

**JURISDICTION** : STATE ADMINISTRATIVE TRIBUNAL

**STREAM** : VOCATIONAL REGULATION

**ACT** : LEGAL PRACTICE ACT 2003 (WA)

**CITATION** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE and CLARK [2006] WASAT 119

**MEMBER** : JUSTICE M L BARKER (PRESIDENT)  
MR N MCKERRACHER QC (SENIOR SESSIONAL  
MEMBER)  
MS B HOLLAND (SESSIONAL MEMBER)

**HEARD** : 2 AND 3 FEBRUARY 2006

**DELIVERED** : 12 MAY 2006

**FILE NO/S** : VR 311 of 2005

**BETWEEN** : LEGAL PRACTITIONERS COMPLAINTS  
COMMITTEE  
Applicant

AND

ALBERT ERNEST CLARK  
Respondent

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*Catchwords:*

Legal Practice - Legal Practitioners - *Legal Practice Act 2003 (WA)* –  
Unsatisfactory Conduct - Conflict of interest – Whether substantial financial  
interest in client's transaction – Whether failure to ensure client was  
independently advised by fully briefed independent solicitor

*Legislation:*

*Administration Act 1903*(WA), s 71

*Guardianship and Administration Act 1990* (WA), s 77(1)(a)

*Legal Practice Act 2003* (WA), s 3, s 185

*Mental Health Act 1996* (WA)

*Supreme Court Act 1935* (WA), s 18

*Result:*

Finding that practitioner guilty of unsatisfactory conduct.

*Category:* A

**Representation:**

*Counsel:*

Applicant : Mr G H Murphy SC and Ms C Coombs  
Respondent : Mr R I Viner QC and Mr A Auguste

*Solicitors:*

Applicant : Legal Practitioners Complaints Committee  
Respondent : Godfrey Virtue & Co

**Case(s) referred to in decision(s):**

Barry v Butlin (1838) 2 Moo PCC 480

Bester v Perpetual Trustee Co Ltd [1970] 3 NSW 30

Breen v Williams (1996) 186 CLR 71

Bullock v Lloyds Bank Ltd and anor [1954] 3 All ER 726

Clearson v Teague (1851) 15 Jur 1016

Commonwealth Bank of Australia and anor v Smith and anor (1991) 42 FCR  
390

Garnett-Botfield v Garnett-Botfield [1901] P 335

Johnson v Staniforth and Ors [2001] WASC 331

Johnson v Staniforth and Ors [2002] WASCA 97

Kyle v Legal Practitioners Complaints Committee (1999) 21 WAR 56

Maguire v Makaronis and anor (1997) 188 CLR 449

Nock v Austin and anor (1918) 25 CLR 519  
Parker v Duncan (1890) 62 LT 642  
Permanent Trustee Co of New South Wales Ltd v Bridgewater [1936] 3 All ER  
501  
Powell v Powell [1900] 1 Ch 243  
Re a Solicitor (1975) 1 QB 475; [1974] 3All ER 853  
Re Austin's Estate (1929) 73 Sol Jo 545  
Re The Full Board of the Guardianship and Administration Board [2003]  
WASCA 268  
Wintle v Nye [1959] 1 All ER 552  
Worth v Clashom et al (1952) 86 CLR 439

**Case(s) also cited:**

Craig v Lamourex [1920] AC 349  
D'Alessandro v Legal Practitioner's Complaints Committee (Unreported, Full  
Court of WA, 25 August 2995, DC 95D4091)  
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41  
Kennedy v The Council of the Incorporated Law Institute of New South Wales  
(1939) 13 ALJR 563  
Low v Guthrie [1909] AC 278  
Pilmer v Duke Group Ltd (2001) 207 CLR 165

**REASONS FOR DECISION OF THE TRIBUNAL:**

*Summary of Tribunal's decision*

1           The Legal Practitioners Complaints Committee asserted that the practitioner was guilty of unsatisfactory conduct in February 2004 when he acted for an elderly and vulnerable client in a position of conflict of interest by preparing and arranging for the execution of a codicil to her will. Under the codicil, the practitioner and his wife were to receive a gift of \$50 000, with priority of payment ahead of other gifts.

2           The practitioner took steps to attempt to arrange for the client to be independently advised by another practitioner in relation to the codicil. In taking these steps, it was clear that the practitioner understood that he had a duty to ensure that the client received independent advice. However, at a time when an independent solicitor had been engaged, had consulted with the client and was partly through the process of giving independent advice, new information came to hand concerning the relationship between the practitioner and the client which caused the independent practitioner to cease acting in the matter. It was clear at that stage that the independent practitioner had not been able to complete the task of giving the independent advice to the client.

3           Notwithstanding that there was no basis on which the practitioner could have been satisfied that independent advice from a fully informed independent practitioner had been given to the client, he nevertheless proceeded to arrange the execution of the codicil of the client soon after the withdrawal of the independent practitioner. For this reason, the Tribunal concluded that the practitioner's conduct constituted unsatisfactory conduct.

*Preliminary matters*

4           The substantial hearing of a complaint made by the Legal Practitioners' Complaints Committee (the Committee) against the practitioner followed two earlier preliminary applications on the part of the practitioner. The first was to strike out the reference as disclosing no proper complaint against the practitioner. That application was dismissed. The second application was to adjourn the hearing until after the resolution of complaints that were made by the practitioner against third parties and against the Committee itself. That application was also dismissed.

***The complaint***

5           The Committee alleges that the practitioner was guilty of unsatisfactory conduct in around February 2004, by acting for an elderly and vulnerable client in conflict of interest, in preparing and arranging for the execution of a codicil to the client's will under which the practitioner and his wife would receive a gift of \$50 000 with certain priorities of payment.

6           Unsatisfactory conduct is defined by s 3 of the *Legal Practice Act 2003* (WA) to include:-

- "(a) unprofessional conduct on the part of a legal practitioner, whether occurring before or after admission as a legal practitioner;
- (b) illegal conduct on the part of a legal practitioner, whether occurring before or after admission as a legal practitioner;
- (c) neglect, or undue delay, in the course of legal practice;
- (d) a contravention of this Act, the regulations or the rules; and
- (e) conduct occurring in connection with legal practice that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner."

***Facts***

7           The particulars of the complaint, most of which are not in issue, establish a chronology leading up to the execution of the codicil. The main differences between the Committee and the practitioner at the hearing were on matters of emphasis, although there are additional factual matters on which the practitioner relies in his defence and to explain why events took place in the manner they did.

8           The client had engaged the services of the practitioner in and from at least September 2002, when she was aged approximately ninety-seven years of age.

9           From that date until November 2002 the client was, to the knowledge of the practitioner, an involuntary patient at the Selby Lodge Psychiatry Unit for the Aged (Selby Lodge), having been diagnosed with a senile

paranoid disorder. Shortly after being involuntarily admitted to Selby Lodge under the *Mental Health Act 1996* (WA), the client requested the practitioner to assist in obtaining her discharge and also to take instructions to amend her will by way of codicil.

10           There was a history of involvement of the practitioner on behalf of the client during and after this time at Selby Lodge. Part of his actions on the client's behalf involved the drawing up of an enduring power of attorney (EPA), which the client executed, with the practitioner as donee of the power.

11           There was also much evidence, most of it documentary, in relation to exchanges between the practitioner and the medical practitioners responsible for the treatment of the client while she was in Selby Lodge, and also after her release. These included expressions of opinion by those practitioners as to the absence of testamentary capacity on the part of the client and absence of her ability to give the EPA. On both matters the practitioner took issue with the views of these professionals.

12           There was also evidence in relation to the practitioner's dealings with the office of the Public Trustee after the Public Trustee was appointed by order of the former Guardianship and Administration Board on her release from Selby Lodge, to administer the affairs of the client pursuant to the *Guardianship and Administration Act 1990* (WA).

13           Again, while this material was all background, the central issue of the complaint related to the circumstances in which a codicil was prepared and executed in February 2004 by the client in favour of, amongst others, the practitioner. The proposal to do so had emerged in early 2003 and the practitioner was conscious of the need, amongst other things, to ascertain what views were held as to the client's testamentary capacity before permitting her to execute such a codicil. He duly made inquiry on that topic from the Public Trustee.

14           On 3 June 2003, the practitioner received a fax from the Public Trustee advising that after discussions with Dr Galhenage, one of the psychiatrists treating the client, a medical report as to her capacity would not be released to the practitioner. He was informed that the medical team thought that it was not in the client's interests to release the report, and that if the client obtained a second opinion, the Public Trustee could not agree to pay the costs of obtaining the second opinion, unless it approved the choice of medical practitioner and was provided with a copy of the report. The Public Trustee requested a copy of any proposed codicil.

15 On the same date the client attended on Dr Piiro, psychiatrist, for a psychiatric examination. The practitioner had arranged this. On 5 June 2003, the practitioner received a telephone call from Dr Piiro, who stated that her report would be available the following week but the position did not appear to be good in terms of the client's testamentary capacity. On 9 June 2003, Dr Piiro forwarded her report regarding the client to the practitioner. The report concluded that the client lacked testamentary capacity and that Dr Piiro did not believe that the client should be relieved of her affairs by the Public Trustee.

