

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

[2022] NZLCRO 032

Ref: LCRO 36/2021

CONCERNING

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

AND

CONCERNING

a determination of [Area] Standards Committee

BETWEEN

ED

Applicant

AND

MR and FR

Respondents

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

Introduction

[1] Mrs ED has applied for a review of the determination by [Area] Standards Committee to take no further action on her complaints.

Background

[2] Mrs ED is the daughter of Mrs DM. Mrs DM suffered a stroke in May 2016 and another whilst in hospital. She moved into a rest home in July 2016 and passed away in May 2018.

[3] As a result of her strokes, Mrs DM lost the ability to speak. At the heart of matters raised in this review is the degree to which Mrs DM's mental capacity was affected.

[4] In June 2016, Ms SA, Mrs DM's oldest daughter, instructed Mr MR to prepare enduring Powers of Attorney for her mother, in which she was appointed her mother's attorney. Mr MR had not previously acted for, or met, Mrs DM.

[5] Arrangements were made for Mr MR to visit Mrs DM in hospital on 29 June 2016, where SA was to meet Mr MR and introduce him to her mother. That meeting was cancelled "due to [Mrs DM's] condition".¹

[6] On 24 August, Mrs ED sent an email to Mr MR, expressing her concern that her mother lacked appropriate capacity to be able to comprehend the nature of any documentation or to communicate with Mr MR.

[7] Mr MR arranged to meet BM (Mrs DM's son) on 30 August at the rest home, where BM was to introduce Mr MR to Mrs DM.

[8] It is apparent there was some misunderstanding as to the purpose of Mr MR's visit. In emails to SA, copied to Mr MR,² BM refers to Mr MR "completing an assessment" to verify whether or not Mrs DM had the required degree of mental capacity to appoint an attorney.

[9] During that visit, Mrs DM executed Powers of Attorney prepared by Mr MR.

[10] These events give rise to one of Mrs ED's complaints about Mr MR.

[11] In October 2016, Mrs DM's house was placed on the market for sale by tender. Mrs DM signed the listing authority.

[12] Another of Mrs DM's sons, XM, wished to have a right of first refusal to purchase the property but did not tender for the property, as expected by Mr MR and SA. No tenders were acceptable, and Mr MR advised³ that the property had been placed on the market with an asking price of \$410,000.

[13] On 25 October, one of the parties who had submitted a tender, re-tendered to purchase the property at a price of \$400,750. The offer was unconditional.

[14] On the same day, Mrs ED and her husband presented a conditional offer⁴ to purchase the property for \$410,000.

¹ As directed by Mrs DM's consultants.

² Emails from BM to SA, copied to Mr MR (23 and 26 August 2016).

³ Email from Mr MR to all the siblings (November 2016).

⁴ The offer was subject to the purchasers being approved sufficient finance to complete the purchase.

[15] Mr MR attended on Mrs DM, who signed the unconditional offer. Subsequently, the purchaser advised that she had briefly met Mr MR on a previous occasion.

[16] The events surrounding the sale of the property give rise to another of Mrs ED's complaints.

Mrs ED's complaints

Mr MR

[17] Mrs ED has tended to conflate complaints about Mr MR with complaints about members of the family, on the basis that Mr MR and Mrs FR had conspired with other family members to the detriment of herself and her brother, XM. By way of example, Mrs ED says in her complaint:⁵

For Mr MR to then believe it was appropriate to make himself our mother's lawyer and turn any authorisation over only to [SA] only raises more concerns for us from a conflict of interest, through to negligent, careless and incompetent practices.

... [MR] from his direct actions of gifting precious heirloom furniture to siblings showed favour to siblings and exclusiveness. This is not how my mother behaved. His behaviour caused [XM] and I emotional stress and we were left feeling like we had no value or identity in this family. That was never coming from my mother. It was coming directly from Mr MR.

... Also, he made himself my mother's lawyer after assessing her for capacity and only made [SA] EPA/Power of Attorney. Also placing only, this one sibling, SA in a position of control of my mother's affairs and signing authority. We have yet to see any further paperwork around various authorisations and instructions that DM would have needed to have participated in even though we have requested these numerous times.

