LCRO 160/2015

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area]Standards Committee
BETWEEN	**Mrs OP** Applicant
AND	**Ms UV** Respondent

DECISION

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

Introduction

[1] Mrs OP has applied for a review of a decision in which the Committee decided that further action with respect to a complaint against Ms UV was not necessary or appropriate.

Background

[2] Mr and Mrs OP were clients of [XX Law] (the firm), based in [Town]. On 28 February 2006 Mr and Mrs OP executed wills apparently on advice from the principal of the firm, a Ms TX. Mrs OP believed that in significant respects they were mirror wills. They were not.

[3] Miss Ms RS became the principal of the firm in 2011.

[4] Mr OP passed away on 12 March 2014. Mrs OP contacted the firm the following day, spoke to Ms UV, a legal executive, and enquired what she should do.

Advice was not immediately forthcoming. Ms UV says "this was a difficult file as estates were not something I did routinely".[1]

[5] Ms UV then began the process of obtaining probate of the will on instructions from Mrs OP and her son [XP], as trustees and executors named in the will. Mrs OP mentioned to Ms UV on several occasions that she was having to resort to her personal savings because she had been unable to access her husband's money.

[6] On 29 May 2014 Mrs OP emailed Ms UV referring to Mr OP's shares, and saying that she and [XP] had agreed those should be "kept and transferred into my name rather than cashed up". She also signed a notice of choice of option electing to make an application under the Property (Relationships) Act 1976 (PRA) for a division of relationship property. That form also appears to have been signed and dated by [Ms RS] on 29 May 2014. Mrs OP says, however, that she has never spoken to [Ms RS], nor did she explain the implications of the notice to her.

[7] Mrs OP says that on 3 June she took Mr OP's will to another lawyer, and that lawyer told her it would be best to apply for probate leaving the will as it was. Once probate was granted, the lawyer told her that [XP] could have a solicitor draw up a Deed of Family Arrangement.[2] It appears there may have been more than one view on how the provisions of Mr OP's will might be interpreted and applied. She says her reading of his will is that she and [XP] were to hold the residue of the estate on trust as executors of the estate, and thus the residue of the estate was not to be paid into the [OP]'s Family Trust.

[8] On 4 June 2014 Mrs OP emailed Ms UV suggesting that a Deed of Family Arrangement might be a quicker option for transferring her husband's shares into her personal name, along with his bank accounts and investments.[3] Mrs OP again referred to a number of expenses that she was paying, which she believed should be paid from Mr OP's estate, and referred again to the transfer of his shares.

[9] Ms UV responded, advising that "probate has to be obtained because of the value of the assets [Mr OP] owned".[4]

[10] Mrs OP replied, referring to what she described as an error in her husband's will. Mrs OP said she believed their wills were supposed to be mirror wills in significant respects, but that her husband's did not reflect hers. In particular, Mrs OP's will

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[1] Letter UV to NZLS (30 March 2015) at [39].
[2] Letter OP to NZLS (13 April 2015) at [3].
[3] Mrs OP does not say quicker than what.
[4] Email UV to OP (4 June 2014).

provides for her trustees to make payments to her husband during his lifetime out of the capital from her residuary estate. Her husband's will however contains no such reciprocal provision. Mrs OP said she could not understand how the "right to resort to capital" that had been included in her will was omitted from her husband's. She said her understanding of her husband's intentions was that "[XP]'s debt to him was to be cleared and the rest left to me to use for my lifetime".[5]

[11] Ms UV's response on the same day included the words "Wills – you are right about the error and I am not sure why [Ms TX] did not pick this up". Ms UV gave no further advice in relation to the supposedly missing clause. There is no mention of independent advice being recommended, or of Mrs OP being told that there was a problem that meant the firm may be unable to continue acting. However, Mrs OP says that about that time Ms UV phoned and told her abruptly that there was nothing for her in her husband's will and that both she and [XP] were going to have to apply to the Family Court for a division of property before they could apply for probate.[6]

[12] On 8 June 2014 Mrs OP sent a lengthy email to Ms UV referring to various assets, the [OP]'s Family Trust, debt, repayments and other issues arising from her husband's passing. Mrs OP accused Ms UV of being uncommunicative, and made it clear she wanted a response.

[13] Ms UV responded the next day, explaining what she had been doing with the file, and saying that she was waiting to hear back from the High Court. Further emails were exchanged. In early July, Ms UV explained that [Ms RS] had recently returned to work following a period of illness and had been attending to the file.