16 The practitioner, accompanied by his wife, attended the client at her home on 18 June 2003. The client reiterated an earlier stated intention to make a gift to the practitioner of \$50 000 and said that she would like to increase it to \$80 000. The practitioner agreed to accept \$50 000. The client also repeated a proposed gift of \$80 000 to another major beneficiary (who will be referred to as Mrs X). On 2 July 2003, the practitioner again attended upon the client, accompanied by his wife. The client agreed to see Dr Bronwyn Bennett, who was also Mrs X's doctor. On 11 July 2003, the practitioner telephoned Dr Bronwyn Bennett and asked if she would see the client.

17 On 14 July 2003, the practitioner attended upon the client, again accompanied by his wife, and discussed a codicil to the client's will. Then, on about 16 July 2003, the practitioner received a letter from the client. The letter referred to the practitioner as being in charge of her "financial affairs", and requested changes to her will which on this occasion did not include the bequest to the practitioner or his wife.

18 Subsequently, on about 3 August 2003, the practitioner attended upon the client, again accompanied by his wife, and discussed changes to the client's will, including a gift to the practitioner of \$50 000.

19 On 31 August 2003, the practitioner attended upon the client, accompanied by his wife, and provided her with a draft codicil which included a gift to the practitioner and his wife of \$50 000.

20 By this time the Public Trustee was becoming concerned about the practitioner's conduct and drew its concerns to the attention of the Committee. By letter dated 8 October 2003, the Committee sent to the practitioner a copy of a letter dated 15 September 2003, from the Public Trustee to the Committee, in which the Public Trustee complained of the conduct of the practitioner in pursuing changes to the client's will which

would benefit the practitioner, in light of the medical advice that the client lacked testamentary capacity.

21 On 10 and 28 October 2003, and 20 January 2004, the practitioner again attended upon the client at her home, accompanied by his wife, and discussed, among other things, the proposed codicil to her will.

22 Then, in late November 2003, the practitioner telephoned Mr Michael Sutherland, solicitor asking whether he would be prepared to attend upon the client to independently advise her regarding the codicil. Mr Sutherland agreed to do so and the practitioner faxed Mr Sutherland a copy of the report of Dr Piirto (mentioned earlier) and asked him to note page 5. Reference to this content will be made below.

23 The practitioner also sent to Mr Sutherland copies of the will and the draft codicil, together with various authorities, on about 15 December 2003. The practitioner did not forward to Mr Sutherland a copy of the Public Trustee's letter dated 15 September 2003.

24 On about 7 February 2004, the practitioner, accompanied by his wife and Mr Sutherland, attended upon the client at her home. Mr Sutherland took instructions from the client whilst the practitioner and his wife went out to the pool area. The practitioner provided Mr Sutherland with Dr Bennett's telephone number, name and address.

25 On about 10 February 2004, the Committee forwarded to the practitioner a copy of a letter dated 4 December 2003 from the Public Trustee to the Committee, which stated, amongst other things, that the client had telephoned the Public Trustee to say "that she is very concerned about the practitioner's actions and that he is no longer a friend and [she] cannot trust him any more".

26 The practitioner immediately faxed a copy of the Public Trustee's letter dated 4 December 2003 to Mr Sutherland. Mr Sutherland, on receipt of this information, then declined to act further and sent a letter dated 13 February 2004 to Dr Bennett advising that he would not be drafting a new will for the client.

27 The practitioner then attended upon the client at her home on 21 and 22 February 2004, accompanied by his wife. He discussed the proposed codicil, including a gift of \$50 000 to the practitioner, with her. In the practitioner's presence, the client denied making the complaints to the Public Trustee that are set out in the Public Trustee's letter dated 4 December 2003.

28 On 23 February 2004, the practitioner telephoned Dr Bennett's surgery and made an appointment for the client to see Dr Bennett at 9:00am, Thursday, 26 February 2004.

29 On 26 February 2004, the practitioner, accompanied by his wife, collected the client at 8:45am and drove her to Dr Bennett's surgery in Cambridge Street. Dr Bennett read out the codicil to the client and the client executed the codicil. Dr Bennett and her receptionist witnessed the client's execution of the codicil.

30 By the codicil to her will, which had been prepared by the practitioner and was executed by the client on 26 February 2004, the client provided that upon her death a gift of \$50 000 should be paid to the practitioner and his wife as joint tenants, such gift to be paid in priority to all other gifts and legacies, save for the gift to Mrs X, and to two other beneficiaries, with which it was to rank in equal priority.

#### *A solicitor's fiduciary duties*

31 A solicitor owes fiduciary duties to his or her client: *Maguire v Makaronis and anor* (1997) 188 CLR 449 at 463. They include a duty not to put himself or herself in a position where duty and interest may conflict: *Breen v Williams* (1996) 186 CLR 71 at 93 and 113.

32 In such circumstances, a fiduciary may only avoid a finding of breach of fiduciary duty by showing that the client gave his or her fully informed consent to the solicitor continuing to act. Where the solicitor has a pecuniary interest in a transaction in which a client is involved, informed consent involves the solicitor ensuring that the client obtains independent advice: *Maguire v Makaronis* at 466. This particular principle was a key one in these proceedings, as a question of both fact and law.

33 It was common ground between the parties that a solicitor who takes a substantial benefit under a client's will is in a position where interest conflicts with duty, and should insist that the client takes independent legal advice: *Re a Solicitor* (1975) 1 QB 475; [1974] 3All ER 853.

34 In *Commonwealth Bank of Australia and anor v Smith and anor* (1991) 42 FCR 390 at 393 the Full Federal Court said:

"It frequently is said that the fiduciary will be absolved by the giving of fully informed consent to the existence of what otherwise would be a conflict. There is no precise formula

which will determine in all cases if fully informed consent has been given; it is a question of fact in all the circumstances of each case: In *re Pauling's Settlement Trusts* [1962] 1 WLR 86 at 108 per Wilberforce J, whose judgment on this issue was untouched by the Court of Appeal, [1964] Ch 303. Turner LJ had spoken to the same effect in *Life Association of Scotland v Siddal* (1861) 3 De GF and J 58 at 73, 45 ER 800 at 806, and also had there said that the question was whether the party had been fully informed of his rights 'and of all the material facts and circumstances of the case'. The circumstances of the case may include (as they do here) the importance of obtaining independent and skilled advice from other parties."

***The nature of "unprofessional conduct"***

35 "Unprofessional conduct" is conduct which would reasonably be regarded as disgraceful or dishonourable by practitioners of good repute and competence, or which falls below, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute: *Kyle v Legal Practitioners Complaints Committee* (1999) 21 WAR 56 at 71-72. "Unsatisfactory conduct", as noted earlier, includes "unprofessional conduct": *Legal Practice Act 2003*, s 3.

36 For the practitioner, it was submitted that the disciplinary function is different from the judicial function of a court considering a solicitor's fiduciary obligation to a client; and that the former is not necessarily answered by the same considerations as the latter. The Tribunal accepts that submission.

37 In disciplinary proceedings, "the real question is what do right minded members of the profession do" in the particular circumstances under consideration: Lord Widgery CJ in *Re a Solicitor* at 478.

***Jurisdictional Submission***

38 At the commencement of the hearing, a submission was made for the practitioner that the Tribunal did not have jurisdiction to determine the testamentary capacity of the client and therefore the validity of the codicil. It was submitted that testamentary dispositions of the client should not be the subject of an inquiry during her lifetime. Reliance was placed on *Nock v Austin and anor* (1918) 25 CLR 519; and *Worth v Clashom et al* (1952) 86 CLR 439. It was submitted that the Tribunal did not have the jurisdiction to determine the matter while the client remained alive and the

validity of the codicil had not been the subject of inquiry by the Supreme Court. Reliance was placed on s 71 of the *Administration Act 1903* (WA) and s 18 of the *Supreme Court Act 1935* (WA).

39 The Tribunal did not accept the submission that it did not have jurisdiction to hear the complaint. The Tribunal made it clear that it was not intending to rule on the validity of the codicil or to rule on the mental capacity of the client. It has not done so.

40 Resolution of the complaint did not, in the view of the Tribunal, require determination of either of those matters. The only inquiry for the Tribunal was whether or not, pursuant to s 185 of the *Legal Practice Act 2003*, the practitioner was guilty of "unsatisfactory conduct".

41 The Tribunal also observed in passing that s 71 of the *Administration Act 1903* is directed to the will or codicil of a deceased person and is to prevent documents being accorded the evidentiary status of a valid testamentary instrument in legal proceedings after the person's death, until it has been duly authenticated and proven. There was no evidence that the client was deceased and the provision had no application to these proceedings.

### ***The practitioner's case***

42 The evidence for the practitioner is referred to in more detail below, but in substance the practitioner:

- denied that he was guilty of unsatisfactory conduct in around February 2004 or at all;
- admitted the client was elderly;
- denied that she was vulnerable;
- said further that if the client was vulnerable she was not exploited by him;
- denied there was a conflict of interest and stated further that at all material times the client made it abundantly clear she wished to benefit him;
- said further that the client was independently advised by Mr Michael Sutherland, solicitor, and independently examined by Dr Piirto and Dr Bennett prior to her executing the codicil on 26 February 2004;
- admitted the client made provision for a gift of \$50 000 to him and his wife;

- admitted that there were certain priorities of payment and says further that the said priorities included three other beneficiaries equally.