[18] The outcomes sought by Mrs ED⁶ are claims that need to be brought against SA as attorney, and SA and JM as executors.

[19] For this reason, a number of Mrs ED's complaints⁷ are not addressed in this review.

Conflict

[20] Mrs ED asserts that Mr MR was conflicted when taking instructions from SA to prepare the Powers of Attorney for her mother.

⁵ ED's supporting reasons for complaint (29 April 2020).

⁶ For example, the request to be reimbursed \$1,000 paid by Mrs ED for Mrs DM's car.

⁷ For example, complaints relating to the distribution of the chattels.

Assessment of Mrs DM

[21] Mrs ED had put Mr MR on notice⁸ that the family was divided over the appointment of SA as Mrs DM's attorney, and about Mrs DM's state of health following her strokes.

[22] Mrs ED expressed concern that Mr MR took on the role of Mrs DM's solicitor on instructions from SA.⁹

[23] Mrs ED is also concerned that Mr MR did not obtain a medical report about Mrs DM's capacity before having her execute the Powers of Attorney. She does not consider the brief notes purportedly made by Mrs DM enough to support MR's view that Mrs DM had the appropriate level of understanding to make the decision to appoint SA her attorney, and to understand the detail of the documents.

[24] Mrs ED subsequently refers to delays in Mr MR 'activating' the Powers of Attorney.

Sale of the property

- Mrs ED alleges that Mr MR conspired with her siblings, other than her brother XM, to obstruct and prevent her or XM from purchasing her mother's property.
- The tender document did not include terms which effectively would provide XM with the right to better any tender.
- Mr MR did not include Mrs ED and XM in communications with the family relating to the sale.
- Mr MR blocked Mrs ED and her husband out of the sale of the property, even though they had offered more than the property was ultimately sold for.
- Mr MR was conflicted when accepting an offer to purchase the property from a person known to him.
- Mr MR "enabled" items to go missing from the property whilst Mrs ED and her brother were unable to enter the property as the locks had been

⁸ Email from Mrs ED to Mr MR (26 August 2016).

⁹ This raises a question as to whether Mr MR provided Mrs DM with the information required by rr 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

changed. There is no indication that MR was instructed by Mrs DM to take this step.

- Mr MR “completed a gifting of heirloom furniture to the family”.
- Mr MR did not have instructions from Mrs DM when overseeing the distribution of items of furniture, advising Mrs ED what items of furniture her mother had gifted to her.
- Mr MR suggested that the family toss a coin to ascertain who would receive items that no one in the family wanted.
- Mr MR should have acted to prevent unequal sharing of her mother’s jewellery.

Mrs FR

- Mrs FR invoiced Mrs DM for legal opinions relating to MR’s conduct in relation to the sale of the property.
- Mrs FR ignored Mrs ED’s concerns about events that occurred prior to her mother’s death.
- Mrs FR took instructions from SA and JM.¹⁰
- Mrs FR failed to communicate with Mrs ED.
- Delays in obtaining probate and distributing the estate.
- Fees charged to Mrs DM and her estate.
- Providing advice to beneficiaries for their own personal matters.
- Requiring an indemnity from beneficiaries before completing distribution of the estate.

Mr VK

[25] Mrs ED includes Mr VK¹¹ in her complaints. The Committee has not addressed these. If Mrs ED wishes to pursue these complaints, she may contact the Committee for it to do so.

¹⁰ SA and JM were the executors of Mrs DM’s will.

¹¹ Mr VK is the CEO of [law firm].

The Standards Committee determination

[26] The Standards Committee identified the following issues arising out of Mrs ED's complaints about MR:¹²

- (i) Did MR fail to act competently consistent with the terms of the retainer and duty to take reasonable care in assessing Mrs DM's capacity when he prepared and witnessed her EPOA, and in particular:
 - (a) In deciding not to obtain a medical assessment as to capacity?
 - (b) In assessing capacity himself did he take reasonable and appropriate steps to confirm his client had capacity?
 - (c) Was there any obligation to adequately record his assessment with reasons and, if so, did he fulfil that duty?
- (ii) In taking instructions in respect of the sale of a client's house and distribution of chattels, did MR take sufficient care in assessing his client's capacity to instruct him?
- (iii) Did MR lack independence from the attorney, SA, required of a solicitor when he had previously acted for RA (spouse of SA the attorney of the EPOA) when he signed the Certificate of Witness to Donor's Signature on the EPOA 30 August 2016?

