

CITATION: *Legal Services Commissioner v Penny* [2015] QCAT 108

PARTIES: Legal Services Commissioner
(Applicant/Appellant)
v
Rhonda Carol Penny
(Respondent)

APPLICATION NUMBER: OCR424-12

MATTER TYPE: Occupational regulation matters

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Justice Thomas, President**

Assisted by:
Dr John Kees de Groot
Practitioner Panel Member

Ms Julie Cork
Lay Panel Member

DELIVERED ON: 10 April 2015

DELIVERED AT: Brisbane

ORDERS MADE:

1. The practitioner be publicly reprimanded.
2. A fine in the sum of \$1,500 be imposed upon the practitioner, to be paid within 30 days of the date of this order.
3. The respondent pay the applicant's costs fixed at \$2,500 to be paid within 30 days of the date of this order.

CATCHWORDS: PROFESSIONS AND TRADES – LEGAL PRACTITIONERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – UNSATISFACTORY PROFESSIONAL CONDUCT – where the respondent is charged with two charges of failing to maintain reasonable standards of competence and diligence – where the conduct occurred in the

course of arranging a power of attorney and a new will – where the respondent’s suspicions were raised as to her client’s capacity to make or sign the relevant documents – where the respondent sought no medical opinion, failed to read the documents to her client, failed to conduct interview in accordance with the “capacity guidelines”, failed to make written records of her conference and failed to keep a file – where the respondent admits that she failed to maintain the requisite standard - whether the respondent is guilty of unsatisfactory professional conduct – whether a pecuniary penalty should be imposed

Legal Profession Act 2007 (Qld) ss 6(1), 418, 462(5)(a)

Queensland Civil and Administrative Tribunal Act 2009 (Qld) s 32

Legal Services Commissioner v Comino [2011] QCAT 387

Legal Services Commissioner v de Brenni [2011] QCAT 340

Legal Services Commissioner v Ford [2008] LPT 12

Legal Services Commissioner v Madden [2008] QCA 301

Re Griffith (dec’d); Easter v Griffith & Ors (1995) 217 ALR 284

Thorpe v Fellowes Solicitors LLP [2011] EWHC 61 (QB)

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (“QCAT Act”).

REASONS FOR DECISION

The charges

- [1] The Legal Services Commissioner alleges that the following charges constitute unsatisfactory professional conduct on behalf of the respondent, Ms Rhonda Penny.

Charge 1

On 8 October 2008, Ms Penny failed to maintain reasonable standards of competence and diligence in relation to the preparation and execution of an enduring power of attorney of her client, Mr Kenneth Mew.

Charge 2

On 8 October 2008, Ms Penny failed to maintain reasonable standards of competence and diligence in relation to the preparation and execution of a will for Mr Mew.

Background

- [2] Ms Penny was the principal of Rhonda Penny Lawyers at the time of the conduct and currently practices in that capacity. Ms Penny is an Australian legal practitioner within the meaning of s 6(1) of the *Legal Profession Act 2007* (Qld) (“the Act”).
- [3] No evidence has been filed in these proceedings. Despite that fact, the parties have elected that the matter be heard on the papers based only upon the application filed on 21 December 2012, a response filed on 27 February 2013 and an amended application filed on 13 August 2013 (incorporating particulars as ordered by the tribunal) and submissions.
- [4] Ms Penny submits that:
- a) As the Legal Services Commissioner has led no evidence (testimonial or documentary) in support of the charges, it must be taken to rely only upon those facts alleged in the particulars to the charges which are admitted by Ms Penny.¹
 - b) Whilst the tribunal is not bound by the rules of evidence the tribunal ought not make findings for which there is no evidentiary basis.²
 - c) The Legal Services Commissioner bears the onus of establishing the charges and must do so having regard to the seriousness of the allegations made.³
- [5] Ms Penny is correct in the thrust of her submissions. Allegations of unsatisfactory professional conduct or professional misconduct are serious allegations which impact upon the reputation and livelihood of Ms Penny. In circumstances where no evidence is called, the case must proceed upon the basis of the facts alleged by the Legal Services Commissioner which are admitted by Ms Penny.
- [6] On that basis, the facts are as set out in the following paragraphs.
- [7] On 14 April 2003 Mr Mew executed an enduring power of attorney (the first power of attorney) which appointed Mr Mew’s granddaughter, Kerry Brammer and Brett Reguse as his attorneys for financial, personal and health matters.