43 The practitioner at the time (and, as the Tribunal understands the position, still considers) that it was appropriate, having regard to all the circumstances and in order to comply with the insistent wishes of the client, to proceed with the execution of the codicil because -

- Mr Sutherland had taken her instructions independently which did not differ from the instructions given to the practitioner;
- The codicil basically set out those instructions;
- The client's own doctor put her through a "mini mental status examination" in which the client scored twenty-nine out of thirty;
- The client's own doctor read the codicil over to her and was satisfied that the client knew and understood what she was doing;
- The client had mentioned to Dr Piirto that she intended to benefit the practitioner in her codicil;
- The codicil was executed and then witnessed by Dr Bennett and her receptionist;
- Since January 2003 the client had been consistent with her instructions;
- The attestation clause in the codicil reads as follows -

"SIGNED BY THE SAID client as a Codicil to her Will which bears the date the 14[th] day of March 2001 the same having been previously read over to her by Dr Bronwyn Bennett the undersigned when the said client seemed thoroughly to understand the same and approved of its contents in the presence of us present at the same time who at the request and in the presence of the client and in the presence of each other have hereunto subscribed our names as witnesses";

- The practitioner emphasised that he saw the client on an almost weekly basis and was able to judge her moods;
- On most occasions she was quite lucid;
- So far as was known to the practitioner, neither the Public Trustee nor the Solicitor for the Public Trustee saw the client at any time;

- As a matter of law, as declared by the Full Court of the Supreme Court of Western Australia in *Re The Full Board of the Guardianship and Administration Board* (2003) WASCA 268 on 13 November 2003, the client was entitled to execute the new codicil notwithstanding that her affairs were placed under administration under the *Guardianship and Administration Act 1990* (WA). The Full Court ruled unanimously that s 77(1)(a) of the *Guardianship and Administration Act 1990* had no application whatsoever to testamentary dispositions.

### *The Committee's case*

44 Evidence for the Committee was largely constituted by tendering documents to establish the chronology outlined above.

45 The client, who was one hundred years of age at the time of the hearing, was not called to give evidence and the only other witnesses called by the Committee were Mr Mark Smedley and Mr Gary Bridges, each of them being trust managers with the Public Trust Office.

46 Mr Bridges in particular, outlined the circumstances under which, by an order of the former Guardianship and Administration Board, the Public Trustee was appointed plenary administrator of the financial affairs of the client on 21 October 2002. Mr Bridges managed those affairs until mid-July 2004. On 9 April 2003, he received a report from consultant psychiatrist, Dr DPC Galhenage, in which Dr Galhenage expressed his opinion that the client did not exhibit sound mind, memory and understanding that would allow her to make a valid will and that she did not have testamentary capacity.

47 Mr Bridges also gave evidence in relation to two telephone messages that appeared to have been left on his voice mail by the client who seemed very upset and was making allegations regarding the practitioner, saying she did not like or trust the practitioner, and that although he had been saying that he had been helping her, she did not know how. She was clearly seeking the assistance of Mr Bridges who she repeatedly described as being a very good friend to her.

48 The Tribunal accepts the evidence of Mr Bridges and Mr Smedley. In relation to the messages, it is unnecessary in the circumstances for the Tribunal to determine whether those messages were in fact left by the client but the Tribunal notes there has certainly been a documented history - on any view of the facts - of some elements of variability on the part of the client as to her attitude to and intentions towards the practitioner.

Much of that history was known to the practitioner as at the date of execution of the codicil. In making this observation, the Tribunal does not reach any conclusion as to the actual capacity of the client when she made the codicil. One such example is her typed letter to the practitioner, referred to earlier, in which she omitted on that occasion to refer to the bequest to him and his wife. Other examples may be found in some of her responses to questions raised in an interview by Mr Monaco, Solicitor, to which further reference appears below.

*Evidence for the Practitioner*

49           The practitioner gave evidence by a lengthy witness statement to which a little oral evidence was added, and through cross-examination. In large measure his evidence served to expand upon the chronology relied upon by the Committee.

50           Now aged seventy-five, his legal career started in October 1955 in Kitwe, Zambia, which was then Northern Rhodesia. He was employed as a managing clerk and, after passing the preliminary examination of the Law Society of England, entered into Articles of Clerkship, then attended the College of Law, Guildford, Surrey, for six months in 1967 and sat for the balance of the English Law Society's final exams in London in August 1967. He was thereafter admitted to the High Court of Zambia, as it then was, as a barrister and solicitor on 30 October 1967.

51           In March 1971, the practitioner, his wife and three young daughters, emigrated to Perth. He commenced work for a short period with a Perth firm in 1972 and subsequently purchased a practice. He continued practice in Perth until December 1974 when he was appointed a Stipendiary Magistrate and posted to Kalgoorlie where he served until December 1977. From there he was transferred to Narrogin and resigned to return to private practice in early 1978. He discontinued regular practice in 1995, travelled for a year and a half with his wife and has since then practised "very much part time", mainly for good clients who he visits rather than sees at his own home.

52           The practitioner has known the client who had engaged his services since prior to 1995 with instructions mainly in regard to her will requirements and also concerning trouble she was experiencing with neighbours.

53           Throughout the proceedings the practitioner emphasised that he has never had difficulty obtaining instructions from the client whose requirements of him were always precise and to the point and he has never

had cause to have any doubt at all about her mental capacity in giving him instructions.

54 On 26 April 1999, the client visited the practitioner with instructions to draw her will. The instructions were reasonably detailed and the will was drawn and executed on 12 March 1999. For these and all subsequent services, it appears that the practitioner rendered accounts that were paid, he says promptly, and without complaint and no part of the complaint by the Committee addresses any aspects of the charges that were raised by the practitioner.

55 Shortly after, on 30 July 1999, the practitioner received instructions from the client to change the executor of her will and on 26 February 2001, there were further instructions to change her will due to the death of some beneficiaries and her desire to add others. Following those instructions the 2001 will was executed on 14 March 2001, although it is incorrectly dated 14 March 2000. That is the current will to which the codicil referred to in these proceedings relates.

56 The will included a gift of some art prints to the practitioner with a nominal value of about \$1200.00 but in fact the client in June 2002 actually gave the prints to the practitioner saying she did not have much use for them. Again, no part of the Committee's complaint relates to either the gift or the bequest of those prints.

57 In addition to the solicitor/client relationship, the practitioner says he has had a fairly personal relationship with the client. The practitioner and his wife would often visit her at home and she would invariably provide them with tea and cakes in an extremely hospitable and well-organised manner. It was only two years ago that the practitioner established the precise birth date of the client, who was born on 18 November 1905. On 26 March 2004, there was occasion for the client to provide the practitioner with her birth certificate that she had recently found although one or more medical practitioners have at times formed the view that the client was somewhat younger than her actual age.

58 The practitioner was in hospital undergoing a spinal fusion operation in September 2002. He became aware on his release that the client had made many telephone calls to his home with imperative instructions that he should "get her out of" Selby Lodge. On 20 September 2002, he received instructions from her to draw an EPA with himself as the donee. On the same day, the EPA was drawn and executed by another solicitor and the practitioner's wife.

59 At about the same time the client was receiving close attention from medical practitioners as to her psychiatric state while she was resident at Selby Lodge. Shortly after the date of execution of the EPA, views were expressed from senior medical practitioners to the effect that the client was suffering from a senile paranoid disorder or similar condition. From the documentation that the Tribunal has examined, it is reasonable to infer that the client was at least expressing inconsistent views about her relationship and confidence in the practitioner. Nevertheless, as the practitioner understood the position, his instructions remained to do all that he could to ensure that the client was released from compulsory care and, consistent with those instructions, the practitioner, on numerous occasions, made representations to and met with the various medical practitioners and the chief psychiatrist at the Mental Health Department, expressing, amongst other things, concerns regarding the treatment of his client and in effect, challenging or at least questioning the validity of the various diagnoses which had been made.

60 The client was apparently discharged from Selby Lodge on 29 November 2002, after signing what was described as a contract between herself and the registered psychiatrist at that institution. Under the contract, there was to be a trial leave of a two-week period but in fact the client has never returned to Selby Lodge. From time to time she was visited by a nurse from Selby Lodge and the nurse in turn had liaised with the client's general practitioner about the ongoing condition of the client.

61 From the practitioner's perspective, the client appeared to have been able to fend for herself in her home ever since her release and from his impression, formed after frequent visits there was no evidence of the disorder (if any) in any respect inhibiting her from living alone and caring for herself. He and other witnesses said that at all times on visits to her home the client appeared to be bright and cheerful and seemed to be coping well and able to communicate well. The client had been indignant and very unhappy about being involuntarily required to stay at Selby Lodge under the care of and by order of the Mental Health Review Board and, over a period of time, the practitioner also expressed complaints about her circumstances and treatment - both medical and financial.

62 On 18 September 2002, the client wrote to the practitioner asking that he have her released from Selby in order to amend her will. The client emphasised in this letter the fact that she felt that she owed the practitioner for his help and referred to the prints that she had given the practitioner and another print in her hall. The Tribunal is not focussing on any issue concerning the prints.

