independent legal advice and that matters might reach the point where directions from the High Court pursuant to the Trustee Act 1956 (or the Administration Act 1969) may be necessary.

[174] One of the executors resigned in July 2015, leaving Ms LA and one other to continue with the administration of Mr A's estate. Relations between those two executors were still, however, at a very low point and continued to deteriorate during the latter half of 2015.

[175] The conflict between the two executors concerned what they perceived Mr A's wishes to have been.

[176] Ms McDonnell should have advised all three executors at the outset that Mr A's wishes were contained in his will, which they were obliged to carry out. She did not, with the result that 12 months later the remaining two executors were effectively deadlocked about the administration and distribution of Mr A's estate.

[177] Any discussion about an alternative distribution (a variation of Mr A's will) can only have taken place in consultation with the beneficiaries; including Mrs A, whose survivorship rights were potentially being interfered with.

[178] Final distribution of Mr A's estate did not occur until May 2016: some 18 months after the grant of Probate. As to that, counsel for Ms McDonnell said:

> To resolve the impasse due to the disagreement between the executors, a compromise was reached which enabled the distribution of [Mr A's] estate to take place. As a result of the compromise, [Mrs A] now has assets that will prevent her from being entitled to claim [the WINZ subsidy] in the foreseeable future.

[179] The distribution, achieved in May 2016, was consistent with the terms of Mr A's will and reflected the operation of survivorship.

Summary: competence

[180] Ms McDonnell should not have led the executors to believe that Mr A's estate could simply be administered according to their wishes and in accordance with PRA principles. Even that assumption would not have produced the outcome sought by all — Mrs A's asset position putting her below the threshold for a WINZ subsidy.

[181] It would appear that no juggling of the figures could have avoided that. Survivorship gave Mrs A a net asset position of over $400,000; PRA principles, up to $350,000.

[182] It took the intervention of Ms LA's lawyer, almost 12 months after Ms McDonnell began to administer Mr A's estate, to bring about the production of the correct second asset schedule by Ms McDonnell.

[183] I agree with the Committee's finding that Ms McDonnell's administration of Mr A's estate fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, contrary to s 12(a) of the Act.

[184] I agree that this warrants a finding of unsatisfactory conduct against Ms McDonnell.

The competing interests

[185] It is important to note that Ms McDonnell acted for Mr A and Mrs A separately, in relation to their estate planning and wills instructions in October 2014. This is reflected in the fact that Mr and Mrs A signed separate letters of engagement sent by Ms McDonnell to them individually.

[186] The position that confronted Ms McDonnell when she began and was initially proceeding with the task of administering Mr A's estate, was ripe with conflicting interests:

(a) Mr and Mrs A jointly owned property: a licence to occupy and some bank accounts.

(b) Mr A's five children were his only beneficiaries.

(c) Three of those children were also his executors.

(d) One of the executors also had enduring powers of attorney in respect of both property and welfare, in relation to Mrs A.

(e) Mrs A was not provided for in her late husband's will (apart from the operation of survivorship in relation to the licence to occupy and some joint bank accounts).

(f) Ms McDonnell acted for Mr A when he gave estate planning instructions and instructions for his will in October 2014.

(g) Ms McDonnell acted for Mrs A when she gave estate planning instructions and instructions for her will in October 2014. However,

because of concerns about Mrs A capacity (the view being that she had "undiagnosed Alzheimer's"), Ms McDonnell did not prepare a will for Mrs A.

(h) Ms McDonnell was instructed to act in the administration of Mr A's estate.

[187] As the administration proceeded, the above was made worse by the following:

(a) There was disagreement between the executors as to how to proceed with the administration of Mr A's estate.

(b) One of the non-executor beneficiaries was in conflict with one of the executors.

[188] On behalf of Ms McDonnell, her counsel submitted to Mr Hesketh at the hearing:

> Ms McDonnell accepts that there was theoretically a possibility of conflict, if the estate decided it wished to formally bring a claim under the PRA to make sure that [Mrs A], who inherited slightly more than half by survivorship, would not realise that inheritance. She accepts that both the estate and [Mrs A] could have been advised to seek independent legal advice, but it was clear that all executors and beneficiaries, including [Ms LA as Mrs A's attorney] were agreed that the will intended a two-way split.

