

NOTICE OF DETERMINATION

A notice made under s318 of the *Legal Profession Uniform Law (Victoria)*.

Complainant: [REDACTED]
Co-Initiator: [REDACTED]
Respondent Lawyer/Law Practice: [REDACTED] / [REDACTED]
Ref: [REDACTED]

ORDERS

Pursuant to s299(1) of the *Legal Profession Uniform Law (Victoria)* ('the Uniform Law') I have decided that the lawyer has engaged in unsatisfactory professional conduct and I make the following order –

The lawyer is cautioned pursuant to section 299(1)(a) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. The deceased was the legal owner of a company ('the company') which was, in turn, the trustee of a family trust. In 1977, the lawyer was appointed as a director of the company and an accountant ('the accountant') was also appointed as a director in 2008.
2. On 14 November 2010, the deceased made her penultimate will ('the 2010 will').
3. The lawyer drew up the deceased's final will ('the final will'); he witnessed its signing and execution on 27 June 2013.
4. The final will appointed the lawyer and the accountant as co-executors and trustees of the will. It also contained a charging clause which stated that:

"[m]y Trustees being a Solicitor or an Accountant or other person engaged in any profession or business may be so employed or act and shall be entitled to charge and be paid all professional or other charges for any business or act done by him or his firm in connection with the trusts thereof including acts which a Trustee could have done personally".

5. The final will also contained a clause which stated that:

"I bequeath to my executor [the lawyer] a legacy of the sum of \$10,000 in lieu of any commission that may be claimed".

6. There were two shares in the company; until 2 December 2014 one share was held by the deceased as the beneficial and legal owner, and the other was held by her daughter, the co-initiator. On 2 December 2014, the deceased transferred her share to the co-initiator.
7. The deceased died on 9 December 2014.

8. Following the death, the co-initiator passed a resolution removing the lawyer and the accountant as directors of the company and adopting a new constitution. She also assumed control of the company in her purported capacity as the sole director ('the company changes').
9. A dispute therefore arose between the lawyer and the accountant on the one hand and the co-initiator on the other regarding a number of issues. These issues included the company changes as well as the appropriateness of the lawyer and the accountant seeking a grant of probate of the deceased's final will.
10. The lawyer and the accountant instructed solicitors to act on their behalf regarding this dispute whilst the co-initiator was represented by her own solicitors. A series of correspondence was thus exchanged between the parties' respective solicitors from January 2015 until June 2015 in relation to the dispute.
11. A negotiated resolution to the dispute was reached with settlement taking place on or about 26 June 2015.
12. Under this settlement, the lawyer agreed to renounce probate as well as the legacy of \$10,000 which he stood to receive under the final will.
13. In exchange, the co-initiator agreed to pay \$44,795 in consideration of the personal costs incurred by the lawyer and the accountant as well as the costs of the solicitors which they had retained.

ISSUES UNDER INVESTIGATION

14. The complaint was made by the complainant, a solicitor, on behalf of her client, the co-initiator. It was received by the Victorian Legal Services Commissioner ('the Commissioner') on 16 March 2016.
15. The issues which the complainant raised and which were investigated are as follows:
 - a) The lawyer drew the deceased's final will at a time when she did not have sufficient capacity to give instructions. The 2010 will had not included a bequest of \$10,000 to the lawyer and the deceased had not intended to include such a bequest in the final will.
 - b) The lawyer drew a will in which he was appointed as an executor without complying with the obligation to provide written information to the client as required by Rule 10.1 of the *Professional Conduct and Practice Rules 2005* ('PCPR');
 - c) The lawyer received instructions to draw a will under which he was entitled to a substantial benefit (in the form of a \$10,000 legacy) and did not decline to act on those instructions as required by Rule 10.2 of the PCPR.
 - d) There was no basis for the amount which the lawyer charged the co-initiator in respect of his personal costs and expenses as part of the settlement of the dispute between the parties. The amount charged was therefore grossly excessive and unreasonable.

INVESTIGATION

16. Following a number of informal enquiries made with the lawyer, the Commissioner sent a letter to him dated 7 June 2016 that gave formal notice of the complaint, requested a response from him pursuant to section 371(1) of the Uniform Law and invited any written submissions.
17. The Commissioner also sent a letter dated 7 June 2016 to the complainant. Amongst other things, this letter requested supporting documentation to indicate that the deceased did not have capacity to give instructions at the time of the execution of the final will and that she did not intend to include the \$10,000 bequest to the lawyer. No response to this letter was received from the complainant.
18. On 28 July 2016, a response was provided on the lawyer's behalf by a solicitor whom he had instructed in relation to the investigation. Amongst other things, the response stated that:
 - (a) The lawyer "*had no doubt that [the deceased] had legal capacity*" at the time of the drafting of the final will. The response also enclosed a copy of typed instructions which the deceased had sent to him on 4 June 2013 directing that amendments be made to her 2010 will. These instructions included reference to a legacy of \$10,000 to each of the executors. The response also highlighted that the deceased was considered by the co-initiator to have sufficient capacity to execute a share transfer in the latter's favour on 2 December 2014 and that the relevant death certificate does not indicate that she was suffering from any long term cognitive impairment.
 - (b) While the lawyer believed at the time of the drafting of the final will that he had reasonable bases for not providing written information to the deceased pursuant to Rule 10.1 of the PCPR, he acknowledged that "*in hindsight, he should have provided [the deceased] with a written warning as required by rule 10.1 of the PCPR to avoid any ambiguity*".
 - (c) While the lawyer genuinely believed at the time of drafting the final will that the legacy of \$10,000 was not a substantial benefit, he now acknowledged that "*his conduct did not comply with rule 10.2 of the PCPR*".
 - (d) The \$44,795 paid by the co-initiator to settle the matter with the lawyer and the accountant was freely negotiated by the disputing parties, all of whom were legally represented. The sum was paid in settlement of a range of dispute issues between the parties including those related to the estate, the company and the family trust. It was therefore denied that the amount was excessive or unreasonable.
19. The response on behalf of the lawyer dated 28 July 2016 enclosed correspondence that indicated that the lawyer's costs and expenses accounted for \$10,400 of the final settlement amount and that this was incurred in respect of executorial work. The Commissioner therefore sent a letter dated 12 September 2016 to the lawyer which requested information pursuant to section 371(1) as to what executorial work he carried out and at what rate such work was charged.
20. On 29 September 2016, a response was provided on the lawyer's behalf by his solicitor. Amongst other things the response reiterated that the lawyer relied upon his then legal representatives to negotiate the settlement sum on his behalf and noted that no formal terms of settlement were drawn up. It noted that the negotiations initially focused on the