[27] The complaints against Mrs FR were addressed in the following manner: *"Did Ms FR breach any professional duty to Mrs ED?"*

[28] Before addressing the issues, the Committee observed the underlying fact that *"Mr MR (and Ms FR) had a duty to protect and promote the interests of his own client and he has no duty to protect and promote the interests of Mrs ED".*¹³

Preparing and witnessing the enduring Powers of Attorney

[29] The Committee commented that it would have been best practice for Mr MR "to have recorded more detail about what questions were asked, what answers were given and overall impressions so as to reduce the risk of the kind of complaint that is now being pursued"¹⁴ and determined that "the minimalistic nature of his record keeping in itself does not sustain a finding that he failed to act competently".¹⁵

[30] The Committee determined to take no further action on this issue.

¹² Standards Committee determination (10 February 2021) at [17].

¹³ At [20].

¹⁴ At [32].

¹⁵ Ibid.

Sale of Mrs DM's house

[31] With regard to this issue, the Committee noted that Mr MR was acting for Mrs DM who signed the agreement herself and it was to Mrs DM that Mr MR owed a professional duty of care.

[32] “The Committee finds no evidence to support the allegation that Mr MR took insufficient care in assessing DM’s mental capacity at the time of the sale of the house and the distribution of chattels.”¹⁶

[33] The Committee noted that MR was not directly involved with the distribution of chattels and his only involvement was to convey decisions that had been made by Mrs DM. It said: “There is insufficient evidence to support a concern that Mr MR was acting without instructions from a client who had capacity”.¹⁷

[34] The Committee could find “no inconsistency in Mr MR taking instructions either directly from DM or from SA in relation to the sale of her house”,¹⁸ noting that the Power of Attorney was operable immediately. It said:¹⁹

In the view of the Committee, it appears Mrs ED may have a misconception about the role that Mr MR should have played during the course of his retainer. There is a general impression that Mrs ED thinks Mr MR should have been actively monitoring how DM was dealing with her property, and whether she had capacity and therefore whether the EPOA should be activated. This was not his role.

[35] The Committee determined to take no further action on these complaints.

Other complaints

[36] In the last section of its decision, the Committee addressed a number of other complaints made by Mrs ED. It determined that it was “entirely appropriate” for Mrs FR to obtain independent legal advice when her, and MR’s, advice was being challenged by Mrs ED.

[37] Mrs FR was acting for the executors of Mrs DM’s estate and her will “provided that chattels be left to trustees to distribute according to lists or as they deemed fit if there were no lists”.²⁰

¹⁶ At [35].

¹⁷ At [36].

¹⁸ At [38].

¹⁹ At [41].

²⁰ At [48].

[38] The Committee could find no evidence to support Mrs ED's allegations that Mrs FR had not disclosed lists of chattels to be distributed to Mrs DM's family and "facilitated the executors distributing chattels contrary to the terms of the will".²¹

[39] The Committee did not consider there had been undue delay in distributing the estate and having reviewed the lawyers' files, the Committee formed the view that the fees charged by Mr MR and Mrs FR were in order.

[40] The Committee noted that advice provided to SA and JM was advice in relation to their role as executors of Mrs ED's estate and not personal advice. It recorded that it did not fall to Mrs FR to communicate with the beneficiaries of the estate and that this was the duty of the executors.

[41] The Committee determined to take no further action on these complaints.

Summary

[42] Having addressed the issues, the Committee determined pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act), to take no further action on any of Mrs ED's complaints.

Mrs ED's application for review

[43] Mrs ED has provided a comprehensive commentary on the Standards Committee determination from which I discern that she has concerns about the following aspects:

- Mr MR taking instructions from SA.
- Mr MR's assessment of Mrs DM's capacity to execute the Powers of Attorney and to make decisions throughout his engagement with her.
- Mr MR's conflict of interest by reason of his being acquainted with the purchaser of Mrs DM's house.
- Delays in administering Mrs DM's estate.

[44] In this decision, I address the issues as I view them. That does not mean I have not considered all of the matters raised by her in her complaint, and on review.