[14] On 22 July 2014 Ms UV sent an email to Ms [OP] and [XP] enclosing documents for them to sign as trustees, and return to her for filing in court. Mrs OP confirmed on 24 July that she was returning the signed documents. Ms UV then filed the application for probate and various documents in support at the High Court. She also filed Mrs OP's notice of choice of option A under the PRA.

[15] On 18 August 2014 Mrs OP requested an update and information. Ms UV replied the same day, saying that she was awaiting the Grant of the Probate. She also suggested that the trustees execute the share transfer forms as executors, but advised they may also require a copy of Probate. Ms UV confirmed she would provide a copy of probate as soon as she received it.

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[5] Email OP to UV (4 June 2014).
[6] Letter OP to NZLS (13 April 2015) at [3].

[16] On 21 August 2014 the Deputy Registrar of the High Court returned the application for probate to Ms UV raising issues about the supporting documents, advising that the application was rejected and saying:

> It would appear that s 76(1)(b) of the Property (Relationships) Act 1976 applies as the first applicant has lodged an option A Notice under s 61 of that act. She is thus deemed to have predeceased the will-maker.

[17] On 1 September 2014 Mrs OP requested an update on the grant of probate from Ms UV.

[18] On 4 September 2014 Ms UV explained difficulties had arisen with the documents filed in the High Court, and on 9 September explained the error could be easily corrected.

[19] On 15 September 2014 Mrs OP noted that six months had passed since her husband had died, and probate had not been granted. She emailed Ms UV asking if the forms would take much longer, and Ms UV replied saying they had been prepared and forwarded to the Registrar for checking before signing. Mrs OP replied saying she could not understand what was going on, her husband's estate was of low value, and she was concerned about her financial position. She said she was "fast running out of patience with the firm who for some unknown reason made the mistake in the will in the first place".[7] Ms UV explained that the documents were still under review by the Registrar.

[20] On 29 September Mrs OP wrote to Ms UV asking, "exactly what is it in the will that they have a problem with"? Although she did not explain, on 8 October 2014, Ms UV said she was still chasing the court for a response. On 9 October 2014, the High Court Registrar emailed Ms UV highlighting issues with the application arising from the notice of choice of option having been filed. The Registrar's explanation was that when a spouse applies for probate it is not necessary to also file a notice of choice of option.

[21] On 10 October 2014, Mrs OP again requested an update and wanted matters moved ahead. Ms UV's response was that she had received a reply from the court and the documents would be sorted on Monday.

[22] On 13 October 2014, Ms UV informed Mrs OP that the firm had changed ownership. Ms UV advised Mrs OP that all the firm's files were under review and Mrs OP could expect a letter in the next day or so.

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[7] Email OP to UV (15 September 2014).

[23] On 15 October 2014 the new owner of the firm, Ms [CB], wrote to Mrs OP and the other trustee/executor of the estate noting the firm had been acting where there were conflicts between the interests of the trustees/executors of the estate and the interests of the beneficiaries, including Mrs OP. Ms [CB] recommended that an independent lawyer be engaged to act for the executors of the estate and that Mrs OP and [XP] engage their own independent lawyer to act for each of them personally.

[24] On 17 October 2014, Mrs OP emailed Ms UV again querying the delay. Half an hour later, Mrs OP emailed Ms UV advising that she had received Ms [CB]'s letter. Later that day, she emailed Ms UV again saying she had not heard from her and requested the files. In her email, Mrs OP also wanted an explanation from Ms UV as to why she continued to act when she lacked the expertise to do so.

[25] Ms UV replied confirming Ms [CB]'s advice, and saying the files could be released to Mrs OP when she received the other executor's consent, which she had requested. Mrs OP replied asking why it was necessary for her to seek independent advice and what that advice would relate to.

[26] In an undated letter, Mrs OP wrote to Ms UV confirming receipt of the files, requesting further information and a copy of an email that appeared to be missing from the file, and asking her to explain why obtaining probate had been so difficult. Ms UV did not respond.

[27] Mrs OP laid a complaint to the New Zealand Law Society (NZLS).

Complaint

[28] In her complaint Mrs OP describes a "massive mistake" made when Ms UV applied for probate, which she says caused her serious financial and health problems. She attached various correspondence and documentation, and requested compensation for the financial and personal stress caused to her. Mrs OP said she wanted $190,000.

[29] Mrs OP says she does not consider there is a conflict between her interests and those of [XP]. She says they have a very close relationship. However, Mrs OP also says she ended up having to sign a deed of debt to the Family Trust, because she was left without any benefit under Mr OP's will.