repayment of fees related to executorial work but then progressed to include the settlement of all fees owing to the lawyer for legal services relating to the various dispute issues.

21. On 21 November 2016, the Commissioner sent a letter to the complainant which gave notice of the proposed determination and invited written submissions about the proposed order. No submissions were received from the complainant.
22. On 21 November 2016, the Commissioner also sent a letter to the lawyer which gave notice of the proposed determination and invited written submissions about the proposed order.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

23. On the basis of the evidence before me, I find the following proved:
 - (a) The lawyer received instructions in June 2013 from the deceased to draw a will appointing him as an executor. He did not, however, inform her in writing before she signed the will of the inclusion in the will of a provision entitling him to charge legal costs in relation to the administration of the estate.
 - (b) The lawyer received instructions in June 2013 from the deceased to draw a will under which he would receive a substantial benefit in the form of a legacy of \$10,000. He did not decline to act upon those instructions or offer to refer his client to another lawyer for advice.
24. Based on the absence of any supporting materials as noted at paragraph 17 above and taking into consideration the lawyer's response as noted at paragraph 18(a) above, I cannot be satisfied on the evidence before me that the deceased lacked capacity at the time of the drafting of her final will or that she did not intend the inclusion of the legacy of \$10,000 to the lawyer.
25. Taking into consideration the lawyer's responses as noted at paragraphs 18(d) and 20 above, I cannot, on the evidence before me, find that there was no basis for the amount paid by the co-initiator to the lawyer in settlement of the dispute between the parties or that the amount was excessive or unreasonable.

RELEVANT LAW

26. The investigation was carried out under the auspices of the Uniform Law as the complaint was received after its entry into force on 1 July 2015¹.
27. The *Professional Conduct and Practice Rules 2005* ('PCPR') apply to the lawyer's conduct, the subject of the findings of fact², as this occurred in or around June 2013 when he received instructions from the deceased, drew up her final will and witnessed its execution.

¹ Pursuant to Clause 27 of Schedule 4 of the Uniform Law which concerns conduct that preceded the commencement date of the Uniform Law.

² By the time the complaint was received on 16 March 2016, the *Legal Profession Uniform Law Solicitors' Conduct Rules 2015 (Victoria)* ('the Conduct Rules') were in operation. However, the PCPR apply in this matter because the conduct preceded the entry into operation of the Conduct Rules on 1 July 2015.

28. Rule 10.1.2 of the PCPR states that:

“10.1 A practitioner who receives instructions from a client to draw a will appointing the practitioner or an associate of the practitioner an executor must inform the client in writing before the client signs the will...”

10.1.2 of the inclusion in the will of any provision entitling the practitioner, or the practitioner's firm or associate, to charge legal costs in relation to the administration of the estate...”

29. Rule 10.2.1 of the PCPR states that:

“10.2 A practitioner who receives instructions from a person to –

10.2.1 draw a will under which the practitioner or the practitioner's firm or associate will, or may, receive a substantial benefit other than any proper entitlement to commission (if the practitioner is also to be appointed executor) and the reasonable professional fees of the practitioner or the practitioner's firm

must:

- (a) decline to act on those instructions; and*
- (b) offer to refer the person, for advice, to another practitioner who is not an associate of the practitioner;*

unless the person instructing the practitioner is either:

- (i) a member of the practitioner's immediate family; or*
- (ii) a practitioner, or a member of the immediate family of a practitioner, who is a partner, employer, or employee, of the practitioner.*

30. Rule 10.3 of the PCPR states that:

“10.3 For the purposes of rule 10:

“substantial benefit” means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.”

CHARACTERISATION OF THE CONDUCT

31. In light of the above findings of fact, I find that the lawyer's conduct has breached Rule 10.1.2 and Rule 10.2.1 of the PCPR.

32. I therefore find that this conduct constitutes unsatisfactory professional conduct as defined in section 296 of the Uniform Law in that it falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

OUTCOME

33. I find that the most appropriate outcome is a caution pursuant to section 299(1)(a) of the Uniform Law.
34. In making this decision I note that the lawyer has retired from legal practice, owing to his age and ill health and that he has acknowledged that his conduct was in breach of the PCPR. I further note that no disciplinary action has previously been taken against the lawyer throughout his legal career.

DETERMINATION

35. Having considered all of the evidence and relevant law, and having made the above findings on the issues under investigation, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.

APPEAL

36. Pursuant to Section 314 of the Uniform Law, a respondent lawyer or a legal practitioner associate of a respondent law practice may, in accordance with the applicable legislation appeal to the Victorian Civil and Administrative Tribunal, or seek a review by the VCAT, of this determination made under section 299 of the Uniform Law.



Michael McGarvie
Victorian Legal Services Commissioner

Date: 24 February 2017