[189] Further:

> Ms McDonnell accepts that she could have advised all the parties that if they were to change their minds about the agreement as to the division of assets, then obviously there would be different interests which would need to be represented separately. In underestimating the likelihood of the agreement being resiled from, she accepts that there may have been a potential for conflict at the outset given that the vagaries of human nature being as they are, any agreement can be subject to one or more of the parties changing their mind.

[190] Ms McDonnell submits that she was simply trying to give effect to Mr A's and Mrs A's instructions about estate planning and their wills, as well as to the executors' concerns about Mrs A's asset position and her eligibility for a WINZ subsidy.

[191] However, in approaching the matter in this way Ms McDonnell overlooked that she was acting in the administration of Mr A's estate and could not possibly continue to act for Mrs A. The interests of the two did not align.

[192] I infer from her counsel's submissions above, that Ms McDonnell now accepts that.

[193] The estate's "interests" involved a *prima facie* administration in terms of Mr A's will. Mindful of what she perceived Mr A's instructions to be, Ms McDonnell's proper approach was to advise the executors about whether to seek leave to bring proceedings under the RPA against Mrs A, including the advantages and disadvantages, and potential outcomes.

[194] This was important because of the fiduciary duties owed by the executors to the beneficiaries. The beneficiaries needed to be aware that their share of Mr A's estate might increase if PRA proceedings were brought against Mrs A.

[195] Ms McDonnell could not possibly act for both the estate and Mrs A in those circumstances.

[196] Even if a settlement had been negotiated between the executors, the beneficiaries and Mrs A (whether or not proceedings had been issued under the PRA), Ms McDonnell could not possibly have acted for Mrs A in any capacity — whether estate planning or advice about settlement, as well continuing to act for the executors.

[197] For Mrs A to have agreed to administration in terms of the first asset schedule (or something similar) would have been a concession by her to her position at law. She was entitled to receive legal advice about that, as well as her overall position including whether she could also bring a PRA claim against Mr A's estate. The latter was probably unlikely; nevertheless, she was entitled to be advised about it.

[198] Critically also, any agreement varying Mr A's will which had the effect of bringing Mrs A below the threshold for a WINZ subsidy would also have been open to scrutiny by WINZ (or the agency which administered the scheme). The result could have been that the agreement was not recognised for WINZ subsidy purposes and that the true position was that provided for in Mr A's will.

[199] Mrs A required careful and considered advice about her position, and Ms McDonnell could not possibly have given that to her whilst simultaneously acting in the administration of Mr A's estate.

[200] Further, it presents as unlikely that Ms McDonnell could have acted for the estate in giving advice about a PRA claim against Mrs A, or about entering into a Deed of Family Arrangement with the other beneficiaries and with Mrs A. This would have involved her acting against her former client, Mrs A.

[201] Rule 8.7.1 provides (where relevant):

> A lawyer must not act for a client against a former client of the lawyer … where –
>
> (a) the … lawyer … holds information confidential to the former client; and
>
> (b) disclosure of the confidential information would be likely to affect the interests of the former client adversely; and
>
> (c) there is a more than negligible risk of disclosure of the confidential information; and
>
> (d) the fiduciary obligation owed to the former client would be undermined.

[202] Ms McDonnell had taken estate planning and will instructions from Mrs A in October 2014 (leaving aside capacity issues). To that extent, Mrs A had been Ms McDonnell's client.

[203] Ms McDonnell continued to act in the administration of Mr A's estate, as well as giving advice to Mrs A about estate planning options.

[204] By March 2015, Mrs A's enduring power of attorney in favour of Ms LA had been triggered. At that point Ms LA was Mrs A's attorney and made decisions on her behalf in effectively all aspects of Mrs A's life.

[205] I consider that Ms McDonnell should also, by then, have advised Ms LA to obtain independent legal advice about her tri-partite roles as executor, beneficiary and attorney for Mrs A.