Practitioner's Reply

[30] Ms UV replied to NZLS on 30 March 2015. She said that [Ms RS] was her employer at the time, and she had not provided her with the supervision and guidance she needed to satisfactorily handle the file. She says she asked [Ms RS] to relieve her of the file but that did not happen. Attributing fault for all that went wrong to the firm, Ms UV says Mrs OP's file was handled in a less than satisfactory way. She says she was aware she was not confident in handling the file, and could not give Mrs OP the service she wanted to provide, and it was not her choice to continue, but she did her best. She says [Ms RS] simply would not assist Mrs OP.

[31] Ms UV set out a detailed narrative of her involvement in Mrs OP's file including reference to the firm having prepared Mr and Mrs OP's wills and established the [OP] Family Trust. She confirms she discussed Mr OP's will with Mrs OP in March 2014, and shortly after that she says Mrs OP advised her that Mr OP's will contained a mistake in that he was supposed to have left his shares to her, not to the trust.

[32] Ms UV does not say that she immediately told Mrs OP she should seek independent legal advice, either in her capacity as trustee of the estate, or personally, when she was first instructed, or at any point over the months that followed.

[33] Ms UV says [Ms RS] told her to arrange for Mrs OP to complete a Notice of Election of option A under the PRA, and had said she would give her further instructions and guidance in relation to the matter, but did not. She says when [Ms RS] again reviewed the file she confirmed the Notice of Election of option A was the correct step. She refers to a file note she made on 2 May 2014 which contains the following:

> … there is a mistake in Mr OP's will as not everything should have gone to the Family Trust/[XP]. The shares were to go directly to her then everything else to the Family Trust/[XP].
>
> This is not what the will states so I discussed matters with Ms RS as I felt it was beyond my knowledge and I was out of my depth. Ms RS hopefully was going to take over the file.
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> Ms RS reviewed the will and file etc and advised me to prepare an option application so that OP could take what she was entitled to. Again I advised Ms RS it was needed to be finalised by her as I was out of my depth. Ms RS advised she will instruct me what to do with the file and to continue.

[34] Ms UV says she dictated the Notice of Election and other correspondence according to [Ms RS]'s instructions and then sent it to Mrs OP for her to sign. She says in her reply to NZLS that "as OP was resident out of town, Ms RS would talk to her regarding signing of the document".

[35] Ms UV says that on 28 May 2014, [Ms RS] reviewed the draft Notice of Election of option A, approved it and told Ms UV to forward it to Mrs OP by email for

her to sign. Ms UV says that [Ms RS] told her Mrs OP "did not have to worry about having witnessed as she would talk to her on the phone and take her through it."

[36] Ms UV says Mrs OP returned the document to the firm, [Ms RS] passed it on to Ms UV for her to file in court, and she sent it out under a letter dated 5 June 2014.

[37] Mrs OP continued to communicate over the difficulties she was having in relation to the estate, referring to the will and the supposedly missing clause.

[38] Ms UV says she discussed the file again with [Ms RS] because she did not understand the situation, and [Ms RS] told her that the Notice of Election was the correct way to proceed with the estate administration.

[39] On 16 June 2014, Ms UV says she received an email from Mrs OP, which included a request that Ms UV send a copy of the will to [XP], and asking that "she be advised about 'exactly what you are going to claim on my behalf from Mr OP's Estate before you lodge any claim so that [XP] and her can discuss this matter'".[8]

[40] Ms UV says she provided a copy of the will to [XP] as requested and spoke to [Ms RS], who confirmed she had spoken to Mrs OP about the Notice of Election.

[41] Ms UV says she is unsure when the court confirmed receipt of the Notice of Election. She says "once the court notified that it had recorded the Notice of Election, probate documentation was completed". She says that before the probate documents were forwarded to Mrs OP and [XP] for signing, [Ms RS] reviewed, amended and approved the documents.

[42] Ms UV says the signed documents were collated and forwarded to the Wellington High Court for filing on 13 August 2014.

[43] Ms UV refers to a minute from Mr ABC, Deputy Registrar, dated 21 August 2014, advising:

> 1. It would appear that s 76(1)(b) of the Property (Relationships) Act 1976 applies as the first application [sic] has lodged an option A Notice under s61 of that act. She is thus deemed to have predeceased the will-maker.

[44] Ms UV says she told [Ms RS] that she did not understand the correspondence received from the court and asked for her instructions when she reviewed the file. Ms UV says [Ms RS] reviewed the file and instructed her to talk to Mr [ABC] because [Ms RS] was also not sure what was required.

