IN THE MATTER OF:

THE LEGAL PRACTITIONERS ACT 1981

ACTION No. 10 of 2017

and

IN THE MATTER OF:

DAVID FULLERTON CLELAND

REASONS FOR DECISION

The practitioner is charged with professional misconduct.

The charges are comprised in the Amended Charges filed on 20 November 2017 ("AC") at page 37 of the Book of Documents (BD) tendered and marked Exhibit1.

The practitioner, pursuant to leave granted on 31 July 2018, filed an Amended Response on 7 August 2018 ("AR").

The practitioner denies that he engaged in professional misconduct.

The Legal Profession Conduct Commissioner was represented at the hearing by Mr Keen.

The practitioner was represented by Mr Magarey.

The practitioner gave evidence and was cross examined.

SUBMISSIONS MADE IN THE PROCEEDINGS

The Tribunal received written submissions.

On behalf of the Commissioner:

- Outline of Submissions of the Commissioner dated 18 October 2018:
- Closing Submissions of the Commissioner dated 16 November 2018;
- Commissioner's Response to practitioner's reply submissions dated 23 November 2018.

(the Commissioner's submissions).

On behalf of the Practitioner:

- Practitioner's Written Submissions corrected 6 November 2018;
- Practitioner's Submissions in Reply to the Commissioner's closing submissions dated 16 November 2018.

(the Practitioner's submissions).

We have had regard to those submissions even if no specific reference is made to them in the course of our Reasons.

Background

The charges arise out of the preparation and execution of certain wills wherein Ms Pamela Mary Cleland was the testator.

They can be summarised as follows:

- **The 14 January 2011 ("the January 2011 Will")** (BD 103)
  That will was prepared by Sue Davies, Solicitor.
- **The 3 October 2014 Will ("the October 2014 Will")** (BD 107)
  That will was prepared by the practitioner.
- **The 21 December 2014 Will ("the December 2014 Will")** (BD 112)
  That will was prepared by the practitioner.

A Statement of Agreed Facts (Exhibit 2) (SAF) was tendered.

There are 7 separate Charges. Each Charge alleges professional misconduct.

Charges 1 – 4 relate to the October 2014 Will; Charges 5 – 7 relate to the December 2014 Will.

The practitioner in his AR denies that he engaged in professional misconduct as alleged or at all.

Statement of Agreed Facts

The agreed facts can be summarised as follows:

1. At all relevant times the practitioner carried on a legal practice as a legal practitioner.
2. The practitioner is the nephew of Ms Cleland. Ms Cleland was born on 14 October 1927.
3. Ms Cleland was formerly married to Mr Fred Fyfe Thonemann ("Fred"), now deceased.
4. Fred had a son, Mr Grant Fyfe Thonemann ("Grant").
5. Ms Cleland and Fred did not have children together.
6. Valerie Cleland ("Valerie") was at all material times the wife of the practitioner.
7. On 14 January 2011 Ms Cleland made a will ("the January 2011 Will").
8. In September/October 2014 the practitioner prepared a document to become (if executed) a Will for Ms Cleland. Ms Cleland executed that document on 3 October 2014 ("the October 2014 Will").
9. In December 2014 the practitioner prepared a document to become (if executed) a will for Ms Cleland. Ms Cleland signed her Will on 21 December 2014 ("the December 2014 Will").
10. The practitioner had a substantial interest as a beneficiary under the January 2011 Will both as a specific legatee and the sole residuary beneficiary of the estate.
11. The practitioner had a substantial and increased (from the January 2011 Will) interest as a beneficiary under the October 2014 Will both as a specific legatee, and as the beneficiary of Ms Cleland's residuary estate.
12. In the October 2014 Will, Valerie was the substitute residuary beneficiary.
13. The practitioner had a substantial interest as a beneficiary under the December 2014 Will both as specific legatee and as the sole residuary beneficiary of the estate.

Each of the Charges was supported by particulars.

We propose to consider the Charges in related groups - some of the Particulars, evidentiary matters and legal issues are common to those groups of Charges. There is also considerable overlap with respect to some of the charges.

We will consider Charges 1 and 5 together, Charges 2 and 6 together and Charges 3 and 7 together. Charge 4 is a standalone Charge.

