LCRO 78/2017

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City] Standards Committee [X]
BETWEEN	**UT** Applicant
AND	**HB** Respondent

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

DECISION

Introduction

[1] Ms UT has applied for a review of a decision by the [City] Standards Committee [X] (the Committee) to take no further action in respect of her complaint concerning the conduct of the respondent, Mr HB, a lawyer, at the relevant time a partner with [Law Firm 1, Suburb 1] (the firm).

[2] Mr HB acted for Ms UT's stepfather, Mr JWS, who had been in a relationship with Ms UT's mother for many years. Ms UT says she was aged three at the commencement of that relationship.

[3] Mr HB had previously prepared wills for Mr JWS. First, in June 1989 in which Mr JWS left his estate to Ms UT's mother (the 1989 will).

[4] Ms UT's mother died in 2001. In October 2001, Mr HB prepared another will for Mr JWS in which Mr JWS left his estate to his mother who lived in the Netherlands (the 2001 will).

[5] On 27 November 2009, Mr JWS telephoned Mr HB with instructions to complete a new will in which he proposed leaving his estate to Ms UT, with a substituted gift to Ms UT's daughters if Ms UT predeceased Mr JWS. Mr HB wrote to Mr JWS on 2 December 2009 recording those instructions (the proposed 2009 will).

[6] Mr JWS died from cancer on [Date] 2010, aged [X] years, without making a new will.

[7] The following day, [Date] 2010, Ms UT met with Mr HB and Mr CT, a senior solicitor employed by the firm. Mr HB told Ms UT about the proposed 2009 will. Ms UT says Mr HB also mentioned the possibility of applying to the High Court to have the proposed 2009 will declared a valid will under s 14 of the Wills Act 2007 (section 14).

[8] Ms UT sought advice from Mr BD, her son-in-law's father, and a lawyer, who registered her claim to share in Mr JWS's estate with Mr HB. Mr BD later instructed a barrister, Mr GN, to assist.

[9] In March 2010 Mr HB, assisted by Mr CT, obtained probate of Mr JWS's 2001 will. Mr HB distributed Mr JWS's estate the following year in February 2011.

Complaint

(1) Proposed 2009 will

[10] In her complaint, lodged with the Lawyers Complaints Service on 9 January 2017, Ms UT complained that Mr HB did not act on Mr JWS's 27 November 2009 telephoned instructions to prepare the proposed 2009 will.

(2) Application for will validation

[11] She also alleged that Mr HB did not, as he told Ms UT he would at their 21 January 2010 meeting, "look into" making an application to the Court under section 14 to have Mr JWS's proposed 2009 will declared a valid will.

(3) Administration matters

[12] Ms UT stated that contrary to Mr HB's statement to her at their 21 January 2010 meeting that in accordance with the details she provided, he would arrange for

(a) cremation, and the return of Mr JWS's ashes to the Netherlands, and (b) a "headstone and plaque", he did not do so.

Response

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

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

[15] On 13 March 2017, an LSO telephoned Mr HB and informed him that the Committee had reached a preliminary view that it would take no further action on Ms UT's complaint. He was asked whether he wished to provide a response to the complaint. He said he was content to leave the matter to the Committee.

Standards Committee decision

[16] The Committee delivered its decision on 14 March 2017 and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act), that no further action on the complaint was necessary or appropriate.

(1) Proposed 2009 will

[17] The Committee stated that because Mr JWS had provided his 27 November 2009 instructions by telephone, Mr HB "was correct to write" to Mr JWS "to confirm" before proceeding.

(2) Application for validation

[18] In the Committee's view, Ms UT had supported Mr HB's application for probate of Mr JWS's 2001 will and had "failed to make her own application" for validation of Mr JWS's proposed 2009 will. As such, it was "difficult to see how Ms UT [could] maintain her view that Mr HB acted improperly in applying for probate" of Mr JWS's 2001 will.

(3) Estate Administration matters

[19] The Committee regarded matters such as a headstone and plaque for Mr JWS as issues for the beneficiaries "to discuss and agree with Mr HB" and therefore was outside the Committee's jurisdiction to consider.

Application for review

[20] Ms UT filed an application for review on 24 April 2017. She asks why Mr HB "did not apply or even try" to apply for a declaration that Mr JWS's proposed 2009 will was a valid will. She seeks compensation and reimbursement for the burial related expenses she incurred for Mr JWS.

(1) Proposed 2009 will

[21] Ms UT largely repeats her complaint that Mr HB did not follow up Mr JWS's will instructions. She says Mr JWS would not have telephoned Mr HB on 27 November 2009 had [Mr JWS] not wanted to make a new will.

[22] She says although Mr HB's 2 December 2009 letter to Mr JWS sought more information about [Ms UT's] daughters who Mr JWS wanted to include in his will, Mr JWS's instructions as outlined in Mr HB's letter were correct.

[23] She says on 21/22 January 2010 she provided Mr JWS's brother, Mr SWS who also lived in the Netherlands, with details of Mr JWS's proposed 2009 will. Mr SWS then telephoned Mr HB to explain why Mr JWS would have wanted to make those changes to his will, including paying back a $15,000 gift made by Mr SWS to Mr JWS nine years earlier.