²¹ At [49].

Mr MR and Mrs FR's responses

[45] Mr MR and Mrs FR's responses, largely repeat information provided to the Standards Committee.

Scope of review

[46] The High Court has described a review by this Office in the following way:²²

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.

[47] This review has been conducted in accordance with those comments and on the material to hand which includes:

1. The Standards Committee file.
2. [law firm]'s three hard copy files.
3. A USB stick on which is downloaded [law firm]'s estate administration file.

[48] I have not viewed the videos of Mrs DM, provided by Mrs ED. I consider this would amount to a breach of Mrs DM's privacy, and, in any event, I will not be making an assessment of Mrs DM's capacity to execute the Powers of Attorney or to make other decisions.

Review

[49] It is important to first address Mrs ED's complaints about a failure by Mr MR and Mrs FR to communicate with her, both before and after Mrs DM's death.

[50] Mr MR's client was Mrs DM. Mr MR had no duties to Mrs ED. SA was the appointed attorney. The responsibility to communicate with others in the family rested with her.

[51] Mrs FR's clients were the executors of Mrs DM's estate, SA and JM. It was their duty to report to other members of the family.

²² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[52] Overall, neither Mr MR nor Mrs FR had duties to Mrs ED.

The Powers of Attorney

[53] Mrs ED expresses surprise at the comment by the Committee,²³ that the Power of Attorney “in relation to property came into effect on signing”. She says:

This is news to everyone. This would be news to MR also. There is no documentation to support this, but that is OK?

[54] Section 97(4)(a) of the Protection of Personal and Property Rights Act 1988²⁴ provides:

- (4) A donor of an enduring Power of Attorney may—
- (a) authorise the enduring Power of Attorney to have effect while the donor is mentally capable and to continue to have effect if the donor becomes mentally incapable; or

...

[55] Mrs ED provided a copy of the Power of Attorney with her complaint. Paragraph 4 of the document executed by Mrs DM reads:

I authorise my attorney to act while I am mentally capable and to continue to act if I become mentally incapable.

[56] SA was able to act on Mrs DM’s behalf from the time the document was signed. The Act imposes particular obligations on an attorney, but it was not Mr MR’s role to ensure that SA complied with those obligations.

Execution of the Powers of Attorney

[57] Section 93B of the Protection of Personal and Property Rights Act 1988 provides:

- (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—
- (i) to understand the nature of decisions about matters relating to his or her personal care and welfare; and

²³ Standards Committee determination, above n 11 at [38].

²⁴ The version of the Act in force as at 30 August 2016.

This a statutory recognition of competence, to be displaced only where circumstances and facts show otherwise.

[58] Section 3(1)(b) of the Act requires a lawyer to protect the consumers of legal services. Section 4(b) of the Act requires a lawyer to be independent in providing legal services to his or her clients.

[59] At the time Mr MR witnessed Mrs DM's signature and provided the required certificate, not only was he aware of her recent medical events, but he was on notice²⁵ that there was dissent within the family at SA being appointed. These circumstances were such that Mr MR should have been extra cautious when making the initial decision to proceed without a medical assessment, and then to be particularly diligent in recording what steps he took to satisfy himself that an assessment was not necessary.

[60] Mr MR made no file notes at all about these matters, which is somewhat surprising for a lawyer who invites the Committee, and now myself, to rely upon his years of experience in this area of the law, which has attracted much judicial and academic commentary.

An important case, dealing with issues of capacity, is *Sandman v McKay*²⁶. The court said:

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.

These comments are equally as relevant to the situation presented to Mr MR.

[61] On 26 June 2016, SA refers to a "chat" with Mr MR in his office on the preceding Friday. It is apparent that this "chat" related to a proposal that Mrs DM appoint SA her attorney for property and health and welfare. In her email, SA confirms agreement from her three siblings who resided locally, and that she had the "thumbs up" from her mother. She enquired whether Mr MR would be able to visit her mother to have this organised.

[62] Mr MR replied to SA and advised that he was happy to help. He instructed a staff member on the same day to prepare the documents.

²⁵ Email from Mrs ED to Mr MR (24 August 2016).

²⁶ *Sandman v McKay* [2019] NZSC 41 at [80].