CHARGES 1 AND 5

In summary:

CHARGE 1

- The practitioner engaged in professional misconduct when he agreed to accept instructions from and act for Ms Cleland with respect to the preparation of the October 2014 Will;
- There was conflict between the practitioner's duty to serve the best interests of Ms Cleland and the interests of the practitioner and Valerie (the practitioner's wife);
- The practitioner preferred his interests over that of Ms Cleland and thus breached Rule 12.1 of the Australian Solicitors Conduct Rules (ASCR).

CHARGE 5

Charge 5 which relates to the December 2014 Will is in substantially similar terms to Charge 1 which relates to the October 2014 will.

Charges 1 and 5 assert that the practitioner breached ASCR 12.1 and the fiduciary duty he owed to Ms Cleland.

In support of the Charges 1 and 5, the best interests of Ms Cleland were particularised in AC 1.1A, in 1.1B with respect to the Practitioner, and in 1.1C with respect to Valerie, the practitioner's wife.

The best interests of Ms Cleland were asserted to be Ms Cleland:

- Receiving or having the opportunity to receive advice from a solicitor in the making of her Will, who was disinterested in making the will and who did not either directly or by an associate of the solicitor have a personal interest in the making of the will.

- Receiving or having the opportunity to receive advice from a solicitor who would not omit or fail to give her advice in respect of the making of the will because of a personal interest of the solicitor or an associate.

- Receiving or having the opportunity to receive advice from a solicitor in respect of all matters that would be usual for a testator to consider in the making of a will.

- Receiving or having the opportunity to receive advice from a solicitor in relation to any conflict which may exist in relation to the making of a will.

- Receiving or having the opportunity to receive independent advice in relation to any conflict which may exist in relation to the making of a will.

- Receiving or having the opportunity of receiving independent advice sufficient to enable her to give fully informed consent if she chose to do so to a solicitor acting in relation to the preparation of her will despite the solicitor or an associate of the solicitor having an interest in the making of the will.

The interests of the practitioner were asserted to be:

- that pursuant to the October 2014 Will, the residuary estate was to pass to the practitioner or if he did not survive Ms Cleland, then to Valerie. (Clause 9 of the will) AC Recital M v.

- The omission of the gifts previously given by Clauses 3, 4, 6, 7, 8, 9, 14 and 15 of the January 2011 Will operated to increase the ambit of the residuary estate to pass to the practitioner or Valerie – AC Recital M vi.

- The practitioner had a substantial and increased (from the January 2011 Will) interest as a beneficiary under the October 2014 Will both as a legatee and as beneficiary of Ms Cleland's residuary estate (with Valerie being the substitute residuary beneficiary). AC Recital T.

- The practitioner had a substantial interest as a beneficiary under the December 2014 Will both as a legatee and as the sole residual beneficiary of the estate. AC Recital U.

In AR 2.9 the practitioner admits the assertions made in recital M save and except M vi.

With respect to Ms Cleland's interests the practitioner in AR 4.2(a) asserted that those interests were to believe that upon the execution of the document she had properly executed a will in the terms she wanted it to be.

In AR 4.2(b) and (c) the practitioner asserted that Ms Cleland had the opportunity to receive advice both before and after instructing the practitioner to prepare that will.

The practitioner also asserted that Ms Cleland would have rejected his suggestions or declined to follow his advice if he had given advice or made suggestions.

With respect to his interests the practitioner asserted AR 4.3 that in relation to the October 2014 will they were to have prepared a will for Ms Cleland without in any way misleading her, a will which she had properly executed and which was in the terms she wanted it to be and in which it was sensible to her.

The effect of the practitioner's response was that the interests of Ms Cleland and the practitioner were effectively mirror images, one of the other.

The practitioner's response in AR 8 with respect to the December 2014 will is in substantially similar terms to AR 4 with respect to the October 2014 will.

