

LCRO 37 / 09

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

AND

CONCERNING A determination of the Southland
Standards Committee

BETWEEN **COMPLAINANT K** of Gore

Applicant

AND **LAWYER E** of Gore

Respondent

DECISION

Background

[1] The applicant, Complainant K complained to the Law Society on 2 September 2008 in respect of the conduct of Lawyer E concerning legal work he undertook in the estate of her mother (the deceased). In particular she complained that Lawyer E had failed to follow directions contained in the will in respect of burial and also had failed to provide information in a timely manner. The matter was considered by the Southland Standards Committee which concluded that there had been a breach of the Rules of Conduct and Client Care in failing to act in a timely manner and to respond to enquiries. It made a finding of unsatisfactory conduct, censured Lawyer E, ordered compensation, and imposed a fine. However, it considered that there was no professional breach in failing to follow instructions in the will. It reached that conclusion on the basis that the deceased funeral directions were " a personal matter and not a part of Lawyer E's practise as a solicitor". Complainant K made an application for review to this office on 31 March 2009 seeking a review of that part of the decision of the Standards Committee relating to the alleged failure to follow the instructions in the will.

[2] This review was conducted on the basis of the application, the file of the Standards Committee which was made available to me and the submissions of the

parties. The parties have consented to this matter being considered without a formal hearing and therefore in accordance with s 206(2) of the Lawyers and Conveyancers Act 2006 this matter is being determined on the material made available to this office by the parties and without a hearing in person.

[3] The deceased's will appointed Lawyer E as a trustee and executor of the will (along with another co-executor). It also stated the desire that her "body be buried beside that of her late husband". It appears that the deceased and her late husband are buried together in plot 178 of block 2 at the Edendale Cemetery. Complainant K is of the view that the intention in the will was that the deceased be buried in plot 179 of block 2 which is owned by (or licensed to) the estate and is beside the plot in the deceased and her late husband are buried.

Applicable standard

[4] This review concerns conduct which occurred prior to 1 August 2008. New legislation came into force in respect of the regulation of the legal profession on that date. Consequently the standards applicable differ between conduct which occurred before 1 August 2008, and conduct which occurred after that date. In general terms, issues of quality of service were not considered to be matters for the professional body prior to 1 August 2008. Matters of professional service since that date may be the basis for a regulatory response by the professional body (and in this case have been the subject of orders against Lawyer E).

[5] The pre 1 August 2008 standards are found in ss 106 and 112 of the Law Practitioners Act 1982. The threshold for disciplinary intervention under the Law Practitioners Act 1982 was relatively high and may include findings of misconduct or conduct unbecoming. Misconduct was 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; *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105). Conduct unbecoming can relate to conduct both in the capacity as a lawyer, and also as a private citizen. 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).

Consideration

[6] Lawyer E was the executor and trustee of the will and it is on this basis that he had the authority to make the funeral arrangements (or to accede to some other appropriate party making the arrangements). He undoubtedly held the position of trustee and executor position because he had acted as lawyer for the deceased. However, when he discharged the functions of executor and trustee he was acting in that capacity and not as a solicitor. This is the case even though he was paid a professional fee for his work. The role of solicitor to the estate and that of executor and trustee are distinct: *Hansen v Young* [2004] 1 NZLR 37. The funeral arrangements were part of the function of Lawyer E as executor and trustee.

[7] I observe that the mere fact that Lawyer E was not acting in his role as solicitor does not preclude a finding of a breach of professional standards. However, in general terms for a finding of a breach (which would be conduct unbecoming the Act as misconduct must be "in a professional capacity") some egregious conduct must have occurred. The Standards Committee appeared to be of the view that given the conduct complained of occurred outside of the role of solicitor it did not reach the high threshold required for a finding of a professional breach. Given the close relationship between Lawyer E's position as solicitor and that of executor and trustee I am not convinced that the sharp dividing line applicable to legal duties is useful in the context of professional obligations. However, in the event, this does not affect the outcome of this review.

[8] I also note Lawyer E rejects that the deceased was buried inappropriately. He also stated in his letter of 20 April to this office that he left the making of the funeral arrangements to the other co executor. The deceased's daughter was also involved in making the arrangements. There is nothing objectionable in a professional trustee leaving the details of the funeral arrangements to a co trustee. Indeed where the co-trustee is a family member this seems appropriate.

[9] It may be that there was a lapse in communication between the second co executor and Lawyer E. Lawyer E does not state whether or not he was aware that the adjacent plot was intended for the interment of the deceased. The whole thrust of Complainant K's complaint is that Lawyer E was aware of this and did not implement that wish. It appears therefore that he was aware of the wish. It also appears that he left the arrangements more or less entirely to the co executor. The applicant has stated

(and Lawyer E has not denied) that he held the will. He therefore can be expected to have been aware of the desire of the deceased to be buried in the adjacent plot.

[10] It may be that the deceased's directions in her will were not followed exactly as they were intended given the fact that an adjacent plot was held. This inference could be drawn not only from the statements of Complainant K, but also from the statements of the co executor in his letter of 1 September 2008. In that letter he explains that he was not aware that the unused plot next to the deceased's husband had been purchased for the deceased. In that letter the co executor proceeds to state that he acted sincerely and honestly in making the arrangements for the funeral. There is no reason to doubt this.

[11] Lawyer E has also pointed out that there was no obligation on the trustees to follow the directions in the will as to burial. Directions as to disposal of remains are, at law, not binding: *Williams v Williams* (1882) 20 Ch D 659; [1881-5] All ER Rep 840. As such the executors of a will are not in breach of any duty owed should the directions in the will as to the disposal of remains not be followed. From this it is clear that even assuming the terms of the direction in the will have been breached, Lawyer E is in breach of no legal duty.

Conclusion

[12] I have concluded that the decision of the Standards Committee was appropriate. I have taken into account the applicable professional standards, the law in relation to an executor's obligation in disposing of a body, and the conduct of the executors in this matter. It may be that in discharging his obligations as trustee and executor of the will of The deceased a lapse in communication by Lawyer E led to interment at variance with the desire of The deceased stated in the will. However in light of the applicable standards the conduct of Lawyer E in discharging his obligations of executor of the will of the deceased did not amount to a professional breach.

Decision

[13] The application for review is declined pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act. The decision of the Southland Standards Committee is confirmed.

DATED this 5th day of May 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 K as Applicant
Lawyer E as Respondent
The Southland Standards Committee
The New Zealand Law Society