(2) Application for validation

[24] Ms UT re-states her claim that by not making a section 14 application to have Mr JWS's 27 November 2009 wishes declared a valid will, Mr HB had not acted in accordance with his professional obligations.

[25] She repeats that Mr HB told her at their 21 January 2010 meeting that he would "look into" the possibility of making a section 14 application.

[26] She says Mr SWS, and Mr JWS's mother who was the sole beneficiary under Mr JWS's 2001 will, agreed that Mr JWS's proposed 2009 will, which included paying back Mr SWS's $15,000 gift, ought to be validated to give effect to Mr JWS's wishes.

[27] Whilst she acknowledges Mr HB told her she would need to obtain independent legal advice, she says her expectation was that he would make a section 14 application. She says Mr HB and Mr SWS "were communicating on this situation". She refers to Mr SWS's 22 September 2010 email to Mr CT that Mr JWS's mother, as beneficiary under Mr JWS's 2001 will, had agreed to relinquish her claim to Mr JWS's estate.

Response

[28] Mr HB's responses were filed in this Office on 22 May 2017, and 9 May 2019. He submits that his conduct in carrying out his executor duties to obtain probate and distribute Mr JWS's assets in accordance with Mr JWS's 2001 will was neither unsatisfactory conduct or misconduct.

(1) Proposed 2009 will

[29] Mr HB states that he did not prepare the proposed 2009 will for Mr JWS because he "never received confirmation of [Mr JWS's] instructions to do so". He says he did not know that Mr JWS was terminally ill until informed by Ms UT following Mr JWS's death.

(2) Application for validation

[30] He says as Mr JWS's executor named in Mr JWS's 2001 will, it was his duty "to [obtain] probate … and execute" that will "in accordance with its terms" in respect of which he obtained advice from the firm.

[31] He says he was advised that Mr JWS's proposed 2009 will "could not be validated under section 14".

[32] He says the firm advised Ms UT to obtain independent legal advice, which he understands she did. He says whilst it was open to Ms UT to make an application to have Mr JWS's proposed 2009 will declared a valid will, she did not do so.

Hearing

[33] The parties attended a review hearing in Auckland on 16 May 2019. Ms UT attended in person. Mr HB attended by telephone.

Nature and scope of review

[34] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … 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.

[35] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

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

Issues

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

Will instructions

(a) Having received Mr JWS's 27 November 2009 telephoned instructions to prepare the proposed 2009 will, what professional obligations and duties did Mr HB owe Mr JWS?

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

(b) Did those obligations and duties include the duty for Mr HB to follow up his 2 December 2009 letter to Mr JWS requesting Mr JWS to confirm those instructions? If so, did Mr HB fulfil that duty?

Wills Act 2007, s 14 application

(c) Did Mr HB tell Ms UT at their 21 January 2010 meeting that he would "look into" making a section 14 application to have Mr JWS's proposed 2009 will declared a valid will and then revert to her?

(d) If so, what professional obligations and duties did Mr HB owe Ms UT and did he fulfil them?

(e) Was Ms UT independently represented by a lawyer following Mr JWS's death?

Funeral related expenses

(f) Did Mr HB owe Ms UT any professional obligations and duties in respect of Ms UT having made arrangements for a headstone and plaque for Mr JWS, and having incurred related expenses?

Analysis

(1) Professional obligations, duties

(a) Retainer

[38] "Retainer" is the term used in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), defined in r 1.2, to describe an agreement between a lawyer and the lawyer's client concerning the provision of legal services by the lawyer to the client, namely:

> … an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not.

[39] Although not defined in the Act or the Rules, the term "client", is included in this definition as the recipient of legal services.

[40] The "retainer" between lawyer and client has been described as being:[3]

> … central to various aspects of the lawyer-client relationship. Fundamentally, it identifies the client and prescribes the services expected of the lawyer. In doing so it determines upon whose instructions the lawyer acts, the scope of the lawyer's authority in carrying out those instructions and the scope of the lawyers' duties.

[41] The Courts have stated that lawyers' duties are:[4]

> governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's instructions. Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer.

(b) Instructions

[42] With limited exceptions, a lawyer risks a complaint from a client with a prospect of a disciplinary response if the lawyer does not carry out the client's instructions.

[43] A lawyer must disclose to his or her client information that is relevant to the retainer, take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.[5]

[44] Where the lawyer is unsure about the client's instructions then:[6]

> ….it is incumbent on the lawyer to obtain clarification of those instructions. The lawyer may not proceed on an assumption the client agrees to a certain course of action.

(c) Act competently and in a timely manner

[45] The purposes of the Act include maintaining public confidence in the provision of legal services, and protecting the consumers of legal services.[7] To this end r 3 provides that:[8]

> In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

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[3] GE Dal Pont *Lawyers' Professional Responsibility* (6 ed, Thomson Reuters, Sydney, 2017) at [3.05] and [5.25].
[4] *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.
[5] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 7, 7.1. See also r 1.2 concerning the way in which information must be provided to the client.
[6] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington 2016) at [10.3].
[7] Lawyers and Coneyancers Act 2006, s 3(1).
[8] Section 6 — "regulated services" is defined as including "legal services" and "conveyancing services", which are themselves defined.

