

***BEFORE THE AOTEAROA NEW ZEALAND ASSOCIATION OF SOCIAL  
WORKERS COMPLAINTS RESOLUTION PANEL***

IN THE MATTER OF      *Complaint against X, a Social Worker*

***DECISION OF THE PANEL***

Jeff Goldstein, Chair  
Sal Faid, Consumer Representative  
Sharon Schwalger, Association Member  
Phil Clearwater, Association Member  
Graeme Warburton, Association Member

Heard: 14 October 2009

Decision:

Mr A Sherriff, Counsel for the Association  
Mr M Parker, Counsel for X

### ***Introduction***

[1] The Complaints Resolution Panel (the Panel) initially had before it two alternative charges.

[2] These were that the Social Worker, (X):

- (i) acted in a manner amounting to professional misconduct or
- (ii) engaged in conduct unbecoming of a social worker

and that X's actions reflected adversely on their fitness to practise as a social worker.

### ***Name Suppression***

[3] At the conclusion of the hearing Mr Parker, counsel for X submitted that the Panel should suppress X's name. Mr Sheriff, counsel for the Association, submitted that the issue of suppression was for the panel to consider and that the Association's view was neutral in regard to this application.

[4] In determining this application we have carefully weighed up the benefit and interest to the public in knowing who X is with the potential irreparable damage to X's standing and business. We have also taken into account that X has not been the subject of a previous complaint to ANZASW.

The Panel has decided that the detriment to X from releasing her identity far outweighs the benefit to the public. We therefore suppress X's name and identity.

[5] Notwithstanding the decision to suppress, the Panel is also of the view that the information contained in this decision will provide guidance to other social workers when dealing with similar issues.

***The Hearing***

[6] The Panel was convened and it acted in accordance with the Constitution and the Standing Orders of the Aotearoa New Zealand Association of Social Workers (the Association).

[7] X is a member of the Association and is bound by the Constitution and Standing Orders and Code of Conduct.

[8] Prior to the hearing Mr Sherriff advised the Panel that X was now admitting the “conduct unbecoming” charge (ii above) and that the Association was not now proceeding with the “professional misconduct” charge (i above).

[9] The Panel found this agreement curious.

[10] Mr Parker acknowledged the admission on behalf of his client.

[11] As a consequence of X’s admission the hearing was conducted on the basis that Mr Sherriff and Mr Parker made submissions in regard to the facts and what penalty, if any, should be imposed on X.

[12] In addition to counsels’ helpful submissions, X and X’s supervisor, who was also present at the hearing, clarified a number of matters for the Panel.

***The Standing Orders and Constitution***

[13] The Association’s Standing Orders and Constitution set out the limits of any penalty that the Panel could impose. Unfortunately the Standing Orders and the Constitution are at odds in one major aspect. The Constitution allows the Panel to impose

a censure in addition to a number of other disciplinary actions. In contrast the Standing Orders permit the Panel to impose only a censure and no other disciplinary action.

[14] Mr Sherriff advised the Panel that this contradiction would be rectified by the Association. Both counsel agreed that if the Panel imposed a censure on the Social Worker it could not impose any other penalty. The Panel accepts that this is the case

[15] The Standing Orders provide for the following alternative penalties to censure where a member Social Worker has engaged in conduct that is unbecoming and reflects adversely on their fitness to practise as a social worker:

- (i) To make a finding that the complaint is found proven but no conditions be imposed or
- (ii) To make a finding that the complaint is found proven and conditions placed on membership which may include any one or more of the following:
  - (a) The member undergo such training and/or supervision and/or mentoring as agreed
  - (b) Payment of compensation to the complainant not exceeding \$5,000
  - (c) Reparation to the complainant
  - (d) That the member pays such sum towards the costs of and incidental to this hearing not exceeding \$5,000
  - (e) Suspension of membership
  - (f) An order that the member undertake ANZASW recertification by a specified date with particular attention paid to one or more competency standards identified by the Complaints Convener. If the member meets the required competency standards then the member's competency will be validated for the next five years form the date of this assessment. The costs of any recertification required under this provision shall be paid by the member concerned or

(g) To make a finding that the complaint is found proven and membership of the member is revoked and

(h) To make such order as to publication of the details and circumstances of the complaint and/or the member concerned and/or the decision arising as may be appropriate.

[16] The Association did not seek to have X's membership suspended or seek cancellation of registration. We accept this submission.

[17] The Panel was provided with an agreed bundle of documents along with a Statement of Agreed Facts. Rather than set out the agreed facts, which include references to various individuals who are entitled to their privacy, I shall set out in an abbreviated form the agreed facts.

### ***The Facts***

[18] The conduct complained of took place in 2008.

[19] It relates to an elderly lady (the client) aged 87 at the time who had been residing in a residential retirement village unit with her partner aged 91 for approximately 18 years. They jointly owned their residence.

