

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 168

Ref: LCRO 131/2020

CONCERNING

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of [Area] Standards Committee [X]

BETWEEN

JG

Applicant

AND

ZN

Respondent

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

Introduction

[1] Ms JG has applied for a review of the determination by [Area] Standards Committee [X] to take no further action on the complaints made by her and her sister (Ms HP) against Mr ZN.¹

Background

[2] The firm of [Law Firm A] had acted for Mr HP for many years.²

¹ Ms JG and her sister lodged complaints against Mr ZN and Mr SA. Only Ms JG has applied for a review of the determination.

² Evidence that the firm had acted for Mr HP since at least February 2009 is provided by the fact that the firm had prepared a will for him at that time.

[3] In June 2019, Mr SA prepared Enduring Powers of Attorney (EPAs) for Mr HP.³ Mr SA and Mr ZN attended on Mr HP at [Rest Home A] on 25 June 2019 for the purpose of having the documents signed.

[4] Mr HP appointed his nephew, Mr ZX, as his attorney. Mr SA was appointed as the successor attorney.

[5] The complaints made by Ms JG and Ms HP against Mr ZN arise out of the fact that Mr ZN witnessed Mr HP's signature to the document and provided the certificates as required by the Protection of Personal and Property Rights Act 1988 (the PPPR Act).

Complaints

[6] Ms JG and her sister lodged complaints against Mr SA and Mr ZN in January 2020. In her letter⁴ in support of the complaint, Ms HP says:

[This letter] provides information of our complaint against Mr ZN and Mr SA ... in relation to serious breaches of the Conduct and Client Care Rules in the handling of my father's affairs whilst he was in the final stages of life in the palliative care unit of [Rest Home A] and Hospital and the subsequent management of my fathers (sic) estate.

[7] She asserts that her "father clearly did not have the mental capacity to understand what he was signing; further Dr WS deemed Dad incompetent to make such a decision and the EPOA invalid".

[8] Ms JG provided details of her relationship with Mr HP and the circumstances in which she was advised of his imminent death. In her letter of complaint,⁵ Ms JG refers only to Mr SA's part in having the EPAs executed by Mr HP. She says:

The opportunities for all of this to have happened would never have presented themselves had Mr SA back in November 2018 knowing my father was unwell asked himself as the Solicitor responsible for executing the Will in November 2018 and the subsequent Will of 2019 – one very simple question :

'I have in front of me, a client in the advanced stages of Prostrate (sic) Cancer, they are making extreme life changes, asking me to write a Will listing beneficiaries who they cannot provide/do not know the full names of and have never mentioned them before – is this the right thing to do as a Solicitor?'

[9] By implication, the assertions made against Mr SA are made against Mr ZN and relate to his witnessing Mr HP's signature to the EPAs.

³ In his letter to Ms JG (4 December 2019) Mr SC of [Law Firm B] says that "Mr ZX organised with Mr SA to obtain EPOAs..."

⁴ HP to Lawyers Complaints Service (6 January 2020).

⁵ Letter Spillane to New Zealand Law Society (8 January 2020).

[10] The outcome of the complaints sought by the complainants was:⁶

We would like this complaint looked into as per documentation attached with regards to the Wills, POA, EPOA & sale of right to occupy, the manner [in] which they were obtained & the events that followed.

[11] Amongst the documents provided by Ms JG and her sister in support of the complaint, is a letter sent by their lawyer, Ms MK, of [Law Firm B], to Ms JG dated 4 December 2019, and letters dated 6, 26 September, and 16 October 2019 from Mr SC⁷ to Mr SA and Mr ZN.⁸

[12] With the October letter, Mr SC included a letter from “the medical practitioner responsible for Mr HP’s care between 28 June 2019 and his death on 25 July 2019”.⁹

[13] Mr SC says:

According to Dr WS the letter was written because he was most concerned that Mr HP could have been asked to sign documents of this nature when he clearly had no capacity to do so. More importantly he is very clear that no attempt was made by [Mr SA] or Mr ZN to ascertain from any medical staff the state of Mr HP’s mental capacity.