[46] The duty to be competent has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help".[9] Relatedly, the definition of "unsatisfactory conduct" includes:[10]

> conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[47] In the practice of law competence "entails an ability to complete the work required by finding the relevant law and applying the relevant skills". Whether the lawyer concerned meets this standard is also to be determined objectively.[11]

[48] However, this does not impose a duty "to provide a high level of service to clients", and "is, in reality, a duty not to be incompetent … aimed at ensuring minimum standards of service". The duty is concerned with "the outcome of a lawyer's work rather than the way in which they deal with clients".[12]

[49] As noted above, r 3 also requires that lawyers must provide regulated services to clients "in a timely manner" which "place(s) some emphasis on timely action as part of expected client service" as acknowledged in rr 3, 3.2, 7, and 7.2.[13]

(2) Will instructions — issues (a), (b)

(a) Parties' positions

[50] Ms UT claims that Mr HB did not act on Mr JWS's 27 November 2009 telephone instructions to prepare the proposed 2009 will. She says having sent his 2 December 2009 letter to Mr JWS, seeking confirmation of Mr JWS's instructions, Mr HB did not follow up that letter with Mr JWS.

[51] Mr HB's position is that he did not prepare the proposed 2009 will for Mr JWS because Mr JWS did not provide him with that confirmation. He denies he was aware from his 27 November 2009 telephone conversation with Mr JWS that Mr JWS was terminally ill.

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[9] Webb, Dalziel and Cook, above n 6 at [11.1].
[10] Lawyers and Conveyancers Act 2006, s 12(a). See also Duncan Webb "Unsatisfactory Conduct" (2008) 717 Lawtalk 18.
[11] Webb, Dalziel and Cook, above n 6 at [11.3].
[12] At [11.3].
[13] *KD v WW* LCRO 83/2011 (30 March 2012) at [84]. Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 3.2: "A lawyer must respond to inquiries from the client in a timely manner"; r 7.2: "A lawyer must promptly answer requests for information or other inquiries from the client".

(b) Chronology

1989 will

[52] In his 1989 will, which Mr HB prepared, Mr JWS appointed Mr HB and another member of the firm as executors and trustees. Mr JWS provided for the residue of his estate to go to Ms UT's mother, or if she predeceased him, to Ms UT. If Ms UT predeceased Mr JWS, then the residue was to go to his mother.[14]

2001 will

[53] By 2001, Ms UT's mother suffered from Alzheimer's. She entered a nursing home. She died later that year having suffered a stroke.

[54] Ms UT says she and her husband sold their farm. Part of the sale proceeds were applied to buy a new house for Mr JWS.

[55] In October 2001 Mr JWS made his 2001 will, which was also prepared by Mr HB. Mr JWS again appointed Mr HB and the same firm member as executors and trustees. He provided for the residue of his estate to be left to his mother, but to be divided equally among his brothers and sisters if his mother predeceased him.[15]

[56] Around that time, Mr SWS made a gift of $15,000 to Mr JWS to enable him to build a chimney for his house.

[57] Between 2001 and January 2010, Ms UT, who lived in Queensland Australia, made numerous visits to see Mr JWS in Havelock North to assist him with "many daily things". During his "final months" she says she phoned him from Queensland "every second day, sometimes daily", as well as liaising with Mr JWS's carers and doctors.

Proposed 2009 will

[58] By November 2009, Mr JWS, then aged 77, had suffered from cancer for some time. On 27 November 2009, he telephoned Mr HB with instructions to prepare a new will.

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[14] Will, 9 June 1989 — further, if Mr WS's mother predeceased him then his estate was to be divided equally among such of his brothers and sisters who survived him with a gift over to their children.

[15] Will, 15 October 2001 — further, if any of his brothers and sisters predeceased him there was a substitution clause for their respective children who survived Mr WS and reached the age of 20 years.

[59] On 2 December 2009, Mr HB wrote to Mr JWS recording Mr JWS's instructions and asking for confirmation. Mr JWS wanted to leave his estate to Ms UT, who was substituted beneficiary under the 1989 will, or to Ms UT's two daughters in substitution if Ms UT predeceased him.

[60] A week later on 9/10 December 2009 while visiting Mr JWS, Ms UT says Mr JWS asked her to write down her full name. She said she did so, on the reverse side of a Meals on Wheels menu, as well as writing the names of her two daughters.

[61] Mr JWS did not respond to Mr HB's 2 December 2009 letter. Mr HB did not follow-up that letter. Mr JWS died on 20 January 2010 without making a new will.

(c) Discussion

[62] The essential question is whether Mr HB, having received Mr JWS's 27 November 2009 telephone instructions, discharged his professional duties to prepare the proposed 2009 will.

Proposed 2009 will instructions

[63] As noted above, upon receipt of instructions from a client, the lawyer concerned must ensure that the client understands what the lawyer is required to do in order to carry out the client's instructions and, if necessary, obtain clarification from the client.[16] Having done so, then carry out the client's instructions in a competent and timely fashion.[17]

[64] The way in which the lawyer must carry out these duties is very much dependent on the type of instructions received from the client.