[20] Differences of opinion had arisen between the client's children in regard to their mother's interests. These differences were centred on the fact that one of the client's daughters (Daughter A), who resided in the same town as her mother, held two Enduring Powers of Attorney (EPOAs). Some of the daughter's siblings had concerns that their sister was not looking after their mother's interests appropriately.

[21] As a result of this concern a daughter residing in another city (Daughter B) applied to the Family Court on 14 April 2008 for Review of Attorney's Decisions under the Protection of Personal and Property Rights Act 1988.

[22] At this time the most recent medical report on the client had been provided on 11 October 2007. That report confirmed that the client was taking medication for some anxiety and agitation associated with memory loss. The client scored 21/30 in the Mini Mental State Examination and her main problem was orientation to time and short term memory recall.

[23] The report stated that the doctor was “unable to say that (the client) wholly lacks capacity and that the welfare guardianship should be enacted”.

[24] Sometime before 15 April 2008 Daughter B met with X again, having met the previous year, to talk about the client’s situation. X and Daughter B agreed that X would prepare new EPOAs in favour of X and revocations of the existing EPOAs and travel to the client’s home town with the purpose of having the client sign the various documents.

[25] We understand that Daughter B contacted her mother and arranged for X to meet with her mother (the client).

[26] On 15 April 2008 X travelled to the city where the client lived and met with the client. X took with her two pre-prepared EPOAs and two revocations. One was for the client’s whole property and the other for the client’s personal care and welfare if she became mentally incapable. The client signed these and her partner witnessed them

[27] At the same time the client revoked her former EPOAs to Daughter A. These were also witnessed by her partner.

[28] On 15 April 2008 X took the client to her bank and presented the new EPOAs and was added as a signatory. X also obtained information about the accounts.

[29] On 16 April X delivered a letter to the client's day care centre and in reliance on the EPOAs instructed the centre not to allow the client to be removed from the day care centre. This was to prevent the client being taken out for the day by Daughter A.

[30] On 18 April 2008 the client's doctor provided a medical report stating that the client had no capacity to understand a change of power of attorney given the extent of her Alzheimer's disease.

[31] By email of 18 April 2008 the above report was provided to X along with a letter from the client's solicitor pointing out that the EPOAs signed in favour of X appeared to have been signed by the client when she did not have capacity.

[32] On 21 April 2008 the Family Court, in response to Daughter A's application ordered a medical report be obtained in regard to the client's mental capability.

[33] On 12 May 2008 X then applied to the Family Court as the client's attorney seeking directions.

[34] On 20 May 2009 the Daughter A and her brother filed a complaint with the Association.

[35] At the hearing we were provided with Family Court documentation that showed that X's application was ultimately struck out and ordered X to pay costs in the sum of \$3,136 to Daughter A.

[36] There was then a number of exchanges of correspondence between X and the Association.

### ***Allegations***

[37] The charge of “conduct unbecoming” arose on or around 15 April 2008, when in providing services to the client X obtained the client’s signature on documents purporting to revoke the existing EPOAs and appoint X as EPOA.

[38] The allegations and particulars were set out in the charge sheet.

[39] The Association alleges that X acted without taking all reasonable steps including failing to obtain an up-to-date assessment of the client’s capacity to revoke her existing EPOA and appoint X as EPOA in circumstances where X was aware or ought to have been aware that:

- (i) The client had a diagnosis of Alzheimer’s disease; and/or
- (ii) The client had been assessed as having some cognitive impairment on a Mini Mental State Examination around six months earlier; and/or
- (iii) The client had been described by Daughter B, from another city, as having memory loss” in a Family Court application dated 14 April 2008; and/or
- (iv) Daughter B from another city, in support of the Family Court application dated 14 April 2008 had sworn an affidavit that “there is no formal assessment that I am aware of to determine this matter of mental capacity/incapacity as it relates specifically to EPOAs’; and/or.
- (v) All reasonable steps should have been taken to discuss the proposed course of action with the daughter holding the existing EPOAs at the time; and/or
- (vi) An application by Daughter B from another city had been filed with the Family Court on 14 April 2008.

[40] Further allegations were made by the Association that

- (a) X was put on notice by the letter and medical report dated 18 April 2008 that the client may have signed the EPOAs without capacity.



- (b) X issued an order pursuant to the EPOA refusing to allow the daughter with the previous EPOAs to remove her mother from the day care centre
- (c) X swore an affidavit on or around 12 May 2008 stating that she held EPOAs for property and personal care and welfare for the client.
- (d) X acted in the interests of Daughter B from another city rather than in the welfare and interests of the client.

[41] Mr Parker on behalf of X submitted that X's acceptance of the unbecoming conduct charge was on the basis that X should have clarified the client's mental capacity at the time the new EPOAs were executed.

[42] Mr Parker also conceded that as the client's mental capacity was unclear at the time X should not have accepted the appointment.

[43] Mr Parker explained why the other particulars alleged should be disregarded by the Panel.