[63] It was arranged that Mr MR would meet SA at the hospital on Wednesday 29 June 2016 so that SA could introduce him to Mrs DM. That meeting was cancelled at the direction of the consultants on Mrs DM's ward "due to [Mrs DM's] condition". This was a clear indication to Mr MR that Mrs DM lacked capacity at that time to be making any decisions about legal matters or executing legal documentation.

[64] SA provided Mr MR with an update on her mother on 20 July advising that her mother had moved into a rest home in the previous week. She further advised that she was hoping to have a conversation with her five siblings²⁷ to agree a way forward "regarding the EPOA etc that would be helpful to have signed".

[65] There seems to have been some misunderstanding between family members about the purposes of Mr MR's visit to Mrs DM. By way of example, BM said in an email to Mr MR on 23 August:

As per SA 's email we would like you to complete an assessment.

[66] It seems therefore, that the family was expecting Mr MR's initial visit to their mother, was to enable Mr MR to meet Mrs DM, and assess whether or not a medical assessment was necessary. Instead, Mr MR took the Powers of Attorney already prepared, and had them signed at that time.²⁸

[67] The chronology, and nature, of events is:

- 8 May 2016, Mrs DM suffered a severe stroke.
- 22 June, Mrs DM suffered a medical event, which was potentially another stroke.
- 26 June, Mr MR was instructed by SA that her mother wished to appoint her (SA) as her attorney.
- 29 June, Mrs DM is adjudged by medical consultants as being unfit to execute legal documents.
- 24 August, Mrs ED advises Mr MR of dissent within the family to SA being appointed Mrs DM's attorney.

²⁷ This would include Mrs ED.

²⁸ An issue that has not been addressed by the Committee, or any of the parties to this review, is that there is no mention of Mr MR providing Mrs DM with the information required by rules 3.4 and 3.5 of the Rules. I can not find either a copy of, or reference to these on the files provided by [law firm].

- 30 August, Mr MR attends the rest home and meets Mrs DM for the first time.
- Mrs DM's only means of communication is to nod yes, and shake her head, no, to questions.
- Mr MR says he asked Mrs DM a number of questions²⁹ and assesses that she has sufficient capacity to understand the nature of the documents.
- Mr MR produces the Powers of Attorney and requests Mrs DM to sign them. She does so.
- Mr MR certifies that he has "no reason to suspect that the donor was or may have been mentally incapable at the time she signed the enduring power of attorney form."

It is difficult to comprehend how Mr MR could have had no reason to suspect that Mrs DM lacked capacity.

[68] It needs to be stressed here, that the issue under review, is whether or not Mr MR has met the standards required of a lawyer by the Lawyers and Conveyancers Act and the Conduct and Client Care Rules. It is not to come to a definitive view as to whether or not Mrs DM lacked capacity to understand and sign the documents presented to her.

[69] Section 12(a) of the Act defines unsatisfactory conduct as:

conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is 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;

...

[70] Rule 5 of the Conduct and Client Care Rules provides:

- 5 A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.
- 5.1 The relationship between lawyer and client is one of confidence and trust that must never be abused.

²⁹ For example:

Whether she understood what a Power of Attorney was.
 Whether she knew why she wanted one.
 Whether she knew who she wanted as her attorney.

- 5.2 The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.

...

[71] Mrs DM was Mr MR's client. Mr MR had to be absolutely certain that Mrs DM herself expressed the view, without prompting, that she wanted to appoint SA as her attorney. The authors of the text *Assessment of Mental Capacity*,³⁰ have this to say:

Depending on the circumstances – for example, where there is an issue of undue influence – further steps may be necessary to protect the client's interests.

[72] The authors refer to *Sandman v McKay* and continue:

In practice, the circumstances in which the client engages the lawyer will be relevant to the taking of will instructions. The lawyer may have to take into account the role and influence of the client's family and third parties, who may have an interest in the proposed will and be supporting the client; also the lawyer may have more confidence in assessing both the intentions and the mental capacity of an existing client, for whom they have acted previously, than of a new client, about whom they have little or no background information.

[73] Again, these comments are equally relevant to the matters with which Mr MR was involved.