[65] For example, where the client's instructions are to prepare a commercial contract, there may be an expectation that the document to be prepared is to initiate negotiations. On the other hand, if the client and the other party/ies have already agreed terms, then the client will most likely require preparation of the document immediately.

[66] In litigation, the speed with which the client's lawyer acts may depend on a variety of factors including the nature of the dispute or issue in question, the stage at which the litigation has reached, time limits, the financial position of the parties to name but a few.

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[16] r r 7, 7.1.
[17] r 3.

Jurisdiction — professional obligations, duties

[67] The Courts, not a Standards Committee or this Office on review, have jurisdiction in respect of disputes concerning wills.[18]

[68] Similarly, it is for the Court to consider and determine a question whether the failure by a lawyer to prepare a will in accordance with the client's instructions, or failure to present to the client for signature a will prepared in accordance with those instructions was due to the lawyer's negligence.

[69] However, it is within the jurisdiction of a Standards Committee or this Office on review to inquire into whether the fact that the client did not sign a proposed will was due to the lawyer having failed to fulfil his or her professional obligations and duties to implement the client's instructions. Such an inquiry is likely to include a consideration of the lawyer's competence, diligence, timeliness and communication with the client.

[70] Valuable guidance for such an inquiry is to be found in the authorities which have considered whether or not a lawyer, by not completing the client's will, failed in his or her duty of care to an intended beneficiary.

Delay

[71] Illustrations of findings of delay by a lawyer in presenting a will to a client for signature include a Court of Appeal decision in which an elderly client, who had instructed her lawyer to prepare a new will, died seven days later without the lawyer having presented the will to her for signature.[19] In a similar case considered by the English Court of Appeal, the client died suddenly without the lawyer having provided the new will for signature.[20]

[72] However, in circumstances where the lawyer, who had visited the client in hospital, intended to complete the will within the following week but the client died five days later, the Court held that the lawyer "had no reason to believe" that the client "had a real risk of not surviving the next week, or indeed the next month", and the lawyer had not been dilatory.[21]

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[18] Senior Courts Act 2016, s 12; Administration Act 1969, s 5; Wills Act 2007; Family Protection Act 1955.
[19] *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 (CA).
[20] *White v Jones* [1995] 2 AC 207 (EWCA Civ).
[21] *X (an infant) v Wollcombe Young* [2001] Lloyd's Rep PN 274 (Ch).

Relevant factors

[73] To assist determining whether a lawyer instructed to prepare a will acted reasonably, a Canadian Court has suggested six factors to take into account:[22]

> [1] the terms of the lawyer's retainer – for example, whether a precise timetable is agreed upon; [2] whether there was any delay caused by the client; [3] the importance of the Will to the testator; [4] the complexity of the job – for example the more complex the job the more time required; [5] the circumstances indicating the risk of death or onset of incapacity in the testator; and [6] whether there has been a reasonable ordering of the lawyer's priorities. By this, [what is] meant [is] that… the job will be done within a reasonable ordering of the priorities in the lawyer's life and practice.

[74] As will be evident from the discussion so far, the outcome of every case will turn on its own facts and circumstances. Clearly, if the lawyer knows the client is aged, very unwell, or has a life-threatening condition then there will be less tolerance of delay in presenting a new will to the client for signature.

- timetable, delay

[75] With this in mind, on 27 November 2009 Mr JWS telephoned Mr HB and provided him with instructions to prepare the proposed 2009 will.

[76] Five days later, on 2 December 2009, Mr HB wrote to Mr JWS outlining Mr JWS's instructions and seeking confirmation of them. In that letter Mr HB explained that Mr JWS's 2001 will provided for his estate to go to his "mother but if she predeceases [him] to [his] brothers and sisters".

[77] He said he understood Mr JWS "now want[ed] to give the whole of [Mr JWS's] estate to [Ms UT] and then to [Ms UT's] daughters". He noted that Mr JWS was "going to give [Mr HB] [Ms UT's] full name". He asked Mr JWS to confirm that "all of [his] estate [is] to go to [Ms UT] in the first instance but if she predeceases [him] then equally to [Ms UT's] daughters".

[78] Mr HB added that "[a]s soon as [he] receiv[ed] [Mr JWS's] confirmation" of instructions, and "confirmation of [Ms UT's] full name" then he would "prepare the new Will" which he could either send to Mr JWS "in Havelock North for signature", or Mr JWS could see [Mr HB] … to sign it if [Mr JWS] plan[ned] to be in [town] shortly".

[79] Finally, he noted that Mr JWS wanted to provide for repayment of Mr SWS's gift of $15,000.

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[22] *Rosenberg Estate v Black* (2001) ACWS (3d) (ONCJ) at [62] - cited in Dal Pont above n.3 at [21.60].