63 There were numerous exchanges while the client was resident at Selby Lodge. It is clear from that evidence that there was some disharmony between the respective groups but little turns on this. It is also clear that the practitioner became sceptical of and concerned about the quality of treatment that the client was getting and the attitude being taken by the medical and other advisors. Again, the Committee sees very little turning on these facts other than it is clear the practitioner had been informed repeatedly that at least in the opinion of the medical advisors, the client was suffering from mental illness. The practitioner's view frequently expressed was that the client was fiercely independent and a very capable person. The practitioner was far less convinced than others about the mental difficulties the client was said to be experiencing.

64 There was also discussion from time to time about the possibility of the practitioner assisting with finding alternative accommodation for the client. The practitioner also made submissions on behalf of the client to the Public Trustee concerning the availability of funds from her assets to support the client and whether it was through the efforts of the practitioner or through the Public Trustee or both, arrangements were made for an increase in the funding for the client's expenses to be made available to her. Throughout all these activities the practitioner kept a fairly detailed record of his time involved and rendered accounts to the client that have been paid. The Committee says that while there is no complaint about the accounts, equally it is clear that at the time of execution of the codicil, there were no substantial amounts due and owing to the practitioner in respect of legal services.

65 On 30 January 2003 there was the first meeting after the appointment of an administrator over the estate of the client and it was, the practitioner says, an extension of her written instructions of her letter of 18 September 2002. The practitioner spent some two hours with the client on this occasion with his wife in attendance at all times. The practitioner's wife did not participate in discussions but was simply in attendance as she had been on some previous visits.

66 The instructions from the client on this visit to her home were to delete various beneficiaries and to increase the gifts to one of them to \$80 000 and to make a gift to the practitioner of \$50 000. The practitioner says on this occasion that he explained to the client that the least of her concerns should be the provisions in her codicil and that every effort should be made to enable her to borrow as much money as she could on the security of her house to enjoy the last years of her life. The practitioner said he thought that it had been ridiculous that she was then

forced to live on \$170.00 per week. He said that he also explained to the client that it would be necessary to obtain a medical report on her testamentary capacity and she clearly understood this advice, according to the practitioner.

67 He also explained on this occasion that it would be necessary, in light of the proposed gift to him by way of bequest, that he would have to arrange for her to obtain independent legal advice but as the issue of testamentary capacity had to be dealt with in the first instance, taking the matter further could be simply left in abeyance.

68 The practitioner gave advice on the codicil instructions, pointing out to the client that her pecuniary bequests were mounting and that she should consider the question of priority with some of her beneficiaries. He said that the client requested that two of the beneficiaries and his wife and himself have priority over any of the other bequests because they were the people who were taking an interest in her at that stage of her life.

69 In the client's circumstances, obviously the practitioner thought it was appropriate to give her such advice as to the possible effect of her proposed codicil. As against this, he acknowledged in cross examination that he did not advise her that the effect of the disposition to him may be that the animal charities nominated under her will might not receive any benefit under the will.

70 The practitioner observed that the client had been very grateful to his wife and him for the visits they had paid to her at Selby Lodge and subsequently. He observed there were very little changes in her instructions with regard to her proposed codicil when those instructions were first given on 30 January 2003 and the codicil was ultimately executed on 26 February 2004.

71 The client also expressed the wish to the practitioner on the occasion of this visit to be released from the control of the Public Trustee. He said he would see what could be done.

72 Pursuant to that request and in relation to the instructions as to the codicil, in February 2003 he contacted Dr Restifo of Selby Lodge by telephone and informed him that he had received instructions from the client for her codicil. He also told Dr Restifo that the client did not want the Public Trustee controlling her affairs and he asked the doctor for a medical opinion of the client. On 5 February this was followed up with a letter to Dr Restifo by the practitioner with regard to the question of the

Public Trustee controlling the affairs of the client and asking for his opinion in that context.

73 The client had explained to the practitioner that she was not happy with the Public Trustee being in charge of her affairs and found it demeaning to have to continue to ask for more money. He said that both the client and the practitioner were of the view that what she was receiving was totally inadequate to her station and her time of life.

74 By letter of 6 February 2003, Dr Restifo wrote to the practitioner declining to provide the medical report as it had not been requested either by the client or the Public Trustee who was charged with the administration of the client's affairs. In any event, on 21 February 2003 the practitioner wrote to the Public Trustee saying that the client had requested him to draw up a codicil and asking for consent of the Public Trustee and the Guardianship and Administration Board.

75 A letter was received on 6 March 2003 in response to that request and seeking a copy of a draft of the codicil. The practitioner did not provide such a draft and said there was no point in providing a draft until he had ascertained the testamentary capacity of the client. He said he wished to establish that capacity himself and noted that the Public Trustee had not raised any objection to his drawing up a codicil. He requested the Public Trustee by letter of 12 March 2003 to provide a copy of the proposed medical report when it became available and also indicated that the client was obtaining a report from her own doctor.

76 The practitioner followed this up on three occasions to ascertain whether the Public Trustee had received the medical report. Ultimately the report was not provided to the practitioner by the Public Trustee although the practitioner had understood that the Public Trustee would do so. On 15 April 2003, the Public Trustee forwarded the practitioner a fax confirming that the medical advice was to the effect that the client did not have the requisite testamentary capacity.

77 The practitioner was not satisfied with this and endeavoured to make his own inquiries. To that end, he attempted to contact Dr Galhenage and the Public Trustee between 28 April 2003 and 8 May 2003 to obtain a copy of the medical report. He continued to be unsuccessful.

78 On 29 April 2003, the practitioner and his wife visited the client who was with Mrs X when it was agreed that the client would visit her own doctor, Dr Remi Roper, for a medical check up. The other major beneficiary under the will (Mrs X) had been a nurse by occupation and

had assisted the client in matters such as transport of the client to her doctor. Shortly after, a referral by Dr Roper to a psychiatrist was obtained. After further correspondence with the Public Trustee, on 8 May 2003 the practitioner received a letter from Dr Galhenage saying that the Public Trustee had given him a copy of the practitioner's correspondence indicating that if he did not see the Public Trustee's medical report, the client would have to take steps to obtain her own report.

79 Dr Galhenage confirmed the advice that had been given to the Public Trustee earlier in relation to the testamentary capacity of the client. As a result, the practitioner then pursued various enquiries of other practitioners in consequence of which he perused a report obtained by Dr Piirto, psychiatrist, who duly examined the client and produced a report in relation to the mental capacity of the client. The practitioner said that the client at a later time informed him while she was at her home that she had enjoyed the consultation with Dr. Piirto and had understood that Dr. Piirto's report would have to be considered before her codicil could proceed, if at all.

80 In the meantime, on 3 June 2003 a fax was forwarded by the Public Trustee referring to the requirement to obtain approval of the Administrator before the client could execute any codicil.

81 At this time he was aware of the decision of *Johnson v Staniforth and Ors* [2001] WASC 331, which had been delivered on 10 December 2001 on that topic but which had been the subject of a successful appeal to the Full Court in *Johnson v Staniforth and Ors* [2002] WASCA 97. That reserved decision had been delivered on 24 April 2002. As events unfolded, the decision on the appeal (which was an appeal from an interlocutory judgment) was ultimately (later in the year) reversed by the Full Court sitting with five judges in *Re The Full Board of the Guardianship and Administration Board* [2003] WASCA 268. The reconsideration of *Johnson v Staniforth* [2002] WASCA 97 in that appeal occurred on 1 August 2003 and reasons were given on 13 November 2003. In short, the practitioner says he knew on that day when the decision was delivered that s 77(1)(a) of the *Guardianship and Administration Act 1990* had no application to testamentary dispositions. He concluded, therefore, that "any jurisdiction which the Public Trustee thought it may have had with regard to testamentary dispositions of people under administration was negated".

82 The report of Dr Piirto, which had been requested, was duly provided and was not particularly what the client and the practitioner might have hoped for. The report concluded in these terms:

"On review today, I did feel that her understanding and appreciation of some relevant matters relating to her will and affairs were affected by mental illness. I cannot make conclusions regarding her knowledge regarding the nature and extent of her property. I felt the nomination of potential beneficiaries was somewhat nebulous, and I have serious concerns regarding her appreciation of the consequences of what the changes would entail. I did not feel she was entirely rational nor that her judgment was adequately intact on review today.

In my opinion [the client] does lack testamentary capacity, thus invoking subsection (a) of 77(1) of the [*Guardianship and Administration Act 1990*] Act which reads '(a) incapable of entering into any contract or making any disposition in respect of his estate or any part thereof or interest therein'. In addition I do not believe that she should be relieved of her affairs by the Public Trustee."

83 The practitioner asserted that it was misleading to say that the client lacked testamentary capacity because on page 5 of the report (which immediately preceded the passage above) the report stated:

"It is true that [the client] would have reasonably good insight into many aspects of her life and affairs, and could have moments of relative lucidity. With respect to her requests, the difficulty would be in ascertaining her mental state at the specific time she made changes to her will, or undertook each financial transaction in the future."

84 The practitioner seized on this paragraph as setting up what he perceived as being a sufficient basis for satisfying himself that the client had testamentary capacity.

85 The Tribunal is of the view that such an interpretation of the report from Dr Piirto is quite unrealistic, this especially so when the single sentence relied upon in the report is preceded by the following paragraphs under the heading "In Summary":

"I would consider her profile to be chronic, and probably progressive. Formal neuro-psychiatric assessment may be of benefit in this regard.