[14] The complaint against Mr ZN reduces to a complaint that he witnessed Mr HP’s signature to the EPAs, and gave the required certificates without taking appropriate steps to ascertain that Mr HP had the appropriate mental capacity to comprehend the content of the document.

Response

[15] Mr RF ([Law Firm C]) responded on behalf of both lawyers. His reply incorporated the content of an earlier letter from himself to Mr SC.¹⁰

[16] Mr RF advised that the EPAs were signed by Mr HP on 25 June 2019¹¹ and Mr ZN’s certificates related to that day. On that day, he says that his “clients were entirely satisfied, as a result of their dealings with [Mr HP] and their discussions with him, that Mr HP had capacity to understand the full nature and effect of the document that he was signing and the purpose of the EPA and that they were following his instructions”.

⁶ Complaint form 8 January 2020, part 6.

⁷ Mr SC is the principal of [Law Firm B].

⁸ The September letters were also addressed to Mr ZX.

⁹ The medical practitioner he refers to is Dr WS.

¹⁰ Letter Mr RF to Mr SC 22 January 2020.

¹¹ The document is dated 9 July 2019, being the date on which Mr ZX signed the document.

[17] Mr RF further describes Mr HP's state of physical and mental health at the time, which gave his clients no cause to consider that Mr HP lacked capacity to understand the nature and effect of the documents.

The Standards Committee determination

[18] The Lawyers Complaints Service dealt with the complaints against Mr SA and Mr ZN separately. This review relates to the determination of the complaint about Mr ZN only.

[19] The issue considered by the Committee is whether Mr ZN had breached rules 2.5 or 2.6 of the Conduct and Client Care Rules.¹²

[20] The manner in which this issue arises is best explained by the Committee itself:¹³

Because Mr ZN's certificate in the enduring powers of attorney is dated 25 June 2019 but the documents themselves are dated 9 July 2019, Ms JG and Ms HP, together with their lawyers, concluded that Mr ZN pre-certified the witness certificate, certifying that Mr HP had capacity to understand and sign the document, some two weeks prior to the enduring powers of attorney being signed by him.

[21] The Committee concluded:¹⁴

Mr HP's subsequent decline while in palliative care for the end stages of a terminal illness is not unusual and is not of itself evidence that Mr ZN did not have reasonable grounds to believe Mr HP understood the nature of the instruments, the risks and consequences of them or that he had reason to suspect that Mr HP was or may have been mentally incapable at the time he signed the documents.

[22] The Committee determined¹⁵ to take no further action on Ms JG's and Ms HP's complaints.

The application for review

[23] Ms JG has applied for a review of the Committee's determination. She asks:

... the LCRO to investigate further [her] complaint against [Law Firm A] (Mr SA and Mr ZN) with regards to the circumstances in which they sought to have an EPOA and POA on the 25/06/2019 signed by [her] father whilst he was in a palliative care unit at the end stages of his life.

¹² Lawyers and Conveyancers Act (Lawyers; Conduct and Client Care) Rules 2008.

¹³ Standards Committee determination (19 May 2020) at [5].

¹⁴ At [12].

¹⁵ Pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006.

[24] Ms JG asserts that the documents would not have been executed if the lawyers involved had:

- a) Identified themselves and the Law firm which they represented to the staff at [Rest Home A] (signs throughout request all visitors are to report to reception) on 25/06/2019. Confirmation from [Rest Home A] shows that they have no record of them having identified themselves on that date and had they have, then a doctor would have been notified.
- b) Sought medical opinion as to the mental capacity of my father to sign such important legal documents from the staff involved in his care considering the circumstances.

[25] Ms JG includes with her application for review, documentation relating to her father's mental capacity dated prior to the documents being signed. She also provides letters from Dr WS dated 12 August 2019 and 18 June 2020.