[206] In an invoice for Mrs A, dated 2 April 2015 and addressed to Ms LA, Ms McDonnell renders a fee to Mrs A for "Estate Planning – General Matters". It describes the legal services as having been carried out "for the period to 31 March 2015".

[207] As evidence of the dual adviser role that Ms McDonnell had assumed, in a letter to the executors of Mr A's estate dated 1 May 2015, Ms McDonnell discussed several issues and said the following:

> You will be aware that [two of the executors] attended our office on 8 April 2015 to discuss the progress of the administration of the estate as well as matters concerning [Mrs A's] estate planning generally.

[208] The letter describes several earlier attendances with Ms LA where advice was given about Mrs A's

> estate planning going forward, including: her future care, her assets, her bank accounts, discussion in relation to care subsidies and our advice to you on the matters required to be undertaken by [Ms LA] as [Mrs A's] Power of Attorney.

[209] Attached to the letter was a separate document headed with Mrs A's name and which listed seven items to be attended to by Ms LA as Mrs A's attorney, including "file WINZ application for rest home subsidy when asset level is sufficiently reduced".

[210] It was very important for Mrs A, through Ms LA, to be advised about any steps taken with the intention of depriving Mrs A of assets so as to produce a result whereby on paper, she was below the WINZ subsidy. As the Committee observed, the question of whether there has been any deprivation of assets can be looked at when a decision is being made as to whether she might qualify for a WINZ subsidy.

[211] By July 2015, Ms LA's lawyer gave her advice about the deprivation issue and warned her about dangers with that.

[212] A further difficulty was that Ms McDonnell discussed Mrs A's estate planning matters in correspondence to the other two executors of Mr A's estate. In a number of emails from Ms LA as Mrs A's attorney to Ms McDonnell, Ms LA instructed Ms McDonnell not to do so, indicating that this had been Mrs A's wish.

[213] Ms McDonnell was wrong to have acted in both the administration of Mr A's estate and, at least until May 2015 when Ms LA sought independent legal advice, also for Mrs A.

[214] Because Mr A's estate pool was considerably less than he might have anticipated, due to his not having transferred the joint bank accounts into his name, the interests of Mr A's estate and Mrs A did not align. Any attempt to distribute Mr A's estate which did not reflect the terms of his will, and which saw Mrs A receive less than her survivorship entitlements, involved a compromise of Mrs A's position.

[215] As I have said, Mrs A was entitled to receive independent legal advice about that.

Conflicts: conclusion

[216] I agree with the Committee's finding that in acting for both the estate of Mr A and for Mrs A, Ms McDonnell breached r 6.1 of the Rules and that this is unsatisfactory conduct pursuant to s 12(c) of the Act.

[217] I note that the period during which Ms McDonnell acted for both, was from 26 November 2014 (when she met with the executors and beneficiaries) and May 2016 when Ms LA instructed her own lawyer.

[218] I have raised the issue of whether Ms McDonnell may have been precluded by the operation of r 8.7.1 from acting for either the estate or Mrs A in circumstances where a variation of Mr A's will was being contemplated.

[219] This was not specifically a ground of complaint, or an issue identified by the Committee for consideration.

[220] However, the Committee alluded to the difficulty (although characterising it as a breach of r 6.1) when it said:[22]

> Given that Ms McDonnell also acted for [Mrs A], she had a clear conflict of duties and should have arranged for both the estate and [Mrs A] to obtain independent legal advice about the issues created by the right of survivorship.

[221] Although I think it likely that the requirements of r 8.7.1 would have been met, in that: Ms McDonnell held Mrs A's confidential information; its disclosure would have been likely to adversely affect Mrs A's interests; there was a more than negligible risk of disclosure and Ms McDonnell's fiduciary obligations to Mrs A would be undermined — I do not have sufficient information before me to conclusively say that Ms McDonnell was prevented from acting for both Mr A's estate and Mrs A.

Summary

[222] I see no grounds which could persuade me to depart from the Committee's liability determination.