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[8] Letter OP to NZLS (13 April 2015) at [17] – Mrs OP says Ms UV's response was that the firm was claiming "investments in their entirety", which seems fairly straight forward.

[45] Ms UV says she phoned Mr [ABC] and he repeated what was contained in his correspondence. Ms UV says she told [Ms RS] and asked for her assistance. [Ms RS] then apparently phoned Mr [ABC]. Ms UV says [Ms RS] instructed her "to prepare documents, advising that there was a typographical error in the Notice of Election – it should have been option "B".

[46] Ms UV says she prepared the documents, gave them to [Ms RS] to review, and [Ms RS] suggested sending them to [Mr BRG] before sending them to Mrs OP and [XP] for them to sign.

[47] Ms UV says she contacted Mrs OP and "advised her of the situation and of [Ms] RS's advice and that we were currently preparing the amended documents". Ms UV does not say whether she specifically advised Mrs OP then, or at any other stage, that there was a conflict between her interests and [XP]'s as beneficiaries of the estate, that she had, or may have had, a claim against the firm, that she should seek independent advice, or whether the firm may not have been able to act further for the trustees/executors. Nor does Ms UV say whether [Ms RS]'s instructions to her included any such directive.

[48] Ms UV says that [Ms RS] checked all the documents and told her to send them to the Registrar for approval before they went to Mrs OP and [XP] for signing. The Registrar's response on 9 October 2014 was:

> … the forms appear to be ok, however the grounds contained in the application are not any of those specified in s.69 of the PRA. Unless one of the prescribed circumstances exist there appears to be no other scope for avoiding the consequences of having filed the Notice of Election of option. I point out that when a spouse is applying for Probate it is not necessary for a Notice of Election of option to be filed. If you wish to pursue this application in the present form I will refer it to a Judge for a ruling. Please note that a filing fee … is payable on application.

[49] Ms UV says that around this time, [Ms RS] sold the firm to Ms [CB] with that transaction being concluded on 30 September 2014. As mentioned earlier, Ms [CB] reviewed the file and terminated the retainer, advising Mrs OP that conflicts of interest had arisen, and suggesting Mrs OP and [XP] seek independent advice. Ms UV says the firm did not render an invoice.

[50] Ms UV says that when the firm ceased acting, probate had not been granted. She did all that was required of her to the best of her knowledge and ability at the time. She says that [Ms RS] was wrong to say that option B should have been elected – it should always have been option A.

[51] Ms UV says that she acted promptly throughout on the instructions she received from [Ms RS], and her limited knowledge of what she was supposed to do. Ms UV does not believe that her conduct was unsatisfactory in the circumstances. She said she would have preferred [Ms RS] to have assumed conduct of the file, and does not consider it appropriate for her to have left the matter in Ms UV's hands. She considers that, as an employee, she was not able to challenge [Ms RS]'s decision. Ms UV says that the minor delays that occurred within her office, as opposed to delays by [Ms RS], were the ordinary sort of things which can and do occur in an office. She does not consider her conduct is the cause of the complaint.

[52] Ms UV later added that she did not appreciate the probate and notice of option processes were two separate procedures. If [Ms RS] had made her aware of that, she says she would have applied for probate and then "addressed the Notice of Election issue later".[9]

[53] In July 2015, Ms UV advised NZLS that the High Court had granted probate (as received by the firm on 17 June 2015).

Decision

[54] The Committee held a hearing and considered the nature of the conduct alleged against Ms UV, and the delay in her applying for probate.

[55] The Committee noted Mrs OP was a trustee and beneficiary of the estate, and had concerns that the will did not accurately record Mrs OP's view of Mr OP's instructions to Ms [TX]. It considered some attempt should have been made to contact Ms [TX] and ascertain whether the will she had drafted correctly reflected Mr OP's instructions, and whether he had read the will before he signed it. No one at the firm appeared to have given consideration to "the law as it applied to drafting errors and the alternative ways of remedying the problem". The Committee was critical of the firm for not having attempted to resolve the situation by recording the parties' agreement to change the will and transfer the shares, and of the apparent lack of inquiry into the relationship property aspects of Mrs OP's position. The Committee observed that no advice was given to Mrs OP about the Notice of Election of option A, and expressed concern over the Notice of Election having been filed and the delay that caused. The Committee concluded that communication between Mrs OP and the firm had been "minimal".

[9] Letter UV to NZLS (3 July 2015).