[80] In the absence of an agreed timetable within which Mr HB was to complete Mr JWS's instructions, Mr HB's professional duty was to do so "in a timely manner consistent with the terms of the retainer and the duty to take reasonable care".[23]

[81] There can be no criticism of the time, five days, it took for Mr HB to write to Mr JWS on 2 December 2009 for confirmation of Mr JWS's instructions. However, that was only the second step towards completing Mr JWS's instructions. At that stage, as Mr HB acknowledged in his 2 December 2009 letter, he was yet to "prepare the new will".

- complexity

[82] As noted, Mr JWS's proposed 2009 will instructions were that:

(a) "all of [his] estate [was] to go to [Ms UT] in the first instance but if she predeceases [him] then equally to [Ms UT's] daughters"; and

(b) to pay back Mr SWS's $15,000 gift.

[83] Mr HB would have been was aware that Mr JWS's 1989 will, as noted above, provided for his estate to go to Ms UT's mother, with a substituted gift over to Ms UT if her mother predeceased Mr JWS.

[84] This presented as a straightforward instruction, which did not require the additional attendances that could be expected when preparing a will for a client whose estate was complex.

- health

[85] In April and June 2014, when Ms UT complained to the firm about Mr HB's conduct, she suggested that Mr HB ought to have "pick[ed] up on [Mr JWS's] health" in the 27 November 2009 telephone conversation. On Ms UT's behalf, Mr GN stated in his 22 November 2012 letter to Mr CT that she did not accept Mr HB "did not know" from that telephone conversation that Mr JWS "was extremely unwell".

[86] However, Ms UT did acknowledge in her June 2014 complaint letter to the firm that Mr JWS "may not have let on" about his health.

[87] Mr HB has consistently denied he knew Mr JWS was ill. Both Mr HB and Mr CT state that Mr HB's file note of the 27 November 2009 telephone conversation "makes no mention" of Mr JWS's medical condition at that time.

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[23] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules, r 3.

[88] In the absence of persuasive evidence from either party that Mr JWS told Mr HB about [Mr JWS's] medical condition during their 27 November 2009 telephone conversation, it is not possible for me to reconcile their opposing positions on this point. However, having acted for Mr JWS on the preparation of his 1989 and 2001 wills, it could be expected that Mr HB would be aware of Mr JWS's approximate age.

Follow up

[89] Upon receipt of Mr JWS's instructions, there were two alternative approaches open to Mr HB. First, as he did, write to Mr JWS setting out [Mr HB's] understanding of Mr JWS's 27 November 2009 telephoned instructions and request confirmation before drafting the proposed 2009 will.

[90] Alternatively, prepare a draft will in accordance with those instructions and send it to Mr JWS. accompanied by a similar explanatory letter requesting confirmation of instructions and any comments.[24]

[91] Either way, taking into account (a) Mr JWS's age, which Mr HB would have known or could have found out from the firm's records, and (b) the straightforward nature of Mr JWS's proposed 2009 will instructions, which would restore Ms UT as a beneficiary, it could be expected that Mr HB would follow-up his 2 December 2009 letter promptly to find out whether Mr JWS wished to proceed.

[92] It goes without saying that where an elderly client presents with will instructions which require a substantial change, then the lawyer must respond in a timely fashion.

[93] At the hearing Mr HB said that he had "no time records of having telephoned [Mr JWS] to chase up". He acknowledged that "maybe [he] should have followed up", but in his view had no professional duty to do so. He added Mr JWS similarly ought to have responded.

[94] The fact that Mr JWS did not respond to Mr HB's request for confirmation of instructions, raises the question how far, in such circumstances, a lawyer's duty to follow up with a client ought to extend? Put another way, does the lawyer's duty to carry out the client's instructions diminish, or cease altogether if the client does not respond? At what point does the client take full responsibility to respond to enable the lawyer to complete the client's instructions?

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[24] see Auckland District Law Society Inc "Legal Practice Manual, Volume 6 — Wills" (5th ed) at 15.

[95] In my view, there can be no general hard and fast approach. Each case will necessarily depend on the type and nature of the instructions, the client's circumstances, and the particular facts and circumstances of each case.

[96] Unfortunately, other than referring to Mr JWS's 9/10 December 2009 request, when visiting him, to write down her full name, Ms UT has been unable to throw any light on why Mr JWS did not respond to Mr HB.

[97] Ms UT says she last spoke with Mr JWS on 19 January 2010, but again he made no mention of his proposed 2009 will.

[98] Although she says she remained unaware of Mr JWS's proposed 2009 will until informed by Mr HB at their 21 January 2010 meeting, on reflection, she suggests Mr JWS's request to write down her full name supports her view that Mr JWS was working towards responding to Mr HB's 2 December 2009 letter.

[99] Equally, Mr JWS's failure to respond to Mr HB might be interpreted as a rethink, or a change of mind by Mr JWS.

[100] While this may digress from the issue whether Mr HB ought to have followed up his 2 December 2009 letter, it does illustrate the difficulty in drawing any conclusion about Mr JWS's testamentary intentions from his failure to respond to Mr HB.

[101] In summary, Mr HB had requested Mr JWS's further instructions, namely, confirmation of [Mr HB's] understanding of Mr JWS's telephoned instructions before preparing the proposed 2009 will. In my view that would necessarily include Mr HB following up to ask Mr JWS whether there was anything further required of [Mr HB] to implement Mr JWS's instructions.