Publication determination

[223] In the event that Ms McDonnell's application to review the Committee's liability determination was unsuccessful, she does not challenge the Committee's order that she pay Ms LA compensation in the sum of $1,500.

[224] Ms LA has not applied to review and seek an uplift of the amount ordered.

[225] Accordingly, I confirm the Committee's order for payment of compensation.

[226] When Ms McDonnell first made submissions to the Committee about publication, she indicated that she intended retiring from the practise of law and was in the process of selling her practice.

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[22] Standards Committee liability determination at [14](a).

[227] Inquiry by the Committee indicated that although Ms McDonnell was selling her practice, she was intending to work as a trustee advisor, eventually without a practising certificate.

[228] The Committee launched an own motion investigation into this on the basis that Ms McDonnell may have misled it as to her true intentions. The result of that investigation was that the Committee took its inquiry no further.

[229] On the same day that it issued its decision not to take any further action on its own motion investigation, the Committee released its publication determination.

[230] Counsel for Ms McDonnell has argued that this has given rise to a breach of natural justice, on the following grounds:

(a) The Committee should have given Ms McDonnell an opportunity to make further submissions about publication.

(b) The decision to order publication may have been tainted by the Committee's reasons for commencing an own motion investigation into the question of whether Ms McDonnell had misled it about her future intentions.

(c) The Committee may also have taken irrelevant considerations into account when it ordered publication; specifically, that Ms LA had submitted that Ms LA's management of the administration of Mr A's estate had resulted in death threats from one of her brothers.

[231] On review, this Office is obliged to approach a Committee's determination through fresh eyes and apply a robust analysis to the facts and to the Committee's reasoning. It is, in effect, a second look at the complaint material.

[232] I am satisfied that whatever shortcomings there may have been in the Committee's approach to its consideration of the issue of publication (and I cannot discern any), can be overcome by the approach to be taken on review.

[233] Ms McDonnell has, through her counsel, made comprehensive submissions to this Office on the issue of publication so that all facts are now before me and may be weighed.

[234] In its publication determination, the Committee noted that it had considered both parties' submissions as to publication, including Ms LA's references to the death threats that she had received.

[235] On the issue of compensation, the Committee noted that Ms McDonnell was not responsible for acts done by Ms LA's brother.

[236] It is reasonable to conclude that the Committee came to a similar view about that when it considered the question of publication.

[237] It bears repeating what the Committee said when it ordered publication:[23]

> … [Ms McDonnell is] going to continue practising as "Coastal Law", an incorporated law firm but did not intend to hold a practising certificate after 30 June 2017. She would however continue work as a professional trustee.
>
> These facts, which have come to the Committee's attention outside of the submissions made by the parties in relation to this complaint, mean that the public interest factor needs to be considered more carefully given that Ms McDonnell is still in practice and will continue work as a professional trustee after 30 June 2017. The Committee also takes into account that this is the fourth finding of unsatisfactory conduct against Ms McDonnell where issues of competence have arisen.
>
> In the Committee's view, the need to protect consumers of legal service outweighs the interests and privacy of Ms McDonnell, her family or the incoming principal of her former practice.

[238] The Committee was principally motivated by the need to protect consumers of legal services as the basis for an order that Ms McDonnell's name should be published.

[239] It noted Ms McDonnell's disciplinary history which included four previous findings of unsatisfactory conduct where competence was an issue.

[240] In doing so, the Committee was giving effect to one of the principal planks of the Act: protection of consumers of legal services.[24]

[241] To this can be added the need to maintain public confidence in the provision of legal services.[25]

[242] In her counsel's submissions concerning the Committee's publication order, Ms McDonnell argues:

(a) Ms McDonnell has made it clear that she will not be accepting any work as a lawyer whether from the Courts or elsewhere.

(b) She will be undertaking work as a professional trustee although not providing legal services.

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[23] Standards Committee publication determination at [10]–[13].
[24] Section 3(1)(b) of the Lawyers and Conveyancers Act 2006, s 3(1)(b).
[25] Section 3(1)(a).