The further points of contention between the practitioner and the Commissioner with respect to Charges 1 and 5, as particularised in AC 1.1, 1.3, 5.1, 5.2, 5.3 and 5.4 are whether the practitioner had:

- Failed in his duty to serve the best interests of his client Ms Cleland, and thus breached ASCR 12.1 and the common law fiduciary duty he owed to Ms Cleland;
- Failed to advise Ms Cleland of the conflict which existed between the practitioner's duty to serve the best interests of Ms Cleland as his client and the interests of the practitioner arising from the January 2011 Will, the October 2014 Will and the December 2014 Will in circumstances where he had an obligation to do so;
- Failed to advise Ms Cleland before accepting her instructions to prepare the October 2014 Will and the December 2014 Will, that she should take independent legal advice as to whether the practitioner should act for her in relation to the preparation of the Wills in circumstances where he had a duty to do so;
- Failed to advise Ms Cleland of the nature and reasons for such conflict of interest where he had a duty to do so and in so failing to properly advise, Ms Cleland was not able to and did not give her fully informed consent to the practitioner for the preparation of the Wills;
- Failed to advise Ms Cleland that pursuant to the terms of the October 2014 Will that the practitioner would receive a substantially increased benefit in the sum of $730,000 as a residuary beneficiary and with respect to the December 2014 Will that the practitioner would receive substantial benefit as a residuary beneficiary in circumstances where he had a duty to do so;
- Failed to make any or any adequate record of the instructions he received, his advice to Ms Cleland and his conduct in relation to his consideration of

whether there was a breach of Rule 12.1 of the Rules with respect to the October 2014 Will and December 2014 Will or the reasons for the practitioner not giving that advice;

- Failed to advise Ms Cleland as to the operation of Clause 13 of the December 2014 Will;
- Failed to open a file or maintain a file or file notes of instructions he obtained from Ms Cleland as to the preparation of the October 2014 will.

The effect of the practitioner's responses AR 4.5 – 4.12 is:

AR 4.8(a) He did not give any advice to Ms Cleland about any conflict

which existed as there was no such conflict.

AR 4.8(c) Ms Cleland consented to his preparation of the October 2014 will, such consent to be inferred from her request for him to prepare it and her subsequent comment that he was the only person she could trust. Such consent was fully informed consent. The basis of that informed consent was Ms Cleland had the experience of being a legal practitioner for many years and she had the capacity to work out for herself the consequences on dispositions to be made by her will.

AR 4.9 the practitioner did not advise Ms Cleland with respect to the October 2014 will that he would receive a substantial increased benefit under that will and that he had a conflict between his own interests and as intended residuary beneficiary and his duty as a practitioner to provide advice is because he had no duty to so advise.

AR 4.10 similarly the practitioner asserted that he had no duty to advise Ms Cleland that she should obtain independent legal advice.

AR 4.11 the practitioner did make a record of the instructions he received for the October 2014 will and that such record consisted of his handwritten markings on his copy of the January 2011 will and with respect to the December 2014 will that such record was his computer file being the terms of the document which upon its execution became the December 2014 will.

AR 4.11(d) the practitioner did not consider taking instructions with respect to the preparation of the will and advising her whether it was in breach of ASCR 12.1. The practitioner had no duty to make such a record.

The failure to make records was not relevant to the issue of a conflict as alleged in Charge 1. AR 4.11(f) and AR 4.12(c).

DISCUSSION

The Commissioner submitted that one of the first principles of the law relating to fiduciaries is that the fiduciary does not prefer his or her interest to those of his or her client and should not place himself or herself in the position of a conflict of interest. No loss is required to be proved in order to establish a breach of duty.

Counsel for the Commissioner referred us to the decision of ***Johnson v. Buttress (1936) 56 CLR 113 at 134-136*** referred to later in our Reasons.

ASCR12 provides as follows:

> *"12.* ***CONFLICT CONCERNING A SOLICITOR'S OWN INTERESTS***
>
> *12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor or an associate of the solicitor except as permitted by this Rule.*
>
> *12.2 A solicitor must not exercise any undue influence intended to dispose the client to benefit the solicitor in excess of the solicitor's fair remuneration for legal services provided to the client."*

It is conceded by the practitioner that ASCR 12 does apply to him and that he does not fall within what may be referred to as "the exception" provided in Rule 12.4.2(i) being *"... a member of the solicitor's immediate family".*

It is an agreed fact that the practitioner prepared the October 2014 Will and arranged for it to be executed in circumstances in which the practitioner knew he was to be a major beneficiary.

The practitioner knew that his interest in the estate as a result of the October 2014 would have increased by some $730,000 from the 2011 Will.

The practitioner did not inform himself about the duties and obligations of a solicitor preparing a will under which he was a beneficiary (T44 and 63). The practitioner was not aware of ASCR 12 (T 106).

Both the practitioner and the Commissioner have variously relied upon the ASCR.

In his letter to the Conduct Commissioner dated 31 March 2016 BD 157, the practitioner referred to the commentary to ASCR 12.