In my opinion, the client does need to continue to be treated under a Community Treatment Order as she is quite insightful [sic] regarding her psychiatric profile, and requires ongoing medication."

86 To conclude that this report was favourable, in the sense described by the practitioner is, in the view of the Tribunal, unsustainable.

87 The practitioner confirms that on 18 June 2003 he attended on the client at her home with his wife. The client apparently repeated that she wanted to make a gift of \$50 000 to him and wanted to increase it to \$80 000. The practitioner said he would not accept the \$80 000 and she then said \$50 000. He said he was reluctant to accept anything but as she was insistent, he agreed to accept \$50 000, which was her suggestion. She confirmed again that she wished to give the other major beneficiary \$80 000. The practitioner stressed in his evidence that he had told the client he was rather reluctant to accept a monetary gift but that the client was very, very insistent she wished to benefit him. In cross-examination there was the following exchange -

"Now, can I just ask you again do you have any recollection at all of you being the one to nominate the amount in her will?

---No. I did not nominate the amount. The amount came from my client and then she had upped it to \$80 000 and I said, "No way in the world" and in fact I - - I told her then, and the note is there, I was reluctant to accept any. She was insistent so I agreed to accept \$50 000.

Well, you wanted the \$50 000?---Who?

You wanted the \$50 000?---Not really. No, I didn't.

Well, she offered, it seems - - ?---She offered it to me - - - \$80 000?---She was insistent. I[n] my view, she would never have executed the codicil that she did eventually execute if I hadn't put that in.

Well, you were very close to all of this, Mr Clark, weren't you? You were very close because you had a very substantial

personal interest in all of this and your view, you would have to recognise, even at the time, might have been influenced by that interest?---As far as I was concerned, I was merely trying to implement the wishes of my client and whether that involved me or not, as far as I was concerned, didn't really matter.

MR MURPHY: You said to her, did you, that you wouldn't accept \$80 000?---Correct.

Why didn't you tell her that you wouldn't accept \$50 000?---I told her I was reluctant but just to pacify her, if you like, and the lady in question is a very determined woman. She wouldn't hear of it and that was it, so that was the end of it.

You're not saying, are you, Mr Clark, that you didn't want to receive \$50 000 if she was prepared to give it to you?---I've told you before it didn't really - - it didn't really worry me. It didn't.

Do you agree, Mr Clark, that that evidence sounds at least incredible with the benefit of hindsight?---No, I don't. I don't agree that it's incredible at all. I honestly was trying to do something for a client and I admit that I would be a beneficiary."

88 There was also the following exchange in cross-examination -

"This was a professional consultation in relation to discussing changes to the client's will, was it?---Yes...

Now, you say that the \$50 000 didn't appear to you to be a substantial amount of money. Is that your evidence?---Well, I don't know really what - - what would you call a substantial amount of money? She had given somebody 2 - - somebody else \$80 000 and she wanted to give Mrs X \$80 000, so whether 50 was a substantial amount or not I don't know.

BARKER J: The question was whether you considered it to be a substantial sum of money?---Not really. No, I didn't. But these - - this conversation, this was a very preliminary conversation with regard to the client's wishes.

MR MURPHY: Let's just get this clear. You didn't regard the proposed bequest to you of \$50 000 to be a substantial amount

of money to be bequested to you?---Well, I don't think \$50 000 is a substantial amount of money, no.

It's neither here nor there to you, is it, Mr Clark?---Oh, it's not either here nor there, no. It's a fair sum of money but I wouldn't describe it as substantial. You are trying to exaggerate the position.

What do you describe as "substantial", Mr Clark?---I don't know but I certainly don't - - I wouldn't describe \$50 000 as substantial. These are your words, not mine."

89 On 11 July 2003, the practitioner phoned the client's new general practitioner to explain that he had received instructions from the client to draw codicil for her. He explained the client's circumstances, that is that her affairs were under administration and formed the view that Dr Bennett had been aware of that fact. He also further explained that it was desirable that if the client was to execute a codicil that it first be read over to her by her doctor, who could witness the codicil, certifying that she had read over the codicil to the client and that she appeared to fully understand the same. The doctor replied to the effect that she would be prepared to do so if in fact the client was capable of fully understanding the contents of the codicil at the time of signing it. The practitioner said he got the impression that Dr Bennett had a good idea of the meaning of testamentary capacity.

90 On 14 July 2003, the practitioner attended on the client at her request with his wife to discuss the codicil and by this stage the practitioner had become aware that there was to be a change of executor and although the practitioner had previously declined in 2001 because he was unsure at that stage of his future movements, he was now in a position to accept those instructions but he asked the client to write out the changes for him and she agreed to type them up.

91 On 16 July 2003, he received a letter from the client confirming a desire to change her will but that letter did not mention the bequest to the practitioner. On 3 August 2003, he attended on the client with his wife and was given by her a typed note, which had been a follow up of previous discussions and once again, on the basis that the monetary gifts were increasing in value, he asked her if she wished any particular beneficiaries to have priority and she replied "Yes, the people who have been caring for me", naming them and nominating the practitioner amongst those people. The practitioner duly expressed that priority on the

note in handwriting. The practitioner says that at times too numerous to mention he advised the client to ignore the provisions of her will and to spend and enjoy the money in her lifetime.

92 There was a further meeting concerning the draft codicil on 31 August 2003 and, as usual, both the practitioner and his wife were in attendance. He left with the client on this occasion a copy of the draft codicil to enable her to consider it.

93 In October 2003 the practitioner knew that a complaint had been made by the Public Trustee to the Law Complaints Officer by a letter dated 15 September 2003 saying:

"It appears that [the practitioner] put [the client] to the inconvenience and trouble of attending Dr Piiro for the making of the report for his own purposes and not in the proper interests of his supposed client. The report was obtained without the knowledge and consent of the Public Trustee.

[The practitioner's] involvement in the affairs of [the client] and his motive for doing so are matters of concern to the Public Trustee especially as [the client] expressed a wish to Dr. Piiro to leave her Solicitor something in her will."

94 Although the practitioner took issue about aspects of this complaint, he gave evidence in his written statement, that "at all material times, I have been very open with regard to the proposals of the client to further benefit me in her codicil".

95 In contrast to this he had earlier said in his statement that he considered the instructions in relation to that topic were very confidential to the client. Further, it appears that it was Dr Piiro who ascertained from the client the client's wish at that point to leave something to the practitioner. There does not appear to be any evidence that the practitioner rather than the client conveyed that information to the doctor. He rejected in cross-examination that this assertion was untrue and insisted that the only reason the Public Trustee was not informed of the further benefit to him in the codicil was because of his duty of confidentiality to the client.

96 In the meantime, in recognition of his obligation to ensure that the client received independent legal advice, the practitioner, with the authority of the client, contacted Mr Michael Sutherland, Barrister and Solicitor, to ascertain whether he would attend on the client to obtain

instructions for a codicil. The practitioner forwarded to Mr Sutherland a copy of Dr Piirto's report in relation to the testamentary capacity and also informed Mr Sutherland of the reason why his independent advice was sought. He also made available to Mr Sutherland a copy of the will, a copy of the codicil and various authorities and research on the topic of testamentary capacity and copies of the recent Supreme Court cases referred to above. He did not forward to Mr Sutherland a copy of the Public Trustee's letter of 15 September 2003 to the Law Complaints Officer but did certainly inform Mr Sutherland at that time that a complaint had been made against the practitioner by the Public Trustee.

97 Putting all that information together, the Tribunal is of the view that the practitioner did convey relevant information to Mr Sutherland to enable him in turn to set about the task of giving independent advice to the client as to the terms and effect of instructions she may wish to give him concerning her codicil. It is true that there was not necessarily an exhaustive history of the client's medical difficulties but there was certainly enough in the report from Dr Piirto and the fact that the Public Trustee was handling the affairs of the client to put Mr Sutherland on notice, at least as to relevant facts as they were known at that stage.

98 On 7 February 2004, Mr Sutherland, the practitioner and the practitioner's wife attended on the client at her home where as she frequently did, apparently, the client welcomed the practitioner and the practitioner's wife, as well, on this occasion, Mr Sutherland, with tea and cakes and the practitioner and his wife remained in attendance while Mr Sutherland read the will and codicil to the client but then Mr Sutherland alone, while the practitioner and the practitioner's wife were in the pool area of the house, proceeded to take instructions from the client in relation to her codicil and will. The instructions taken by Mr Sutherland were largely consistent with the instructions that had already been given by the client to the practitioner. The practitioner said that after the interview had been completed with Mr Sutherland the client expressed pleasure about the interview and then played the piano for Mr Sutherland indicating, the practitioner said, the client's happiness with the situation.

99 Mr Sutherland also obtained on that date from the client her written authority to consult a general practitioner, Dr Bennett, and clearly the fact that he considered it necessary to do so meant that he wished to obtain the medical practitioner's views about the client's testamentary capacity. Accordingly, on 9 February 2004 and to that end, Mr Sutherland wrote to Dr Bennett in order to obtain her views about the testamentary capacity in light of the report from Dr Piirto, which Mr Sutherland had forwarded to

Dr Bennett. However, Mr Sutherland was unable to pursue this in the following circumstances.