[102] Again, in the absence of an agreed timetable it could be expected that Mr HB would nonetheless do so promptly, particularly taking into account the looming 2009/2010 Christmas and New Year holiday period.

[103] The High Court has stated that whilst the Rules are to be "applied as specifically as possible",[25] they "are also to be applied as sensibly and fairly as possible".[26]

[104] Following that approach, from my analysis of the information provided to this Office on this aspect of Ms UT's complaint in the particular circumstances of this matter, I consider that Mr HB failed in his professional duties to promptly follow-up his

[25] *Q v Legal Complaints Review Officer* [2012] NZHC 3082, [2013] NZAR 69 at [59]
[26] *Stewart v Legal Complaints Review Officer* [2016] NZHC 916, [2016] NZAR 600 at [62].

2 December 2009 letter (a) for Mr JWS's confirmation of instructions as requested, (b) whether Mr JWS still wanted the proposed 2009 will prepared, and (c) if so, make arrangements for signature of the will.

[105] The conclusion I have reached is that by failing to do so Mr HB contravened rr 3 (act competently and in a timely manner) and 7.1 (consult with the client), which constitutes unsatisfactory conduct under s 12(c) of the Act, namely, "a contravention of this Act, or of any regulations or practice rules made under [the] Act". That conduct, in my view, also falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, which constitutes unsatisfactory conduct under s 12(a) of the Act, referred to earlier.

(3) Wills Act 2007, s 14 application – issues (c), (d), (e)

(a) Lawyer's duty to non-clients

[106] There may be occasions when a lawyer owes a duty, other than a professional duty, to persons for whom the lawyer does not act. For example, a duty of care in negligence; or in circumstances where a lawyer provides a certificate as to certain facts, or a certificate to a bank confirming that securities are in place, or a certificate provided for e-dealing purposes in Landonline.

[107] Generally, however, "the existence of a duty" owed to a non-client has been described as "exceptional". To illustrate, a lawyer acting for a client would not owe a duty to a person who was an opposing party in litigation, or on the opposite side of the transaction.[27]

[108] As the High Court has explained:[28]

> Caution must be exercised in imposing a duty on solicitors to those who are not only not the solicitor's clients, but who indeed have interests essentially in conflict with those of the solicitor's direct client.

(b) Parties' positions

[109] Ms UT claims that Mr HB did not, as he told Ms UT he would at their 21 January 2010 meeting, make a section 14 application to have Mr JWS's proposed 2009 will declared valid.

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[27] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4.3].
[28] *Burmeister v O'Brien* [2010] 2 NZLR 395 (HC) at [234], referred to in Webb, Dalziel and Cook at [5.4.3].

[110] Mr HB says he did not recall informing Ms UT that "he would ensure" Mr JWS's "wishes" in his proposed 2009 will "were followed". He says as Mr JWS's executor of the 2001 will, it was his duty to obtain probate of, and administer, that will. He says he was advised that the proposed 2009 will "could not be validated" under section 14.

(c) Chronology

[111] Following Mr JWS's death on 20 January 2010, Ms UT immediately flew to New Zealand, and met with Mr HB and Mr CT the following day, 21 January 2010.

[112] Ms UT claims that Mr HB told her he would "look into" having the proposed 2009 will declared a valid will under section 14. She says either Mr HB or Mr CT told her she might have to obtain her own lawyer.

[113] Either that day, or the following day, 22 January 2010, Ms UT telephoned Mr SWS to inform him about the proposed 2009 will. She says Mr SWS then telephoned Mr HB and informed him that Mr JWS's mother "would be relinquishing the 2001 Will" in favour of the proposed 2009 will as recorded in Mr HB's 2 December 2009 letter to Mr JWS.[29]

[114] The next day, 23 January 2010, Ms UT telephoned Mr BD, as noted earlier, her son-in-law's father, and a lawyer, for his assistance.

[115] On 12 February 2010, Mr BD wrote to and informed Mr CT that Ms UT "intends to pursue a claim to the residue of the estate", but had "no wish to take an aggressive stance …as she [understood] that the … beneficiaries in the 2001 Will have indicated that they will renounce".

Probate

[116] Mr HB applied for probate of the 2001 will, supported by an affidavit of death sworn by Ms UT, which was issued on 8 March 2010.

Family arrangement discussions

[117] During the following twelve months, Ms UT had discussions with Mr SWS about how Mr JWS's estate might be shared among Ms UT and Mr JWS's "family in Holland". Mr BD exchanged correspondence on this and related matters with Mr CT.

[29] Later confirmed by Mr SWS in his 22 September 2010 email to Mr CT referred to below.

[118] On 22 September 2010, Mr SWS informed Mr CT that:

> [he] trust[ed] that the fact that [his] [mother] is willing to follow [Mr JWS's] verbal will instead of the written will, may persuade the judge to acknowledge [Ms UT] as the beneficiary.

[119] Ms UT did not, however, formally press her claim.