[74] Mr MR had not acted for Mrs DM previously. His instructions came from SA, who was to be appointed. Her appointment was opposed. Mr MR did not make a file note of his overall impressions of Mrs DM. He did not record the specific questions he asked Mrs DM and how he was certain that she had the required capacity to execute the Powers of Attorney. To have asked Mrs DM if she wanted to appoint SA as her attorney is putting a "loaded" question to her. From the information available, she would not have been able, of her own volition, to indicate who she wanted to appoint as her attorney and to have a full understanding of the import of what it was she was signing.

[75] Mr MR certified:³¹

3. I am independent of [SA], who is appointed as attorney under the enduring power of attorney.
4. Before the donor signed the enduring power of attorney form, I explained the effects and implications of the enduring power of attorney to the donor and advised the donor of –
 - (a) the matters referred to in the notes to the prescribed form of power of attorney; and

³⁰ Alison Douglass, Greg Young, John McMillan *Assessment of Mental Capacity – A New Zealand Guide for Doctors and Lawyers* (Victoria University Press, Wellington, 2020).

³¹ Certificate of witness to donor's signature (30 August 2016).

- (b) the donor's right to suspend or revoke the power of attorney; and
- (c) the donor's right to –
 - (i) appoint more than one attorney, or a trustee corporation as attorney; and
 - (ii) stipulate whether, and if so, how, the attorney's dealings with the donor's property are to be monitored.

5. I have no reason to suspect that the donor was or may have been mentally incapable at the time she signed the enduring power of attorney form.

[76] Rule 2.5 of the Rules provides:

A lawyer must not certify the truth of any matter to any person unless he or she believes on reasonable grounds that the matter certified is true after having taken appropriate steps to ensure the accuracy of the certification.

[77] On the information available to me, the certificate given by Mr MR is questionable, for the following reasons:

- Mr MR received instructions from SA to prepare the Powers of Attorney. Can Mr MR certify he is independent of SA? The 'notes' referred to in para 4(a) of the certificate, are comprised in five pages of information about 12 different legal matters relating to the document. It would have taken a significant period of time to explain all of these matters to Mrs DM, and, in her compromised state, how could Mr MR have been sure that she comprehended all of the information imparted to her.
- There is no record of the time spent by MR attending on Mrs DM on 30 August, but to impart that amount of information would have taken a considerable period of time.
- Mr MR is not a doctor. He was aware of Mrs DM's medical events in the preceding 4 months, and that just 2 months previously, medical consultants did not consider that Mrs DM was in a fit state to be signing any legal documentation.

[78] The authors of the text referred to in [71] above say:³²

... the new witnessing requirements place more emphasis on the donor understanding the effect of making or changing an EPOA, namely the 'risks and consequences of the decision' (similar to the other PPPR tests that refer to the capacity to foresee the consequences of decision-making, or the 'use or weigh' element of the MCA test). Depending on the circumstances, having the capacity to understand the nature of an EPOA and its effects may involve a relatively

³² At p 89.

complex understanding of the legal consequence of making or changing an EPOA.

[79] Overall, I have serious reservations that Mr MR's certificate is one that meets the requirements of r 2.5 of the Rules.

What should the outcome be?

[80] If Mr MR was still in practice, I would have no hesitation in finding that Mr MR's conduct constituted unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006. On balance, however, the objectives of the Act would not be furthered by doing so.

[81] I therefore confirm the determination of the Standards Committee to take no further action on this issue. Nothing would be achieved by making an adverse finding against Mr MR, and the complaints process is not punitive in nature.

[82] Mrs ED naturally has a subjective view of the actions taken by SA as Mrs DM's attorney. Her remedy was to have challenged the appointment in the Family Court.

Other complaints

[83] Mrs ED's other complaints arise from her view that Mr MR has facilitated SA being able to utilise the Powers of Attorney to act to Mrs ED's detriment. She goes further. She attributes SA's actions to Mr MR personally. That is not the case and no further discussion is necessary.

Fees

[84] Mr MR's fee for the enduring Powers of Attorney was \$1,400 plus GST and disbursements. Time recorded by him was \$1,584. Oddly, the time records referred to an appearance in court which was identified subsequently as an error. Some time recording systems have a set list of the nature of attendances and it is possible that Mr MR made an error when including this narration. The time spent does not alter.