100 On or about 10 February 2004 the Committee forwarded to Mr Arthur Auguste, solicitor for the practitioner, a copy of correspondence dated 4 December 2003 from the Public Trustee. It is not clear why, on a topic of some importance, it took over two months for that letter to be forwarded to the practitioner but obviously part of that time was taken up with the Christmas holiday period. The last substantial paragraph in that letter reads as follows:

"There is one further matter I would like to point out to you. Mr Bridges has recently received telephone calls from the client saying that she is very concerned about the practitioner's actions, that he is no longer a friend and cannot trust him any more. Mr Bridges has taped two of these telephone calls. [The client] has also advised Mr Bridges that she does not ask [the practitioner] to come to her house. He just appears there without being invited. She has also advised that he has suggested that she should sell her house and move into a retirement village or purchase another house. In light of the medical evidence, I am not saying that [the client's] assertions are true, simply that she has made them."

101 The practitioner says that it was at the request of the client that he and his wife visited the client to speak to her about the matter mentioned in the letter and in fact gave her a copy of the letter to read. He said that the client was most upset about the allegations and denied ever having made them. She said that she would never say such things, that the practitioner and his wife were friends. The practitioner says that he and his wife have only ever visited her house at the request of the client. The client responded in writing to that correspondence (on 19 May 2004), and confirmed her denial that such messages were ever left with the Public Trustee (assuming that the statements referred to in the letter are those referred to by the Public Trustee). The client also goes on to speculate as to the possibility of some other person having left those messages instead of the client. By the time that letter arrived, the central events that are the subject of this reference - the execution of the codicil - had passed.

102 Importantly though, in the Tribunal's view and quite properly, the practitioner faxed to Mr Sutherland a copy of the Public Trustee's letter and consequently Mr Sutherland declined to act for the client and wrote to Dr Bennett and the client to that effect. The practitioner did not suggest in

evidence-in-chief that he knew at the time of the advice, if any, given by Mr Sutherland prior to withdrawing. In cross examination he was asked -

"Mr Clark, you've made it clear that you became aware from Mr Sutherland that he took instructions from your client about -  
-?---That was long after she - - yeah. Go on.

I see?---I didn't see the instructions. I knew he had taken them but I didn't see them.

Did you ever know whether Mr Sutherland gave your client any advice?---I assumed he took instructions. He may have said and I can't remember. At the time he may have said something, "I think - - well, she's confirmed everything" - - everything or something. I don't know.

Mm hm?---But I certainly knew he had got - - well, he did say to me that, "You go out of the room while I take instructions on the bequest to you" or something like that and we did go out of the room."

103 In re-examination there was the following exchange -

"MR VINER: Now, Mr McKerracher asked you a question about the instructions your client had given to Mr Sutherland. Had you - -or were you advised by Mr Sutherland of what those instructions were?---I think he may have confirmed the gift to me and he said they were basically the same as the instructions I got.

Now, would you look at - - ?---But I didn't have his written notes at that time."

104 Once again, the practitioner says the client was very upset by the withdrawal of Mr Sutherland. Mr Sutherland's actions in declining to continue to act were, in the circumstances, entirely proper.

105 After the withdrawal of Mr Sutherland on 13 February 2004, there was for some reason another meeting at the client's home on 21 February 2004 where, according to the practitioner, the same topic was discussed and the client continued to deny having made the complaints to the Public Trustee. However, on the next morning, 22 February 2004, the client telephoned the practitioner at home early in the morning and left a message on the telephone answering machine saying "What about my

will? You are going away on holiday and leaving me". This message was in response to information given to her by the practitioner on the previous day that he and his wife were going to Kojonup on the following Thursday to visit family.

106 The practitioner was of the view that this phone message had a ring of urgency about it, like other messages he had had in previous years to attend at hospitals to facilitate the execution of a will in circumstances of urgency. The Tribunal listened to a recording of the message and accepts that there appeared to be an element of concern on the part of the client. In cross-examination on this topic there was the following exchange:

"Yes?---I thought it was basically a hospital case. Get the will done and get it executed and she had had all that - - it wasn't as if I had gone there for the first time and said, "You're going to give me this. You're going to do that" and so forth and so on. Mr Sutherland had seen her and I'll repeat it. Dr Piirto had been told she was - - she wanted to benefit me and Dr Bennett took her through that test. Now, I've never in all my years of experience of getting wills executed with people like my client have they put through a mental status examination. Mrs - - Dr Bennett did that and she was satisfied as to her testamentary capacity and she took over in that room, not me. That to me was independent advice because Mrs - - the client confirmed to the doctor what she wanted to do.

BARKER J: Mr Clark, Ms Holland just would like you to explain when you use the expression "like a hospital case" what you mean by that?---Well, sometimes you get telephone calls from the hospital. Our client is in dire straits and you've got to get up there quick. You've got to get the instructions. You've got to get the will prepared. You've got to get it back. You've got to get it executed. That's what I'm talking about and I've done lots of those. I've taken instructions - - in fact I've written out wills on the death bed. I've written out wills for clients who didn't think they were going to last much longer and I didn't have time to get it typed. I've taken a typist up to the hospital, and I've done a few of them. You've got - - got to act quickly just in case the poor testator dies.

BARKER J: And - - and why did you think this seemed like a hospital case?---That's what I'm saying. On a telephone call I thought that she was - - it was an urgent - - she was - - she was

very urgent about the whole thing. She seemed quite urgent when I went to see her so I said, "Right, this is - - I'm going to get this thing finished with" and I did.

Yes, Mr Murphy?

WITNESS: And don't forget, your Honour, we're dealing with a lady who is 98 years of age at that time."

107 Because of his perception of the client's state of concern the practitioner contacted her that day to discuss the codicil and, wishing to get confirmation of her instructions, he then visited the client late in the same day (22 February 2004) when she was once again given the last page of the letter from the Public Trustee to read and again denied ever having made the complaints to the Public Trustee, stating "You are my friends in my home and most welcome". Accordingly, the practitioner went through the draft of her codicil with her again. He asked her to sign both pages of the draft and to initial any alterations, which she did, and explained that he would make an appointment with Dr Bennett for the next Thursday as it would be necessary for her to sign the codicil before Dr Bennett explaining that was necessary so that the doctor could confirm her mental capacity. He explained that Dr Bennett would have to satisfy herself that the client fully understood the codicil.

108 It seems that the client was less troubled than the practitioner might have thought as she complained about having to reschedule a hair appointment, but the practitioner was not sympathetic to this complaint and the Tribunal concludes that he was keen to finalise the codicil without further delay, although this could be partly explained by the fact that the client was elderly and keen to finalise matters, and he was about to depart for the country for some time. By this stage there had been many more complications than is customary in finalising the execution of a codicil to a will.

109 The client also instructed him then to consider making an application to have the Public Trustee removed as her administrator. He said he would consider that matter on his return from Kojonup in the middle of the following month.

110 Accordingly, the next day the practitioner telephoned Dr Bennett at her rooms to make an appointment for the client. He confirmed the appointment with the client and with Mrs X and informed Dr Bennett's receptionist of the reasons for the appointment, that is to arrange the

execution of the codicil of the will. The practitioner called for the client at 8:45am on 26 February 2004.

111 The practitioner attended Dr Bennett's rooms in the background, so to speak, taking no part in the discussions concerning the codicil. Before Dr Bennett read the codicil to the client, she put her through a mini-mental status examination, as a result of which the client scored 29 out of 30 in contrast with her performance when the test was conducted by Dr Piirto.

112 The practitioner said that the instructions to the doctor had been very brief. He had merely asked for her to read over the codicil to the client to satisfy herself that the client fully understood it, and to sign as a witness. He did not know at that stage that the doctor intended to put the client through the mini-mental status examination, which the doctor probably did of her own volition. Thereafter the codicil was executed by the client and witnessed by Dr Bennett and her receptionist.

113 The practitioner has repeated many times that there was no doubt in his mind that the client knew what she was doing, otherwise the codicil would never have been executed.

114 The practitioner's wife was also called to give brief evidence in addition to her witness statement; her evidence corroborated that of the practitioner. Each of them made the point that the client expressed to the practitioner that she had been very pleased and very relieved that her codicil had at last been executed. Each of them expressed the view that they were both satisfied that the client was very much aware of what she was doing at all times and very much aware of the role being played by the practitioner.

115 A witness statement from Mrs X was also relied upon. In her capacity as a retired registered nurse she has had a great deal to do with the client. The client, despite her one hundred years, also regularly visited Mrs X in the latter's house, which is diagonally opposite that of the client. Mrs X observed that the client has always been and remains an eccentric and extraordinary person, perceiving herself to be "a cut above everyone else", but she looks after her diet very well, was a regular correspondent to The West Australian newspaper and very active socially.

116 Mrs X described the circumstances in which the client was compulsorily taken to Selby Lodge by police officers accompanied by a doctor, nurse and a social worker and, although Mrs X was at a loss as to how to assist her friend, the client of her own volition within forty-eight

hours had made contact with the practitioner to assist her with being released from Selby Lodge. She was also of the view that it was not appropriate for the client to stay at Selby Lodge but, of course, in due course she was released.