[120] Mr HB informed Mr BD on 24 February 2011 that [Mr HB] intended "to distribute the residuary estate assets pursuant to the [2001] Will" to Mr JWS's mother. Mr SWS died in March 2011.

[121] There was no further correspondence exchanged until October 2012, when Mr BD instructed Mr GN, a barrister, to put forward Ms UT's position. In particular, that the proposed 2009 will had "not been honoured, and Mr HB had not, as he undertook to Ms UT, applied to have the proposed 2009 will validated under section 14. Mr CT, on behalf of Mr HB, rejected Ms UT's claim.

(d) Discussion

[122] As noted above, it is an exception rather than the rule for a lawyer to owe professional obligations and duties to a person for whom the lawyer does not act. The issue therefore concerning this aspect of Mr JWS's complaint is whether Mr HB owed Ms UT any professional duty to apply to the High Court to have Mr JWS's proposed 2009 will validated under section 14.

Independent legal advice

[123] In that regard, Ms UT and Mr HB each acknowledge that Mr HB and Mr CT, or both of them, informed Ms UT, either at their 21 January 2010 meeting or soon thereafter, about Mr JWS's proposed 2009 will and told her she would need to obtain independent legal advice.

[124] Ms UT informed Mr CT by fax on 23 January 2010 that she had provided Mr BD with information so he could "inform [her] of any legal requirements, that [she] may need to know".

Section 14 application

[125] Even so, Ms UT maintains that Mr HB undertook to her at their 21 January 2010 meeting that he would "get back to [her] the following day … after he had spoken to the relevant people/courts about the situation over the [proposed 2009 will)".

[126] Mr HB denies he told Ms UT he "would ensure" Mr JWS's "wishes" in the proposed 2009 will "were followed". He says he "does not recall" having made such a statement, and he has no record on his file of having expressed other than "his condolences" and having discussed "some practical estate administration matters". At the hearing he stated that if he did not call back as promised, then that was not a mistake on his or Mr CT' part and has no bearing on Ms UT's complaint.

[127] The parties take entirely opposing views about the steps, if any, Mr HB was to take to gauge the likelihood of success an application under section 14 to have the proposed 2009 will declared valid.

[128] In the absence of any compelling evidence from Ms UT that Mr HB gave her this assurance, I am not able to take this aspect of her complaint any further.

Family arrangement — negotiations

[129] On 12 February 2010, Mr BD wrote to Mr CT to register Ms UT's claim to at least part of Mr JWS's estate. This, as noted earlier, led to correspondence between him, later Mr GN, and Mr CT concerning the possibility of a family arrangement to resolve Ms UT's claim.

[130] Unfortunately for Ms UT, following Mr SWS's death in March 2011 the prospects of a family arrangement dwindled and ultimately disappeared.

[131] I observe that Ms UT could have pressed her claim earlier by lodging, with the Registrar of the High Court, a caveat against the grant of probate made by the High Court to Mr HB on 8 March 2010.[30] However, Ms UT did not do so. Having attended Mr JWS's funeral, she swore an affidavit of death in support of Mr HB's application for probate.

[132] On 24 February 2011, Mr CT informed Mr BD that Mr HB, as executor, intended "to distribute the residuary estate pursuant to the [2001] Will" to Mr JWS's mother in the Netherlands.

[133] Ms UT says that even though probate of the 2001 will was granted she thought that she "would [still] benefit" because Mr SWS told Mr HB in January 2010 that Mr JWS's mother had relinquished her entitlement to Mr JWS's estate. She says she was relying on Mr SWS, irrespective of Mr BD's "involve[ment]" on her behalf registering her claim.

[30] Administration Act 1969, s 60.

[134] However, at the hearing she acknowledged she was "too trusting" that Mr JWS's proposed 2009 will "would happen" and that as executor, Mr HB would "do the right thing" by applying to have the proposed 2009 will validated.

[135] Overall, despite having sworn an affidavit of death, and assisting Mr CT with estate matters, Ms UT had her own lawyer to represent her in respect of her claim to Mr JWS's estate. From my analysis of the information provided to this Office, the conclusion I have reached is that no issues of a professional nature adverse to Mr HB arise on this aspect of Ms UT's complaint.

(3) Funeral related expenses – issue (f)

(a) Parties positions

[136] Ms UT claims Mr HB told her at their 21 January 2010 meeting that, in accordance with the details she provided, he would arrange for cremation of Mr JWS's body, return the ashes to the Netherlands, and arrange a headstone and plaque. She said he failed to do so.

[137] In response, Mr HB says he had nothing to do with Mr JWS's funeral arrangements. He says he understood Ms UT, or Mr SWS had organised a funeral, but otherwise he has no personal recollection of this issue.

Discussion

[138] Ms UT stated in her complaint that she wanted to know why Mr JWS's wishes that his body be cremated and ashes returned to the Netherlands, as conveyed to Mr HB by her, had not been carried out. She asks why she and her family have been left to pay for Mr JWS's headstone and plaque when "this should have been part of the executor's job …before distribution of the estate".

[139] Mr HB says it is "unusual for [him] to organise burial", which is "usually" attended to by next of kin.