[44] In arriving at our decision the Panel has carefully and fully considered all that both counsel put to us along with the documents that were before us.

### ***Findings***

[45] X embarked on this course of action because Daughter B instructed X to act in that way. We are satisfied that in doing so X put themselves in a conflict situation. This occurred because X held themselves out as acting for and looking after the client's interests while at the same time trying to assist Daughter B achieve her aims.

[46] We are satisfied that X ought to have known that X was conflicted from the outset when the request was made for X to assist resolve a family dispute by assisting one party

against the other. By the time X met with the client X should have realised that there was a conflict and withdrawn. It appears to the Panel that X presented to third parties (i.e. the bank, the day care centre and the Family Court) that X was acting in the best interests of the client (and this may well have been the case) but at the same time X was furthering Daughter B's interests against the interests of Daughter A.

[47] We also find that X was aware or should have been aware that the client had a cognitive impairment at the time the EPOAs were signed and revoked.

[48] An EPOA has the potential to be a very powerful legal tool. Social worker appointees to EPOAs have a high standard of trust and confidence placed on them by vulnerable elderly people. A social worker ought to be very wary about accepting appointment to an EPOA without first ensuring that the donor has the necessary capacity.

[49] In this case one EPOA gave X the authority to immediately control the client's personal property and the other gave X control of the client's personal care and welfare if incapacitated. X also arranged for the revocation of the earlier EPOAs.

[50] Crucially, as far as the Panel is concerned X then proceeded to act on the EPOAs in her favour. X did this twice, initially on 15 and again on 16 April 2008. On 15 April X used the EPOA to access the client's bank records and become a signatory to the account.

[51] On 16 April X relied on the EPOA that only came into force when the client lacked mental capacity. On that day X instructed the day care centre where the client attended that the client was not to be removed from her day centre without either X's permission or the permission of the Police. This direction was to prevent the client from being removed from the day care centre by Daughter A.

[52] We are satisfied that when X gave this instruction X was relying on their opinion that the client lacked mental capacity and that the EPOA for personal care and welfare had come into force. Without this conclusion X's action may well have been unlawful.

[53] However X had no evidence to base the opinion that the client lacked mental capacity on 16 April when the client had allegedly exhibited mental capacity the day before. The Panel is of the view that this contradiction encapsulates all that was wrong with X's actions in this matter.

[54] Unbelievably X made the decision that the client's mental capacity had altered from the previous day without any medical evidence while knowing that the client did have a cognitive impairment.

[55] X's action and inaction in this regard was clearly unprofessional and wrong.

[56] When X became aware of the client's lack of mental capacity on 18 April 2008 she should have immediately sought to resolve the issue. Such resolution included her withdrawing as attorney. Instead X continued to maintain that the EPOAs were valid. We find X's action in this regard to be at the least misguided.

[57] We also find X's delay of about one month in making the application to the Family Court unsustainable. A professional social worker in the position that X put herself in ought to have given this matter the utmost priority and ensured that matters were filed promptly.

[58] As a consequence of the above matters we find that X's conduct was unbecoming of a social worker. Those actions reflect adversely on X's fitness to practice.

### ***Penalty***

[59] Mr Parker submitted that we impose no penalty on X and merely find the complaint proven.

[60] Mr Sherriff submitted that we impose a number of penalties on X.

[61] We find the complaint proven. We place the following conditions on X's membership:

1 The member is to undergo Remedial Supervision as follows:

This supervision is to reflect a "line management" and "case review" style and approach that will have, but not be limited to, a reflective and randomised auditing component that may effect and address issues that relate to X's whole client caseload.

The remedial supervisor to be appointed to this role shall be acceptable to the ANZASW Complaints Convenor and X.

This supervision will take place monthly for a period of two years. The remedial supervisor will meet with the external supervisor every six months and will also report to the Complaints' Convenor on a six monthly basis to confirm X has changed her practice appropriately to avoid any recurrence, and to advise the Association of the professional development X has undertaken in the areas referred to above.

2 The member is to undergo External Supervision as follows:

Remedial supervision is not expected to replace external supervision but rather to supplement it. External supervision is expected to continue on a monthly basis, with the supervisor meeting with the Complaints' Convenor and the remedial supervisor each six months as above.

3 Professional Development

X's future professional development should also include training concerning the new legislation relating to EPOAs, updating of assessment skills including mental health assessments, knowledge of professional boundaries, ethics, the implications of the Privacy Act and informed consent on X's social work practice.

The member to undergo such professional development training and/or supervision and/or mentoring as agreed for a two year period

4 The member undertakes ANZASW recertification within three months from the date of this decision.

5 The member is to pay compensation to the male complainant of \$500. This is a contribution towards that complainant's airfare costs.

6 The member is to pay costs of \$500 to the Association

Dated:

Jeff Goldstein

Graeme Warburton

Sharon Schwalger

Phil Clearwater

Sal Faid