The submissions on behalf of the Commissioner also referred to the commentary to the Rules.

A copy of the relevant Rule 12 together with commentary was provided to the Tribunal.

The Tribunal observes at the outset that the ASCR are not statutory or legal obligations imposed upon the practitioner.

Rule 2.1 states that the purpose of the Rule is to assist solicitors to act ethically and in accordance with the principles of professional conduct established by the common law and the rules.

Rule 2.2 provides that in considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the rules apply in addition to the common law.

Rule 2.3 states that breach of the rules is capable of constituting unsatisfactory professional conduct or professional misconduct and may give rise to disciplinary action.

The commentary to Rule 12 states:

> *"Because the relationship between solicitor and client is of a fiduciary character, in dealing with the client, the solicitor must not:*
>
> 1. *Engage in situations where his or her own interests do or may conflict with a duty owed to the client except with the latter's fully informed consent.*
> 2. *Profit from the position of solicitor except with the client's fully informed consent."*
>
> *Rule 12 is directed to reflecting the application of fiduciary duties in the solicitor - client context. It also highlights that the relationship between a solicitor and client is one of influence, capable of giving rise to the presumption of undue influence."*

The commentary refers not only to interests which do conflict but also those which may conflict.

The Commissioner's submissions also referred us to ASCR 12.4.1 which provides that a solicitor must inform the client in writing prior to the client signing the will of any entitlement to claim executor's commission and of any provision to charge legal costs in relation to the administration of the estate. The disclosure also requires that if the solicitor has an entitlement to claim commission, that the client be informed that they could appoint as executor a person who might make no claim for executor's commission.

The October 2014 will included charging and commission clauses.

The commentary indicates that obtaining fully informed consent may permit a solicitor to engage in situations where their own interests do or may conflict with the duty owed to the client or may permit a solicitor to profit from their position as a solicitor.

On behalf of the Commissioner it was submitted:

- that the interests of the practitioner were as the major beneficiary under the October 2014 Will and the December 2014 Will.
- that the practitioner had the further interest and therefore a conflict of interest in that he appointed his wife Valerie as the substitute beneficiary under the October 2014 Will.
- that the best interests of Ms Cleland were that she execute a will which was effective and in order to achieve this, she should have received independent legal advice regarding the preparation and effect of each will and be given independent legal advice which would most enhance the prospects of her will being valid and effective and not subject to the potential of a successful challenge.
- It was in this circumstance that the practitioner's interests and the best interests of Ms Cleland were not aligned and were in conflict.
- Given the mandatory nature of ASCR 12.1, the practitioner should not have prepared either the October 2014 Will or the December 2014 Will.

INFORMED CONSENT

With respect to the conflict of interest and ASCR Rule 12, including the commentary regarding fully informed consent, the Commissioner submitted there has been no fully informed consent because no proper advice was given to Ms Cleland by the practitioner to enable him to obtain such consent as the practitioner did not advise Ms Cleland at the relevant time that he had a conflict of interest and that she should get independent legal advice and a failure to do so could mean that potentially there could be a successful challenge to each of the Wills in the circumstances of each will.

We were referred to ***Beach Petroleum v. Kennedy (1999) NSWCA 408 at 465.***

Fully informed consent can be expressed or implied. It is a question of fact to be determined in all of the circumstances of each case but that fully informed consent is to be inferred from the undisputed facts.

It was submitted on behalf of the Commissioner that fully informed consent requires the client to be aware of all the relevant facts and issues in relation to the matter to be determined. Importantly, that fully informed consent is whether the client has been given independent skilled advice about all the facts and circumstances of their case.

The Commissioner further submitted that the practitioner, in AR 8.5(e), appeared to claim that there was fully informed consent by Ms Cleland to him acting for her on the basis that she was a lawyer and would have been aware of the consequences of dispositions made by her. Similar assertions were made by the practitioner in AR 4.8(c) and (d).

In AR 2.2(c) the practitioner asserted that Ms Cleland was a legal practitioner, she practised mainly in the areas of family law and criminal law and that she retired from legal practice well before the year 2000.

It would appear that the practitioner was not aware of exactly when Ms Cleland retired.

Ms Cleland had therefore been retired for well in excess of 14 years and was nearly 87 years of age at the time of the execution of the October 2014 Will

We will address this more fully when discussing the submissions made on behalf of the practitioner.