[85] I cannot see any time recorded for attendance at the rest home on 30 August when Mrs DM signed the Powers of Attorney, but if Mr MR attended to the matters to which he has certified, the time spent would have been considerable. The lack of a time record is puzzling.

[86] Mr MR's hourly rate of \$330 is reasonable. The total fee, referenced to the timesheets, cannot be questioned.

[87] Mrs ED has also complained about the quantum of Mrs FR's fees which included costs incurred in obtaining independent advice relating to her obligations to Mrs ED and to Mr MR's attendances on Mrs DM. Mrs FR's timesheets refer to correspondence and attendances with other lawyers, seeking this advice.

[88] Mrs ED had raised numerous issues with Mrs FR and had requested significant amounts of information and explanations. Mrs FR took advice as to what her obligations to Mrs ED were.

[89] A lawyer cannot generally render accounts for investigating and responding to complaints.

[90] However, the demands³³ being made by Mrs ED on Mrs FR went beyond requests for information about specific issues. They were wide-ranging and include, as noted, requests for large amounts of information. Mrs FR would have been required to expend a significant amount of time responding to Mrs ED and it is likely that she would not have recorded all of her time.

[91] Mrs ED has not identified specific entries in Mrs FR's timesheets to which she objects. I do not intend myself to comb through the timesheets to try and identify these.

[92] Mrs ED's complaints about Mrs FR's fees administering the estate, are raised somewhat obliquely. She refers to fees of \$17,357.67 being rendered for an "uncomplicated estate". I do not know what Mrs ED measures a degree of complication against, but the dynamics within the family were time consuming, if not complicated. Mrs FR's fees were based on the time spent and Mrs ED herself must take some responsibility for this.

[93] Mrs ED complains that Mrs FR had provided advice to SA and JM on personal matters for which fees were invoiced to the estate. There is nothing provided that evidences this complaint.

[94] Taking all these factors into account, I confirm the determination of the Committee to take no further action on this issue.

³³ Mrs ED considers she was entitled to this information. That is not correct. Mrs FR's clients were the executors of the estate.

Delays in administering the estate

[95] SA and JM were the executors of Mrs DM's estate. They were the persons responsible for making decisions, and from whom Mrs FR took instructions. Mrs ED's complaints about delays need to be directed to them.

[96] However, I will comment on Mrs ED's complaint about delays in obtaining the Grant of Probate. Mrs DM's will referred to a list directing how her furniture and belongings were to be distributed between her children. The list could not be found. This necessitated additions to the usual form of affidavit required to obtain the Grant. Being satisfied that the list could not be found, and determining the form of the affidavit took additional time. In addition, arrangements had to be made for JM to swear the affidavit in Australia. This took additional time as well.

[97] There is no foundation to these complaints.

Indemnities

[98] Mrs ED refers to the "illegal practice" of requiring beneficiaries to sign an indemnity before final distribution of the estate is made.

[99] The request for an indemnity is not "illegal". It is common practice and recommended to lawyers as being best practice. The executors, and lawyers acting for them, are entitled to have it confirmed prior to distribution, that the administration of the estate is in order, to avoid matters being raised subsequently.

Conflict

[100] Mrs ED says that Mr MR knew the purchaser of Mrs DM's property. Mr MR confirms that he did know the purchaser (Ms QQ) but he says that he only became aware that she was the purchaser after receiving the signed offer for the property.

[101] Mrs ED seems to suggest that Mr MR acted against her interests by being involved with acceptance of the offer. The contract to sell the property was signed by Mrs DM herself. If she had not done so, the contract could have been signed by SA. Mr MR did not make the decision to accept the offer.

[102] There is no substance to the allegation of a conflict of interests.

Decision

[103] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 I confirm the determination of the Committee to take no further action on Mrs ED's complaints.

Publication

[104] Pursuant to s 206(4) of the Lawyers and Conveyancers Act, I direct publication of this decision in anonymised format.

DATED this 14TH day of APRIL 2022

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:

Mrs ED as the Applicant
Mr MR and Mrs FR as the Respondents
Mr WN as a Related Person
[Area] Lawyers Standards Committee
New Zealand Law Society