[140] Although it is not within the jurisdiction, or responsibility of a Standards Committee, or this Office on review to assist the parties on what is essentially a legal matter concerning the scope of an executor's duties, I make the following observations.

[141] The 2001 will includes Mr JWS's direction to Mr HB as executor and trustee "[t]o pay all [Mr JWS's] debts and funeral expenses" which represent a charge on his estate.

[142] A person who orders a funeral will be personally liable for the funeral expenses. If that person is not an executor then, depending on the extent of the estate assets, he or she may seek reimbursement from the executor. The cost of the headstone, or a plaque, "is a matter that depends largely on the size of the estate, and the circumstances in life of the will-maker".[31]

[143] As with the proposed 2009 will validation issue, the parties have opposing views concerning which of them was responsible for these funeral related arrangements and expenses. Ms UT explained at the hearing that the combined cost of the headstone and plaque was approximately $2,000 in respect of which she had paid $1,000 for the headstone. In such circumstances it may be open to Ms UT to seek reimbursement of the expenses she has incurred with Mr HB, as executor, and possibly with Mr JWS's family.

Decision

[144] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Committee concerning Ms UT's complaint in respect of:

(a) The proposed 2009 will is reversed as to the finding to take no further action, and substituted with my finding that Mr HB failed to promptly follow up his 2 December 2009 letter for confirmation or otherwise of Mr JWS's 27 November 2009 instructions to prepare the proposed 2009 will and by doing so:

(i) Mr HB contravened rr 3 (act competently and in a timely manner) and 7.1 (consult with the client), which constitutes unsatisfactory conduct under s 12(c) of the Act.

(ii) Mr HB's conduct also fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, which constitutes unsatisfactory conduct under s 12(a) of the Act.

(b) The section 14 issue, and the funeral related expenses issue to take no further action is confirmed.

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[31] Nicky Richardson *Nevill's Law of Trusts, Wills and Administration* (10th ed, Wellington, LexisNexis, 2010) at [20.1]–[20.1.1].

Orders

[145] Having made a finding of unsatisfactory conduct, s 156 of the Act includes among the orders that a Standards Committee can make, orders in the nature of penalty.

[146] In this regard, the functions of penalty in the disciplinary context have been described by the Court of Appeal as (a) punishing the practitioner, (b) a deterrent to other practitioners; and (c) to reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.[32]

[147] The starting points for penalty are the seriousness of the conduct and culpability of the lawyer concerned. Mitigating and aggravating features, as applicable, are also taken into account. Acknowledgement by the lawyer of error and acceptance of responsibility are matters to be considered in mitigation.

(a) Fine

[148] A fine is one of the orders a Standards Committee, or this Office on review, can make. The maximum fine available is $15,000.[33] Concerning an appropriate fine, this Office has stated that in cases where unsatisfactory conduct is found as a result of a breach of applicable rules (whether the Rules, regulations or the Act) and a fine is appropriate, a fine of $1000 would be a proper starting place in the absence of other factors.[34]

[149] In my view, taking into account the particular circumstances of this matter as I have discussed, I consider that a fine of $1,000 would be appropriate.

(b) Compensation

[150] Ms UT seeks an order for compensation of $198,000, which she says she would have received from Mr JWS's estate if Mr HB had completed Mr JWS's instructions to prepare Mr JWS's proposed 2009 will, or failing that, applied to have the proposed 2009 will validated under section 14.

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[32] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA) at [21].
[33] Lawyers and Conveyancers Act 2006, s 156(1)(i).
[34] *Workington v Sheffield* LCRO 55/2009 (26 August 2009) at [68].

[151] Section 156(1)(d) provides:[35]

> Where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner …[it may] order the practitioner … to pay to that person such sum by way of compensation as is specified in the order, being a sum not exceeding [$25,000].

[152] There must be a clear "causative link" between conduct of the lawyer concerned and the loss claimed. For that reason, such matters are best determined by the Courts in respect of any claim in negligence brought by a client against the lawyer concerned where witnesses can be tested by cross examination.

[153] As discussed earlier, it is unknown whether or not Mr JWS intended to complete his proposed 2009 will. Consequently, there is not a clear "causative link" between Mr HB's failure to follow up his 2 December 2009 letter, and the loss claimed by Ms UT. Ms UT's request for compensation is therefore declined.

[154] Because it may be open to Ms UT to seek reimbursement for Mr JWS's funeral related expenses incurred elsewhere, her request for an order of compensation in respect of those expenses is similarly declined.

(c) Orders

[155] Pursuant to s 211(1)(a) of the Act Mr HB is hereby ordered to pay a fine to the New Zealand Law Society of $1,000 within 30 days of the date of this decision (section 156(1)(i)).

(d) Costs

[156] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr HB is ordered to pay costs in the sum of $1,200.00 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. 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.

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[35] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008, reg 32 — maximum amount of compensation.

(e) Anonymised publication

[157] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and absent of anything as might lead to their identification.

DATED this 26th day of June 2019

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B A Galloway
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Ms UT, as the Applicant
Mr HB, as the Respondent
Mr RS, as a related person
Central Standards Committee 2
New Zealand Law Society