The Commissioner submitted that simply because Ms Cleland was a legal practitioner it did not mean she was not entitled to receive independent advice nor that she had been provided with sufficient information to make a fully informed consent.

The practitioner submitted that there was no conflict between his duty to serve Ms Cleland's best interests and his interests (and in respect of the October 2014 Will Valerie's interests). If there was, it was cured by Ms Cleland's fully informed consent to it. If there was any conflict, it was between his interests and those of the beneficiaries whose gifts he was directed to delete.

We consider that there are many matters which may have impacted upon Ms Cleland, her capacity to instruct and whether she provided informed consent.

For example, whether Ms Cleland had testamentary capacity, whether she was suffering from a medical condition, dementia or other disability.

We consider that the fact that Ms Cleland might in a previous capacity as a practising solicitor have understood the consequences of the disposition and the relevant legal issues is of no avail to the practitioner. The relevant point at which to assess whether Ms Cleland provided informed consent was at the time of the execution of each of the wills.

It was submitted on behalf of the Commissioner that it was for the practitioner, who had the professional obligation, to ensure that he received fully informed consent from Ms Cleland.

The practitioner did not advise:

- That he had a conflict of interest;
- That Ms Cleland should get independent legal advice; and
- Failure to do so could mean that potentially there could be a successful challenge to each of the wills in the circumstances of each will.

The practitioner, we find, has admitted that he did not provide the advice referred to in the preceding paragraph, his position being that he did not have any obligation to provide such advice.

The practitioner did not concede that there could be a successful challenge to each of the wills.

The practitioner submitted that to establish a breach of Rule 12.1, the Commissioner must establish that there was a conflict between Ms Cleland's best interests and the practitioner's interests. No such conflict existed automatically (merely) because the practitioner was preparing the Wills and was a beneficiary as to a significant amount under each will.

In our view that submission misconceived the nature of the practitioner's obligations.

The conflict or potential conflict is between the practitioner's duty to advise his client and the obligation imposed by that duty including advising of the potential for conflict and the necessity to obtain independent legal advice on the one hand, and his own personal interests in the outcome and benefits of the will on the other hand.

The practitioner was the intended beneficiary but at the same time had a duty as a practitioner to advise in respect of all of the matters pertaining to the consequences of the changed gifts contemplated in the October 2014 will and in a similar way with respect to the December 2014 will.

The practitioner submitted that the Commissioner has done no more than to effectively assert the interests of the practitioner and the interests of Ms Cleland and allege that there was a conflict between those interests. That did not constitute evidence of conflict.

For example, the Commissioner asserted that there was a conflict between Ms Cleland's interests which included receiving advice from a disinterested solicitor and the practitioner's interests which included his being a residuary beneficiary.

The practitioner submitted there was no conflict of interest between those interests if Ms Cleland was to receive independent advice as it could be inferred that it was equally in the practitioner's interests as well as Ms Cleland's that she have such advice.

Those submissions, in our view, are not to the point. It was in the interests of Ms Cleland to receive independent legal advice or at least be advised to do so. The reality is that the practitioner proffered no such advice to her, did not advise her of the necessity or desirability for obtaining such advice and the reasons for same. No independent legal advice was obtained.

We refer to matters pertaining to Ms Southern and the advice provided to Ms Cleland by the practitioner to obtain advice from her later in these Reasons.

We do not accept the submission put on behalf of the practitioner that the interests of Ms Cleland were simply to execute a will that reflected her wishes or that she believed to be valid.

That cannot be a correct statement of the interests of Ms Cleland. That submission seems to suggest that the practitioner had no obligation to Ms Cleland in relation to the preparation of the will other than to ensure it was executed properly and that it was in the terms that she wanted. Seemingly, the practitioner considers that he had no obligations to provide any advice to Ms Cleland.

We find that the practitioner had the duty to provide and Ms Cleland was entitled to receive advice about the will and its consequences, even if Ms Cleland did not want to hear that advice or in the circumstances chose not to act upon it. The practitioner made no effort at all to discharge his duty to Ms Cleland.

We find that it would be fundamental to the interests of Ms Cleland that she have prepared for her, by a legal practitioner, a will which was not only reflective of her wishes but also effective and not subject to the potential of a successful challenge.