117 Evidence was also given by Mr Pino Monaco, solicitor, who is a solicitor of some thirty years standing. He has also recently visited the client in connection with the matters the subject of this reference. His view, which is in large measures supported by impressions gained by the Tribunal from a video tape that he took with the permission of the client on this occasion, was that on this occasion she appeared to be agile, able to walk without assistance, able to bend, able to lift the kettle and able to identify her signature on the various documents that he produced in the interview, namely a copy of her will, the typed note that she had prepared, the handwritten note of Mr Sutherland, the draft codicil signed by her on 22 February 2004 and a codicil actually executed on 26 February 2004. As he said, the video tends to support this impression. The client was a friendly and welcoming lady, hospitable and well organised. She was, in his view, a lady who appeared to be in control of herself and her circumstances and aware of what was happening and was aware of the fact that the practitioner was her lawyer and that the practitioner's wife was married to him. Mr Monaco said that the client told him at the interview that the inclusion in the codicil of the practitioner and his wife in her bequests was her idea.

118 That observation is correct, in the sense that the client was asked "When you decided to change your will - who did you discuss the changes of your will with?", to which the client said "I didn't discuss it with anyone". The client did independently recall that, when Mr. Sutherland came, which was almost two years before that date, what she had wanted to effect was the removal of a certain class of beneficiaries from her will. She also independently explained that she wanted to remove the existing executor of the will and replace him with the practitioner, whom she knew very well.

119 However, some aspects of the interview were a little confused, unsurprisingly. Additionally, some aspects of the discussion concerning the bequest to the practitioner were (at least at the point in time almost two years after the event) not as clear as the description the practitioner has given of her wishes at the time at which he took instructions. But due to the time lapse, nothing adverse can turn on this.

120 The following exchange has been transcribed from the videotape:

"The client - I give, devise and bequeath the sum of \$50 000 to the said (the practitioner) - that's the solicitor isn't it?

Mr Monaco - Yes - and are you happy to give him \$50 000?

The client - Well he hasn't done that much for me.

Mr Monaco - And can you read whatever, what ...

The client - No the writing is so bad that I can't read the next part.

Mr Monaco - Right - and it says his wife (the practitioner's wife) as joint tenants - so have you initialled that in the margin? - is that your initial there?

The client - I have already put him in the will haven't I?

Mr Monaco - Yes you have - but I am asking you - are they your initials there in the margin?

The client - That's my initial there.

Mr Monaco - Alright - and it says that you are prepared to give him \$50 000 for himself and his wife - is that something that you want to do?

The client - I don't know what I ... I can't imagine why I would want to give them all that - he hasn't done very much really for me.

...

Mr Monaco - Now I am going to take you back to paragraph 6 of the will which is on the previous - ah of the codicil and this is the changes that you wanted to be made to your original will and in paragraph 6 you've said - "I give, devise and bequeath the sum of \$50 000 to the said (practitioner) and the (practitioner's wife) as joint tenants" - who is (the practitioner)

...

The client - I don't remember stating how much - but I wanted to give them something.

Mr Monaco - Alright - do you know who (the practitioner) is?

The client - Ah - he's my solicitor.

Mr Monaco - Alright - and do you know who (the practitioner's wife) is?

The client - That's his wife.

Mr Monaco - And are they people that are known to you?

The client - Pardon.

Mr Monaco - Are they known to you? Do you know them?

The client - Not personally - only - only just as business people.

Mr Monaco - Okay - now in paragraph 6 you have said that you want to leave them \$50 000 - are you comfortable with that - leaving them \$50 000.

The client - It is a lot isn't it?

Mr Monaco - Yes - but I am asking you the question - and I am ...

The client - Yes, I know.

Mr Monaco - And I am asking you - if there is enough money ...

The client - Well, I don't think he's done that much for me.

Mr Monaco - I understand that - and you have said that before but this is now your codicil - this is the document."

121 The evidence of Mr Sutherland confirms the evidence of the practitioner. As indicated, Mr Sutherland's involvement was quite truncated by the news that he received of the complaints recorded in the correspondence from the Public Trustee to the Law Complaints Officer. At the stage when he received that information, Mr Sutherland had taken instructions from the client, as indicated above, and was intending to discuss the question of testamentary capacity with the client's doctor and if at that stage the doctor had confirmed that the client had testamentary capacity, he intended to revert to the client to confirm the nature of the instructions she wished to give. Beyond that, his involvement is hypothetical but a question that does fall for consideration in the view of the Tribunal is whether the steps taken by Mr Sutherland to this point

satisfy the practitioner's requirement of being sure that independent advice on the relevant topic has been given to the client.

122 It appears clear that the practitioner has gone to very considerable lengths over a period of time to endeavour to advance the interests of the client, both in relation to her mental health and in relation to her financial affairs. His attempts have not always been particularly welcomed by other institutions formally charged with her care, both of a mental and of a financial kind. Again, the friction between the practitioner and these entities is, in the view of the Tribunal, of little relevance in its consideration of the complaint other than the extent to which the practitioner's belief in the inappropriate treatment of his client might explain the circumstances under which the codicil, which is the subject of the complaint, was ultimately executed.

### *Findings*

123 Generally, the Tribunal accepts the evidence of the practitioner. It does not differ in substance from that called for the Committee, although it adds a great deal more observation and comment.

124 The practitioner (as he accepts) was clearly in a position of a conflict of interest. The proposed gift of \$50 000 was a "substantial sum" both in absolute terms and relative to the size of the estate, the principal asset of which comprised a house, the equity in which was about \$300 000 to \$360 000. His unwillingness to accept this description was unrealistic.

125 At the relevant time, the client was elderly. It is unnecessary to make any finding concerning the extent of "vulnerability" or testamentary capacity of the client. The Tribunal has not reached any such finding.

126 Notwithstanding that Mr Sutherland had withdrawn from acting, the practitioner proceeded to arrange for and attend at the execution of the codicil on 26 February 2004, which provided for the payment of \$50 000 to himself and his wife.

127 Whilst the practitioner apparently regarded the client as having testamentary capacity, the circumstances were such that the client required full and complete independent legal advice in any event.

128 It is clear that the client gave independent instructions to an independent solicitor, Mr Sutherland, which included her intention to benefit the practitioner. However, Mr Sutherland did not prepare the codicil, the practitioner did.

129           There is no evidence that Mr Sutherland had the opportunity to, and did in fact give, the client any advice at all in relation to the terms and effect of those and other testamentary instructions. By comparison the practitioner himself had given the client advice in similar circumstances to the effect that her pecuniary bequests were mounting and that she should consider the question of priority with some of her beneficiaries. It appears that he recognised his obligation to do so.

130           The practitioner's very detailed witness statement does not suggest that prior to the execution of the codicil he had clearly been informed by Mr Sutherland that the client wished to make the bequest to the practitioner. Nor does Mr Sutherland suggest he told the practitioner of this fact. The practitioner's speculation that he may have been told was not seriously advanced by him as a basis for proceeding further with the execution of the codicil.

131           Mr Sutherland may well have given advice in such areas had he continued to act in the matter, but he did not have the opportunity to do so. The very least he would certainly have done, had he continued to act, would have been to thoroughly and independently explore the allegations made by the Public Trustee which triggered his quite proper concern to withdraw. In the end the only legal practitioner to explore that topic was the practitioner himself, who in the circumstances was far from independent.

132           The practitioner relies on the fact that the client was independently tested by Dr Bennett as to her testamentary capacity. Dr Bennett witnessed the signing of the codicil independently of the practitioner and Dr Bennett independently confirmed the provisions in the codicil for the intended beneficiaries, including her solicitor. The Committee was sceptical about the choice of Dr Bennett when other treating specialists and medical practitioners had already concluded there was a lack of testamentary capacity. In the Tribunal's view this factor taken alone is not an area of concern in relation to these proceedings. The lack of independent advice on execution of the codicil is the area of concern.

***The question of independent advice***

133           It was submitted for the practitioner that the gravity of the solicitor's conduct in ***Re A Solicitor*** was that in none of the three instances before the disciplinary committee in that case did the solicitors concerned even suggest to the clients that they obtain independent advice. Reliance was placed on "*Cordery on Solicitors*", 8th edition, footnote 201, page 19, which notes: "It is the duty of any man who expects that a will is about to

be made in his favour to see that the testatrix had independent advice"; *Parker v Duncan* (1890) 62 LT 642, *Re a Solicitor* (1975) 1 QB 475. It is said that the practitioner in the present case clearly fulfilled that duty. The Tribunal accepts that the practitioner recognized that duty and did act upon it but is more concerned about whether he saw that the client received independent legal advice.

134 *Cordery* at pages 18-19 also states:

"Where, therefore, the client is intending to give a substantial benefit to the solicitor, the latter should insist on the client receiving independent advice and that the will is prepared by another solicitor, and should endeavour to ensure the preservation of evidence that the will was read to and approved by the testator and of the instructions from which the will was prepared, though other evidence may suffice."

135 It was submitted for the practitioner that this statement in *Cordery* is satisfied except that the codicil was prepared by the practitioner. It was submitted that there is no requirement in Western Australia for a codicil to be drawn by another independent practitioner.

136 The Tribunal does not need to decide this last point, but draws no adverse conclusion for present purposes from the fact (alone) that the practitioner himself drew up the codicil.