¹ Respondent’s submissions filed 15 October 2013, paragraph 2.

² Respondent’s submissions filed 15 October 2013, paragraph 2.

³ Respondent’s submissions filed 15 October 2013, paragraph 2.

- [8] The first power of attorney was in force at all material times prior to 8 October 2008.
- [9] On 25 September 2008, an assessment by the Aged Care Assessment Team (ACAT) showed that Mr Mew had impaired short term memory, his dementia had progressed, and that Mr Mew was no longer orientated in time or place. Mr Mew's mini mental score was 14/30 which indicated moderate dementia.
- [10] Also on 25 September 2008, in a memory test conducted by ACAT, Mr Mew could not state the year but could state that it was September and that he was 85 years old.
- [11] On various dates between 1 September 2008 and 8 October 2008, Kerry Brammer instructed Ms Penny to prepare a new power of attorney on behalf of Mr Mew, appointing her as the sole attorney of Mr Mew. Kerry Brammer advised Ms Penny that Mr Mew could not come to her office as he was a little incontinent and he was embarrassed about it. Kerry Brammer also advised Ms Penny that Mr Mew was partially deaf.
- [12] Some time after 1:30pm on 8 October 2008, Ms Penny attended upon Mr Mew at his residence at Coochiemudlo in order to discuss and execute the enduring power of attorney and a will. Prior to that attendance, Ms Penny did not seek any medical opinion verifying Mr Mew's capacity to sign the enduring power of attorney or to make a will.
- [13] On 8 October 2008, when attending upon Mr Mew for the purpose of signing the enduring power of attorney and making the will, Ms Penny:
1. Knew Mr Mew was elderly.
 2. Had been told by Kerry Bramer that Mr Mew did not wish to attend at her office because he suffered from incontinence and was embarrassed.
 3. Had been told by Kerry Brammer that Mr Mew was partially deaf.
 4. Knew the request for the attendance was made by Kerry Brammer and not by Mr Mew.
 5. Knew Mr Mew appeared thinner and frailer than when Ms Penny had last seen him in 2003.
 6. Had no medical evidence about Mr Mew's condition.
 7. Knew the time taken in discussing the enduring power of attorney with Mr Mew was 5-10 minutes.
 8. Knew Mr Mew tired after approximately 20 minutes of discussion regarding the enduring power of attorney and the will.

9. As to the will, knew Mr Mew appeared uncertain about whether he wanted to make a change of bequeathing the taxi license to his grandchildren.
 10. As to the will, knew that upon asking Mr Mew twice about whether he wished to bequeath the taxi license to his grandchildren, Mr Mew just nodded his head on each occasion.
- [14] Ms Penny did not read the whole of the enduring power of attorney or the will to Mr Mew, nor did Ms Penny facilitate Mr Mew reading the whole of the documents himself.
- [15] Ms Penny did not undertake the interview with Mr Mew in accordance with the “capacity guidelines” for witnesses of enduring powers of attorney.
- [16] Ms Penny did not make any written record of the steps taken in assessing Mr Mew’s capacity to execute the enduring power of attorney.
- [17] Ms Penny did not keep a client file in relation to Mr Mew’s matter.

Allegations by the Legal Services Commissioner relating to the failure to maintain standards of competence and diligence

- [18] An order was made by the Tribunal which required that the Legal Services Commissioner provide further particulars. This order resulted in the Legal Services Commissioner filing an amended application.
- [19] In the result, dealing with both charges, it is asserted that Ms Penny failed to maintain reasonable standards of competence and diligence in that Ms Penny:
- a) As to the execution of the enduring power of attorney; prior to or at the time of her attendance on Mr Mew on 8 October 2008, failed to seek any medical opinion or information verifying Mr Mew’s capacity to sign the enduring power of attorney.
 - b) As to both the enduring power of attorney and the will; failed to read the whole of the document to Mr Mew and failed to facilitate Mr Mew in reading the whole document.
 - c) As to the enduring power of attorney; failed to undertake the interview with Mr Mew in accordance with the Queensland Law Society’s “capacity guidelines for witnesses of enduring powers of attorney”. (I understand that there are no such guidelines but I take the reference to be the guidelines published by the Public Guardian (formerly the Adult Guardian).
 - d) As to the enduring power of attorney and the will, failed to make any written record of the steps taken in assessing competence, including all questions and answers.

- e) As to the enduring power of attorney and the will, failed to keep a client file in relation to Mr Mew's matter.