[26] The outcome of the review sought by Ms JG is that:¹⁶

... [Law Firm A] be held accountable for their actions and that [she] be compensated financially for all legal expenses to date that have been incurred fighting this and for the time and emotional toll it has taken on [her] health. [She does] not want this to ever happen to anyone else.

Mr ZN's response

[27] Ms TY ([Law Firm C]) responded on behalf of Mr ZN and referred to the comprehensive response provided to the Standards Committee by Mr RF.

[28] Ms TY says:

- Mr SA and Mr ZN spoke with staff at the rest home when they arrived to see Mr HP to ask for directions to his room. They were not asked to sign in.
- It is speculation on Ms JG's part that a doctor would have been notified if Mr ZN and Mr SA had identified themselves on arrival.
- "At all times during the meeting with Mr HP, Mr ZN (and Mr SA) was reassured that Mr HP understood the documents and had no cause to question his mental capacity."
- "Mr ZN took his obligations seriously and would not have certified the EPOAs if he had any doubt about Mr HP's capacity."

¹⁶ Application for review (23 June 2020) part 8.

- Dr WS met Mr HP for the first time three days after the EPAs were certified and his views were reached on 19 July 2019, after the documents were signed.
- The medical and legal approaches to capacity do not always coincide.

Process

[29] This review has been completed on the material to hand with approval by both parties. The material to hand includes the Standards Committee file.

Review

Preliminary comments

[30] Ms JG and Ms HP are unhappy with the steps that Mr ZX took in dealing with Mr HP's assets. Neither the Standards Committee, or myself, can make a finding that the EPAs were invalid. If they wish to challenge the steps taken by Mr ZX to dispose of Mr HP's property¹⁷ then this must be done by way of Court proceedings.

Mr ZN

[31] This review relates only to the complaint against Mr ZN. I place on record here, that I have not seen the Committee's determination of the complaints against Mr SA, nor am I aware of the outcome.

[32] Mr ZN's involvement was to explain the effects and implications of the EPAs to Mr HP, and to witness Mr HP's signatures.

[33] Ms JG and Ms HP consider that Mr ZN should have obtained a medical assessment of Mr HP's mental capacity before having the documents executed.

[34] S 93B of the Protection of Property and Personal Rights Act provides:

93B Presumption of competence

- (1) For the purposes of this Part, every person is presumed, until the contrary is shown, —
 - (a) to be competent to manage his or her own affairs in relation to his or her property:
 - (b) to have the capacity—

¹⁷ This includes the [Area] property.

- (i) to understand the nature of decisions about matters relating to his or her personal care and welfare; and
 - (ii) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; and
 - (iii) to communicate decisions about those matters.
- (2) A person must not be presumed to lack the competence described in subsection(1)(a) just because the person manages or intends to manage his or her own affairs in relation to his or her property in a manner that a person exercising ordinary prudence would not adopt in the same circumstances.
- (3) A person must not be presumed to lack the capacity described in subsection (1)(b) just because the person makes or intends to make a decision in relation to his or her personal care and welfare that a person exercising ordinary prudence would not make in the same circumstances.
- (4) A person must not be presumed to lack the competence described in subsection(1)(a) or, as the case may be, the capacity described in subsection (1)(b), just because the person is subject to compulsory treatment or has special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

[35] That presumption stands, notwithstanding a person's age, conduct or circumstances. It does not, therefore, automatically follow that Mr ZN was required to seek a medical assessment of Mr HP before the EPAs were signed.

[36] It is relevant to record here the certificates provided by Mr ZN:

6. I believe on reasonable grounds that the donor:
- o understands the nature of the instrument creating the enduring power of attorney; and
 - o understands the potential risks and consequences of the instrument; and
 - o is not acting under undue pressure or duress.
7. I have no reason to suspect that the donor was or may have been mentally incapable at the time the donor signed the instrument.