137 If a bequest to a solicitor beneficiary is made by the solicitor's client the court "will require affirmative proof (which is most satisfactorily furnished in showing that the will was read over to the testator or is in accordance with instructions proceeding from him) of the testator's knowledge and approval"; *Cordery* at 18; *Barry v Butlin* (1838) 2 Moo PCC 480 at 484 and *Wintle v Nye* [1959] 1 All ER 552, HL.

138 *Barry* and *Wintle* are well known authorities which have often been followed in Australia and were specifically followed in *Re "DDM" File No. 02/0352; Ex parte The Full Board of the Guardianship and Administrative Board* (2003) 27 WAR 475 which is the report of the case cited for the practitioner as (2003) WASCA 268.

139 *Cordery* also observes that where, therefore, the client is intending to give a substantial benefit to the solicitor, the latter should insist (because "It is the duty of any man who expects that a will is about to be made in his favour to see that the testatrix had independent advice": *Parker v Duncan* (1890) 62 LT 642, *Re a Solicitor* [1975] QB 475, [1974] 3 All

ER 853) on the client receiving independent advice and that the will is prepared by another solicitor, and should endeavour to ensure the preservation of evidence that the will was read to and approved by the testator (as to the value of this evidence, see *Garnett-Botfield v Garnett-Botfield* [1901] P 335; *Fulton v Andrew*, at 462, 463, 464) and of the instructions from which the will was prepared (as to the weight of evidence, see *Atter v Atkinson*, at 668), though other evidence may suffice (see *Clearson v Teague* (1851) 15 Jur 1016; and see *Re Austin's Estate* (1929) 73 Sol Jo 545).

140 The practitioner knew that Mr Sutherland had not completed his work before declining to act further and also knew that, at the time of acting, he did not have all relevant knowledge as the practitioner had not, at the time of the meeting between Mr Sutherland and the client, received nor been able to pass on the content of the letter from the Public Trustee of 4 December 2003. The practitioner recognised the importance of conveying the content of that letter to Mr Sutherland but also knew that Mr Sutherland ceased acting when that information had been conveyed to him. However, it is also clear in this case that Mr Sutherland, quite correctly in light of the history, had intended to conduct further inquiries to satisfy himself of the requisite capacity and of the client's "knowledge" and "approval" within the meaning of the expression in *Cordery* at 18. His withdrawal meant that his task was not completed.

141 The mere taking of the instructions by Mr Sutherland alone, which in any event were not discussed in any detail with the practitioner, did not, in the Tribunal's view, constitute the giving of advice and, even if it did, at the time of giving the advice, not all facts were known to the professional adviser. The person advising must be informed of all material facts and provide advice as to the appropriateness of the transaction: *Permanent Trustee Co of New South Wales Ltd v Bridgewater* [1936] 3 All ER 501 at 507, 509; *Powell v Powell* [1900] 1 Ch 243; *Bester v Perpetual Trustee Co Ltd* [1970] 3 NSW 30 at 35-6. In *Powell*, Farwell J said -

"It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the latter impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must shew (and the onus is on him) that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation.

... On the authorities it appears to me not to be a question of actual pressure, or deception, or undue advantage, or want of knowledge of the effect of the deed. The mere existence of the fiduciary relation raises the presumption, and must be rebutted by the donee in the way that I have just stated. Further, it is not sufficient that the donor should have an independent advisor unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it, and to defeat the rule; but the stronger the influence, the greater the need of protection. ... "

142 In *Permanent Trustee*, the Privy Council held, at p 507, that although there had been an independent legal advisor, the advisor made no attempt to advise his youthful (in that case) client or to assist him.

143 Although the nature of advice that should be given has usually arisen in undue influence cases (which this case is not), those cases give some insight as to the nature of advice that is sought from and obtained from the independent advisor. In *Bester*, the plaintiff was born in March 1928 and her mother died in 1940. Her father died in 1946. After she left school, the plaintiff worked as a stenographer with a scriptwriter. She turned twenty-one in 1949. She did not have a bank account or any experience in business and property matters. Her father left her half his estate and the defendant company was administering this estate by its trustee officer, Mr Hohnen. The plaintiff's uncle and Mr Hohnen and a solicitor who had married one of the plaintiff's aunts, all considered that her fortune should be settled. The settlement was drawn up by the solicitor and Mr Hohnen took the plaintiff to her for it to be signed. The solicitor told the plaintiff that, as he was a relative, he had arranged with Mr Emmanuel, an independent solicitor, to read the settlement to her and make sure she understood it. When the plaintiff got to Mr Emmanuel's office, Mr Emmanuel read the settlement to her and asked her if she had any questions. She said "no". He then asked her if she realised that she would not have access to the capital during her lifetime and she said that she realised that. At no stage was he asked for nor did he give any advice as to the advisability of making a settlement at all, or as to whether it might be advisable to include in the settlement provisions for revocation or to allow her to have some say in the management of the settlement moneys.

144 Street J (as his Honour then was) held that the purpose of obtaining independent advice is to enable the making of an independent choice. The mere fact that a document is explained, and that no questions are asked by

the proposed settler, does not tend strongly to a conclusion that the proposed settler made a deliberate and intelligent choice to adopt all the provisions of the relevant document. His Honour held that it is important that a person giving independent advice to a proposed settler should make it abundantly clear that there is no obligation to make any settlement at all and that the settler could do exactly as she pleased and that the settlement as drafted was not necessarily one to be totally accepted or rejected but one to be discussed point by point with a full understanding of various alternative possibilities. His Honour followed an earlier English decision of *Bullock v Lloyds Bank Ltd and anor* [1954] 3 All ER 726 in this regard.

### *The Key Issue*

145        There is in the end one short question, namely, whether the practitioner not only took steps to see that the client was independently advised but also satisfied himself that such advice had been given. It was not in fact until a long time after the event that he clearly knew what instructions were given by the client to the independent adviser. There was no occasion on which he knew any advice was given.

146        The purpose of the independent advice is not simply to verify through an independent solicitor that the client's instructions are as the practitioner believes. Clearly the solicitor who is giving the independent advice also has to fully discharge whatever professional obligations arise on that occasion and in the relevant circumstances. In this instance, for example, if hypothetically the client had totally changed her instructions and said that she wanted to leave a very large sum to another charity but still wanted to give \$50 000 to the practitioner and his wife, it would not have satisfied the professional obligations of the independent solicitor to simply allow that to occur and to confirm her intention to benefit the practitioner. The independent advisor would have an obligation to see that the change in instructions was not only what she really wanted but also, within reason, what could probably be achieved out of the estate. The Tribunal considers that the duty goes beyond simply confirming the intention to benefit the practitioner in the way the practitioner had been originally instructed.

147        On the practitioner's receipt of the letter from the Public Trustee to the Committee indicating the complaint from the client to the effect that she no longer trusted the practitioner and he was not a friend, the practitioner acted correctly in informing the independent solicitor of that matter by facsimile communication to him. If the independent solicitor

had continued to act at that point, then the duty may have been discharged if he took full instructions from the client and generally satisfied himself as to the position. However, he chose to withdraw. Clearly, that changed circumstance needed to be conveyed, together with all other instructions, to a new independent solicitor - if one was willing to independently advise, taking into account that information.

148       The practitioner was aware that an independent solicitor should advise with the knowledge of that communication and that is the reason he faxed the letter to the independent solicitor at that time.

149       When the practitioner knew that the independent solicitor did not advise, and declined to act in those circumstances, he should not simply have pursued the execution of the codicil himself. It was then incumbent on him to ensure that the client was fully independently advised by an advisor who also had the benefit of this additional information.

150       The suggestion that the practitioner had to act as a matter of urgency because of the early morning phone message was not sufficient to displace the duty in the circumstances of the background to the execution of the codicil. The appropriate course after the withdrawal of the independent solicitor was to refer the client to another solicitor, even if it was necessary to act promptly – or alternatively to inform the client the matter would have to await his return. The entire instructions could be sent to another solicitor if that proposal was not acceptable.

151       Regardless of the practitioner's views about the testamentary capacity of the client, he was well aware that the clear majority of medical views were to the contrary. He and his wife were to be bequeathed a substantial sum by his elderly client. In those circumstances it was incumbent on the practitioner not only to ensure that independent legal advice was given to the client, but also to ensure that the independent legal advisor was fully apprised of all relevant facts including relevant allegations against the practitioner himself. The practitioner did recognise this duty. But he also knew, before arranging for the execution of the codicil, that the independent advisor had neither completed his task nor, at the actual time of taking instructions from the client been put in possession of all material information on which to advise. Indeed it was not possible for the practitioner to be satisfied that there had been the opportunity for any independent advice to have been given at all at the time of arranging the execution of the codicil.

*Conclusion*

152 For the foregoing reasons, the Tribunal finds that the allegation against the practitioner is established, namely, that he was guilty of unsatisfactory conduct in around February 2004, by acting for an elderly client in conflict of interest, in preparing and arranging for the execution of a codicil to the client's will under which the practitioner and his wife would receive a gift of \$50 000 with certain priorities of payment.

153 The Tribunal will hear the parties as to the appropriate penalty.

I certify that this and the preceding [153] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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**JUSTICE M L BARKER, PRESIDENT**