Admissions

[20] As to charge 1 (concerning the enduring power of attorney), Ms Penny admits that she did not maintain reasonable standards of competence and diligence in relation to the execution of the power of attorney by:

- a) not reading the whole of the document to Mr Mew, nor facilitating Mr Mew reading the whole of the document;
- b) not undertaking the interview with Mr Mew in accordance with the "capacity guidelines for witnesses of enduring powers of attorney";
- c) not making any written record of the steps taken in assessing Mr Mew's capacity to execute the enduring power of attorney; and
- d) not keeping a file in relation to the matter.

[21] In relation to charge 2 (concerning the execution of the will), Ms Penny admits that she failed to maintain reasonable standards of competence and diligence in relation to the execution of the will by:

- a) failing to make any written record of the steps taken in assessing Mr Mew's capacity to execute the will; and
- b) not keeping a client file in relation to Mr Mew's matter.

Failure to seek any medical opinion or information verifying Mr Mew's capacity to sign the enduring power of attorney

[22] Originally an allegation was made concerning a failure to seek medical opinion or information verifying Mr Mew's capacity both with respect to the enduring power of attorney and the will. However, the allegation concerning the will was withdrawn when the amended disciplinary proceeding was filed on 15 August 2013.

[23] In Ms Penny's submissions, it is suggested that the allegation is that the failure occurred before the interview on 8 October 2008. The allegation encompasses the time "prior to or at the time of" the attendance.

[24] The question which arises with respect to this issue is whether sufficient indicia were present which would have caused a competent legal practitioner to be sufficiently concerned as to capacity so as to have required a medical opinion or sought information.

[25] It is common ground that no medical opinion was sought.

[26] By reference to the agreed facts, the possible indicia were:

- a) Mr Mew was elderly.

- b) Mr Mew suffered incontinence and was therefore unable to attend at Ms Penny's premises.
- c) Mr Mew was partially deaf.
- d) Mr Mew appeared thinner and frailer than when Ms Penny had seen him 5 years before in 2003.

[27] There was also an admission by Ms Penny that Mr Mew's physical appearance aroused her suspicions during the interview, but that admission goes on: "those suspicions were dispelled by her observation of him during the attendance".⁴

[28] It is the duty of the legal practitioner acting as a witness to an enduring power of attorney to take adequate steps so as to be satisfied that the client has sufficient capacity to execute the document. The steps which should be taken by the legal practitioner will vary depending upon the circumstances of each individual case. Where more indicia of a lack of capacity are present, a competent legal practitioner would be expected to make a higher level of enquiry including, possibly, suggesting that medical opinion be obtained.

[29] A client's advancing years are not, of themselves, an indication of lack of capacity. Nor are conditions such as frailty or deafness. It follows that these conditions would not necessarily, without more, mean that the competent legal practitioner should make further enquiries, including, possibly, seeking a medical opinion.

[30] It is appropriate to note the remarks of Sharp J in *Thorpe v Fellowes Solicitors LLP*⁵, where her Honour said:

"... there is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary."

[31] In the circumstances as agreed, without further evidence, the matters alleged against Ms Penny as to the enduring power of attorney and in relation to the need to seek medical opinion are not, in my opinion, sufficient to establish that by not seeking medical opinion Ms Penny's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

[32] As to the allegation that Ms Penny failed to seek "information", no details of this allegation have been provided and Ms Penny asserts that any

⁴ Response filed 27 February 2013, paragraph 3(d)(iii).

⁵ [2011] EWHC 61 (QB) at [77].

suspicions which were held were dispelled by observations during the conference.⁶

- [33] In the absence of further factors and without further evidence, the matters alleged against Ms Penny as to the enduring power of attorney in relation to seeking information are not, in my opinion, sufficient to establish that Ms Penny's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

Balance of the allegations

- [34] As to the balance of the allegations, Ms Penny has admitted that she did not maintain reasonable standards of competence and diligence. However, it is necessary for the Tribunal to come to a view as to each aspect.

CHARGE 1

Failure to read the whole of the document or facilitate Mr Mew in reading the whole of the document

- [35] It is the duty of the legal practitioner to take steps to ensure that the client understands the nature and effect of the document being executed.
- [36] This duty may not necessarily require that the client read every word of a document (word by word) or have every word of the document read by the practitioner to the client, particularly in the "boiler plate", more legalistic, sections. Indeed, physically reading word by word to a client, especially an elderly client, may be counterproductive. It is the duty of the practitioner to explain the documents to the client in sufficient detail so as to ensure that the client understands what is being executed.
- [37] The Tribunal takes the admission referred to in paragraph [20](a) to be of the effect that this process was not followed, and so the meaning of the document was not adequately explained to Mr Mew.
- [38] In those circumstances, Ms Penny did not maintain reasonable standards of competence and diligence.