[37] Dr WS is certain that Mr HP lacked sufficient capacity to comprehend the content of the documents he signed. He says that Mr HP did not have the requisite mental capacity throughout the period of time that he was under Dr WS's care (28 June to 25 July 2019).

[38] A lawyer does not have the expertise of a medical practitioner. When Mr SA and Mr ZN attended at [Rest Home A], Mr HP was in the lounge room having a cup of tea. Mr RF says:¹⁸

He was alert and responsive. He recognised Mr SA.... They retired to Mr HP's room for privacy. [Mr HP] was sitting upright, speaking clearly, he was oriented and lucid.

[39] Mr ZN had no cause to consider that Mr HP was mentally incapable of understanding the content of the EPAs and has certified accordingly. In making this complaint, Ms JG and her sister ask me to either disbelieve the certificates provided by Mr ZN, or that a lack of prudence on his part in not seeking a medical assessment, amounts to unsatisfactory conduct.

*Sandman v McKay*¹⁹

[40] The judgment of the Supreme Court in *Sandman v McKay* includes comments that are equally as relevant to the issues under consideration here. The Court said:

[80] When acting for a client, solicitors have a duty to follow their clients' instructions. Solicitors also, however, need to provide the relevant advice and information to ensure the client is in an appropriate position to give informed instructions. Where the instructions are to prepare a will in circumstances where there might later be issues raised about capacity, the lawyer should carefully document the advice given and the steps taken. In this regard, it would be prudent for a solicitor to suggest that a medical certificate be obtained. It would also be prudent to document the reasons for the provisions of the will and the process involved in taking instructions and in ensuring that the instructions had been correctly understood.

[81] It is certainly arguable that once the steps set out above have been taken it would not be up to the solicitor, who is not a medical expert, to decide whether a client has testamentary capacity and thus to decide whether to follow his or her instructions. The position arguably is that a solicitor, even if he or she does not think a client has capacity, would nevertheless be obliged to prepare and arrange for the execution of the will. The issue of actual capacity would then be decided after the client's death, on the basis of the evidence including expert medical evidence.

(citations omitted)

[41] The 'certificate of witness' signed by Mr ZN documents the advice provided referred to by the Court in this judgment. There is no evidence to support a view that the certificates are not a true record of the advice provided to Mr HP.

¹⁸ Letter Mr RF to Mr SC 22 January 2020.

¹⁹ [2019] 1 NZLR 519.

Conclusion

[42] Mr HP was in palliative care. It is accepted that such treatment will often cause a state of mind which brings into question a person's capacity to execute documents, and in this case, the EPAs. Ms JG and Ms HP have raised legitimate concerns about Mr HP's capacity. However, neither of them had seen Mr HP in the days immediately before or after 25 June 2019.

[43] There is no other, direct, evidence that on the day, and at the time, Mr SA and Mr ZN visited Mr HP at the rest home, his responses to them were sufficient to put them on notice that he lacked capacity to understand the effects and implications of the documents.

[44] Mr ZN has acted in accordance with his professional duties. Any challenge to the validity of the documents must be made in Court.

Rules 2.5 and 2.6 Conduct and Client Care Rules

[45] The Standards Committee identified the issue to be addressed in the complaint as to whether Mr ZN had breached rule 2.5 or 2.6 of the Conduct and Client care Rules.

[46] In her letter to Ms JG of 4 December 2019, Ms MK expressed the view that Mr ZN had breached these Rules.

[47] In the discussion above, I have concluded that Mr ZN was not put on notice that Mr HP may lack mental capacity to comprehend the effects and implications of the EPAs.

[48] It follows therefore, that Mr ZN is not in breach of the Rules.

Decision

[49] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee to take no further action on Ms JG's and Ms HP's complaints is confirmed.

DATED this 27th day of October 2021

O Vaughan
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 JG as the Applicant
Mr ZN as the Respondent
Mr SA as the Related Person
[Area] Standards Committee [X]
New Zealand Law Society