(c) The consumer protection foundation of the Act does not extend to members of the public dealing with professional advisers who are not lawyers.

(d) The four previous findings of unsatisfactory conduct "could be broadly said to be related to matters involving trusts … mainly in terms of … promptness … which was due to considerable work at the time".

[243] Ms CD's principal argument is that the need for consumer protection has all but evaporated because Ms McDonnell no longer provides regulated services as a lawyer.

[244] I am not persuaded that this sufficiently tips the balance in favour of non-publication.

[245] On any view, four — now five — separate findings of unsatisfactory conduct where there has been a failure to act competently in matters involving trusts, presents as a troubling pattern and a worrying disciplinary history.

[246] For that reason alone, the twin threads of public confidence and consumer protection are properly met by publication of a lawyer's name following disciplinary inquiry.

[247] Although not apparently practising as a lawyer at present, there is nothing to suggest that Ms McDonnell will not take it up again at some point in the future. She has not retired from professional life and works in a field which has more than a nodding acquaintance with the work a lawyer does.

[248] Had this been Ms McDonnell's first disciplinary finding, there would have been a compelling argument to say that publication of her name was not necessary to achieve the purposes of the Act.

[249] But the number of findings and their common theme of failings in the field of trust-related advice, persuade me that publication of Ms McDonnell's name is a proper response to the findings made by the Committee and which have been upheld by me.

Penalty

[250] The Committee censured Ms McDonnell and ordered her to pay a fine of $8,000. It noted that the level of fine reflected its finding that Ms McDonnell's conduct

fell "well below the standard of lawyers practising in the area of estates".[26] It took her disciplinary history into account.

[251] Because a publication order may only be made following a censure, the Committee was right to have imposed a censure on Ms McDonnell and I do not propose to interfere with that.[27]

[252] I have upheld each of the Committee's findings. In my view those findings were soundly based.

[253] A fine of $8,000 is slightly more than half of the maximum available. $8,000 is a significant fine.

[254] A Review Officer should be slow to interfere with the level of fine imposed by a Committee, unless some tangible fault can be found with the Committee's reasoning. The question to be asked is whether a particular level of fine presents as a proportionate response to the nature and extent of a lawyer's professional lapse.

[255] As was the Committee, I am troubled by the approach Ms McDonnell took to the administration of Mr A's estate. From day one, she was wrong-footed. It is not enough for her to simply say that she believed she was doing what Mr A, the executors and the beneficiaries all wanted.

[256] Were that the approach adopted by lawyers at the commencement of an estate administration, there would be anarchy.

[257] Care is required: care to ensure that the executors understand the terms of the will (whatever else may previously have been said about testamentary intentions); care to ensure that the executors understand their roles; care as to describing the estate assets; care to ensure that executors explain to the beneficiaries — including in this case a person in Mrs A's position — the terms of the will and the estate pool; and care to ensure that all competing interests are given the opportunity to receive independent legal advice.

[258] Ms McDonnell accomplished none of that for at least the first six months of the administration of Mr A's estate. It took a further 12 months before the matter was settled between all the parties — and on terms reflecting Mr A's will.

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[26] Standards Committee liability determination at [22].
[27] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 30.

[259] I cannot lay blame exclusively at Ms McDonnell's door for the 12-month delay to settlement following Ms LA instructing her own lawyer.

[260] But I cannot say that the fine imposed by the Committee was a disproportionate response to the findings it had made against Ms McDonnell — particularly when this was coupled with her disciplinary history.

Decision

[261] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed in all respects.

Costs

[262] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Ms McDonnell is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society within 30 days of the date of this decision, pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006.

Enforcement of costs order

[263] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Publication

[264] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision may be published, including Ms McDonnell's name, but without any details that may directly or indirectly identify Ms LA or any members of her family or Mr and Mrs A's family.

DATED this 28th day of June 2019

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R Maidment
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 McDonnell as the Applicant
Ms RT/Mr KN as the Applicants Representative
Ms LA as the Respondent
[Area] Standards Committee [x]
New Zealand Law Society