[56] The Committee exonerated Ms UV on the basis of her attribution of fault to [Ms RS]. Its view was that Ms UV should not be held responsible for [Ms RS]'s decision-making, and that [Ms RS] should have assumed responsibility or supervised Ms UV more closely, given the alleged drafting error in the will by Ms [TX]. The Committee expressed concern that Ms UV had not consulted a text or taken steps to inform Mrs OP of the difficulties on the file. Having regard to all the circumstances of the matter, however, the Committee considered further action against Ms UV was not necessary or appropriate.

[57] Mrs OP disagreed with the decision and applied for a review.

Review Application

[58] Mrs OP's application for review proceeds on the basis that she is entitled to "monetary compensation for very real financial loss and damage to personal well being". She refers to a requirement that she sign a deed of family arrangement pursuant to which she can recover costs, and says her complaint was originally laid to address the delay in obtaining probate. She says Ms UV advised and insisted that there was nothing in her husband's will for her. She says "this was not the way my son and I as executors read the will and certainly not what I knew my late husband wanted". Mrs OP says the arguments about how the will was to operate were between the lawyers and "justice personnel", not her and [XP], who she says are united in their view of the proper outcome.

[59] Mrs OP wants this Office to take action to prevent a repeat of her experience, which she says resulted in her self-esteem, personal well-being and health being affected. She says she was made to feel "worthless" and "of no account". She considers the Committee should have taken steps to discipline Ms UV.

Nature and Scope of Review

[60] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[10]

> [39] … 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.
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> [40] 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

[10] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209.

> a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
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> [41] … 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.

[61] More recently, the High Court has described a review by this Office in the following way:[11]

> [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.

[62] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

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

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

Review Hearing

[63] Mrs OP attended a review hearing on 2 June 2016. Ms UV was not required to attend and the review hearing proceeded in her absence.

Review Issues

[64] The issue on review is whether there is good reason to substitute my discretion for that of the Committee. For the reasons discussed below, the answer to that question is no.

Analysis

[11] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

[65] At the heart of Mrs OP's concerns is the fact that the Committee did not order Ms UV to compensate her for the errors that she made.

[66] Aside from all of the errors that have been laid at [Ms RS]'s door, the most obvious professional error on Ms UV's part is her failure to spot a conflict of interest when it arose, and to deal with it appropriately by advising Mrs OP to seek independent legal advice.

[67] The conflict in question had emerged clearly by early June 2014, when Mrs OP identified her concern about the supposedly missing 'right to resort to capital' clause in Mr OP's will. Although Mrs OP characterised that as a drafting error made by Ms [TX] in 2006, it gave rise to a potential claim against the firm, because wills must be precisely drawn. Drafting errors that are recognised in a will after the testator's death routinely give rise to consideration of whether there may be potential for a claim against the lawyer responsible for drafting the will.

[68] In those circumstances, rule 5.11 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) is relevant.

[69] Rule 5.11 says:

> When a lawyer becomes aware that a client has or may have a claim against him or her, the lawyer must immediately–
>
> (a) advise the client to seek independent advice; and
>
> (b) inform the client that he or she may no longer act unless the client, after receiving independent advice, gives informed consent.

[70] In the circumstances, Ms UV should ideally have followed the directives set out in rule 5.11. It is surprising that Ms UV, a trained legal executive, did not recognise the conflict for what it was. However, Ms UV says she did not routinely do estates work. There is no evidence to contradict that. Mrs OP appears to be of the view that Ms UV lacked relevant experience. In the circumstances it must be accepted that, for the purposes of rule 5.11, Ms UV did not become aware that Mrs OP had or may have had a claim against the firm arising from the drafting of the will.

[71] It is distinctly unsettling that Ms UV continued to act knowing she lacked relevant expertise. However she says she was acting on her employer's directions. Ms UV's acknowledged failures to provide a proper level of service to Mrs OP are primarily matters between Ms UV and her employer that this Office lacks the jurisdiction to resolve.

[72] There are insufficient grounds on which to base a finding that there has been unsatisfactory conduct on the part of Ms UV in accordance with the Act. It is therefore not possible to make an order pursuant to s 156(1)(d) of the Act, which is the section that provides for compensation to be paid in certain circumstances. First, there must be a finding of unsatisfactory conduct in respect of Ms UV's conduct, which there is not.

[73] In the circumstances there is no reason to interfere with the Committee's decision in respect of Ms UV.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2008 the decision of the Committee to take no further action in respect of Mrs OP's complaints about Ms UV's conduct is confirmed.

DATED this 17th day of February 2017

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D Thresher
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 OP as the Applicant
Ms UV as the Respondent
[Ms RS] as a related person
[Area] Standards Committee
The New Zealand Law Society