Capacity guidelines for witnesses of enduring powers of attorney issued by the Public Guardian (formerly the Adult Guardian)

- [39] The guidelines set out important methodologies which assist in ensuring that the client is aware of the meaning of the document.
- [40] In the judgment of Fryberg J in *Legal Services Commissioner v Ford*,⁷ his Honour considered that a failure to undertake an interview in accordance with those guidelines was one of the four findings which, together,

⁶ Response filed 27 February 2013, paragraph 3(d)(iii).

⁷ [2008] LPT 12.

satisfied him that the practitioner in the circumstances of that case was guilty of unsatisfactory professional conduct.

- [41] I do not take his Honour's findings to suggest that in every case a practitioner must follow those guidelines. The circumstances of each case will determine what is expected of a reasonably competent legal practitioner. For example, in the case of a person where no "indicia" are present and in obvious total command of her or his affairs, how a practitioner ensures there is the necessary capacity will be very different from the case where a practitioner is called on to take instructions from an elderly, frail and hospitalised client.
- [42] In every instance the practitioner must ensure a client understands the nature and effect of the document.
- [43] I take Ms Penny's admission referred to [20](b) as accepting that this was a case where a general following of the guidelines was appropriate, because of the circumstances that presented at the time.
- [44] The factors described are such that the practitioner should have followed the guidelines.
- [45] In those circumstances, I find that Ms Penny did not maintain reasonable standards of competence and diligence.

Written records of the steps taken in assessing competence including all questions and answers

- [46] As the guidelines published by the Public Guardian reflect, when assessing competence, it is prudent to be prepared for any challenges to the assessment.⁸ The practitioner is the best source of first hand independent evidence. Good practice is to make a written record of the steps taken in assessing competence (including questions asked and answers given).
- [47] It is usual and sound practice for a legal practitioner to maintain a record of attendances on a client. What is expected in this regard will depend on the circumstances and nature of the attendance and, again, it is a matter of degree. The greater the concern about capacity, the greater the desirability of the practitioner keeping detailed notes.
- [48] Ms Penny admits that Mr Mew's physical appearance raised her suspicions as to problems with capacity but asserts that those suspicions were dispelled by her observation of Mr Mew during the attendance. Yet, in those circumstances Ms Penny made no notes. In the absence of medical opinion, when the practitioner takes instructions for an enduring power of attorney, the practitioner is the professional in the best position to independently assess the capacity of the client - the legal practitioner's evidence is likely to be of central importance. In the circumstances, an

⁸ "Capacity Guidelines for Witnesses of enduring powers of attorney" issued by the Public Guardian, p 3.

attendance record should have been kept. Ms Penny has admitted that her failure to prepare detailed notes is conduct that falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

- [49] I find that Ms Penny's conduct in failing to prepare to detailed notes is conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.

Failure to maintain a file

- [50] A client is entitled to expect of a legal practitioner that, where the practitioner's notes or documents may be important in the context of the services provided by the legal practitioner, a file will be created where these notes and documents are maintained.
- [51] The failure to maintain a file and with it, the relevant notes, falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.
- [52] Again, Ms Penny rightly concedes that she did not maintain reasonable standards of competence and diligence in not keeping a client file.
- [53] In the above circumstances in relation to charge 1 the Tribunal finds that the conduct of the practitioner fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner as defined in s 418 of the *Legal Profession Act 2007* (Qld).

CHARGE 2

Failure to make an appropriate record of the steps taken in assessing Mr Mew's capacity to execute the will.

- [54] I refer to my earlier remarks at [46]-[48] regarding records of attendances that might be expected.
- [55] On this issue I note that Ms Penny's admission to the effect that she failed to make an appropriate record of her attendance refers specifically to failing to record "*the steps taken in assessing the client's capacity to execute the will*".
- [56] It is the duty of a legal practitioner to establish a sufficient method of communication with a client so that the solicitor is able to be satisfied that the client is providing coherent instructions. One aspect of this will be by observation of the person during the conference and engaging the person in discussion, asking questions which require the client to respond in answers beyond just 'yes' or 'no', commonly called open ended questions.
- [57] In the circumstances, the absence of any attendance record on file falls short of the reasonable standards of competence and diligence expected

and the practitioner has admitted this. It was also asserted that Ms Penny failed to maintain reasonable standards of competence and diligence in that Ms Penny failed to read the whole of the document to Mr Mew and failed to facilitate Mr Mew in reading the whole of the document.

- [58] It is the duty of the practitioner to take steps to ensure that the client understands the nature and effect of the document which the client is executing.
- [59] As I mentioned in relation to the enduring power of attorney, the duty may not necessarily require that the client read each and every word of the document (word by word or have every word of the document read by the practitioner to the client), especially the more legalistic sections. Such an approach may, especially with an elderly client, be counter productive. As I have said in relation to the enduring power of attorney, the duty of the practitioner is to explain the document to the client in sufficient and appropriate detail so as to ensure that the client understands what is being executed.
- [60] In this case, the agreed evidence was that Mr Mew appeared uncertain about whether he wanted to make a change to bequeathing the taxi license to his grandchildren and, in relation to that issue responded by nodding on each occasion the matter was raised. The agreed facts also suggest that the discussion in relation to the will took no more than 10 minutes.
- [61] In most circumstances, Ms Penny's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably qualified Australian Legal Practitioner.

Penalty

- [62] Penalties in disciplinary matters are imposed for the protection of the community, rather than as punishment, and, in deciding upon a penalty, the Tribunal has regard to protection of the public as well as maintenance of appropriate professional standards.⁹
- [63] The Legal Services Commissioner has drawn attention to the fact that in *Comino*¹⁰ the practitioner was fined \$2,000, but points to the fact that in the current case, the practitioner's conduct was worse because of the fact that no client file was maintained.
- [64] In the case of *de Brenni*¹¹ the fine imposed was in the sum of \$1,000 and in the case of *Ford*¹² there was a public reprimand, but no pecuniary penalty was imposed. In that case, Fryberg J suggested it was in the

⁹ *Legal Services Commissioner v Madden* (No 2) [2008] QCA 301.

¹⁰ [2011] QCAT 387.

¹¹ [2011] QCAT 340.

¹² [2008] LPT 12.

nature of a test case, and that the position with respect to the fine might alter in the future when practitioners were warned by his decision.¹³

- [65] The Legal Services Commissioner submits that the orders should be that the practitioner be publicly reprimanded and a pecuniary penalty of between \$2,000 and \$4,000 be paid within 30 days of the date of the order.
- [66] Ms Penny accepts that she should be publicly reprimanded but submits that the circumstances are different from those of the earlier cases, and so no penalty should be imposed.
- [67] Ms Penny points to the fact that in the case of *Ford*, Fryberg J acknowledged the case to be a test case and so imposed no penalty. *Ford*, it is submitted, had been the first case to decide that a failure to follow the capacity guidelines would constitute unsatisfactory professional conduct, with the decision being delivered on 22 August 2008, less than 2 months before the conduct the subject of these proceedings.
- [68] Ms Penny also refers to the fact that, in each of the cases relied upon, the findings were that the practitioners should have been alerted to the indicia; whereas, in the current case, the Tribunal has found that, on the state of the admitted facts, the same position does not apply.
- [69] The submissions made by Ms Penny have some merit.
- [70] However, Ms Penny has, on her own case, conceded that her suspicions were aroused to possible problems with capacity and so, regardless of the requirements of guidelines, should have maintained a file note and, in particular, should have maintained a file as to her client's matter. Ms Penny should also have taken more care in explaining the contents of each of the documents to Mr Mew.
- [71] In the circumstances, the Tribunal orders that:
- a) The practitioner be publicly reprimanded.
 - b) A fine in the sum of \$1,500 be imposed upon the practitioner to be paid within 30 days of the date of this order.

Costs

- [72] The Legal Services Commissioner has sought an order that Ms Penny pay the Legal Services Commissioner's costs fixed in the amount of \$2,500 pursuant to s 462(5)(a) of the *Legal Profession Act 2007 (Qld)*. Ms Penny accepts that she should pay the Legal Services Commissioner's costs and agrees to those costs being fixed at \$2,500 to be paid within 30 days.

¹³ Ibid [30], [40].

[73] The Tribunal orders that Ms Penny pay the Legal Services Commissioner's costs fixed at \$2,500 to be paid within 30 days of the date of this order.