The practitioner in his AR clearly acknowledged that Ms Cleland needed to have an effective will – we refer to and incorporate our reasons with respect to that topic in Charge 4.

The practitioner's submissions that Ms Cleland's best interests were to make a will that she believed was valid and which gave him, as her immediately previous 2011 will had done, the residuary estate are not consistent with the practitioner's AR where he clearly asserted he redrafted a fresh will with the express intention of making changes in relation to the interpretation administration and effectiveness of the will – not merely making changes to the nature of the testamentary disposition.

In reality those clauses benefited the practitioner by ensuring the residuary estate went to Valerie his wife, should he predecease Ms Cleland, and by ensuring that he was entitled to charge a fee and commission on the administration of the estate.

The practitioner in his evidence T80 said he thought it was what Pam wanted.

The practitioner further submitted that if indeed there was a conflict between Ms Cleland's interests and the interests of the practitioner, it was cured by Ms Cleland's consent to his preparing the will. That consent, it was submitted, was given by Ms Cleland telling the practitioner that she wanted him to prepare a will for her and that he was the only person she could trust. AR 2.5.(b)(11).

Ms Cleland had told him in early 2014 that she could not remember what was in her will and she did not have a copy of it. AR 2.5(b)(1)

The practitioner at AR 2.5(b), 22 and 23 asserted that he did not reproduce the 2011 will but redrew it using a precedent of his own. In so doing he included additional provisions "relating to the interpretation, administration and effectiveness of the will David thought desirable including a provision adding Valerie as a substitute residuary beneficiary"

At AR 4.4 the practitioner asserted that Valerie did not know that he was going to prepare a will that made her a substitute residuary beneficiary and asserted at (c) that Valerie's interests were to help that will guard against an intestacy in respect of the residuary estate and have the gift in the event that David predeceased Pam be as close to a gift to David as it could be.

It was further submitted on behalf of the practitioner that at the time each will was made there was no one who has been shown to be an eligible person to claim provision from the estate under the Inheritance (Family provision) Act.

We accept that submission.

That fact would not preclude a challenge by a beneficiary as to the testamentary capacity of Ms Cleland with respect to the wills or on the basis that there was a conflict of interest with respect to the preparation of the wills by the practitioner, or a claim by a disappointed beneficiary as a consequence of the amendments to the October 2014 will and the December 2014 will

We do not accept, and the evidence does not establish, that there was any fully informed consent by Ms Cleland to the practitioner preparing her will. To the contrary, we find that no advice was provided to Ms Cleland. Accordingly, her consent, if there was one, or if one could be implied from the surrounding facts, was entirely uninformed and in our view, ineffective.

Undue Influence

In their Outline of Submissions, Counsel for the Commissioner provided a copy of the relevant excerpts from ***Dal Pont GE: Lawyers Professional Responsibility 6th Ed. (at 6.125 – 6.130)***.

It was submitted on behalf of the Commissioner that the rules regulating conflict of interest are linked to the presumption of influence that arises in certain fiduciary relationships, one of these being the relationship of solicitor and client.

The lawyer and client relationship is presumed to be one of influence – ***Powell v Powell (1900) 1 Ch. 243 at 246; West Melton (Vic) Pty Ltd (Receiver and Manager appointed) v. Archer (1982) VR 305 at 312-313.***

> *"Solicitors are trusted and confided in by their clients to give them conscientious and disinterested advice on matters which profoundly affect their material wellbeing",* making it *"... natural to presume that out of that trust and confidence grows influence".*

At paragraph 6.125 of Dal Pont, it is noted -

> *"The strength of presumption of undue influence varies according to the nature of the client. A client whom the evidence establishes was clearly dependent upon her or his lawyer will attract a weighty presumption.*
>
> *On the other end of the scale is the sophisticated and well informed corporate client."*

We note that in the submissions filed on behalf of the practitioner, it was submitted:

> *"David and Pam were close. She had no children. He was the closest thing she had to a child of her own. He and she had become close over the time since 1997, not 2014 as asserted by the Commissioner.*
>
> *.... (Pam) had no children. Her closest relatives were David and his siblings. He saw much more of her than any of his siblings did. He was the closest thing to a child she had in the sense that he did for her the sort of things a child would do. He had been doing those things for over 12 months before she told him she wanted him to prepare the first of the wills."*

The Tribunal considers in the circumstances of this matter, including the age of Ms Cleland, that the presumption of undue influence is at the weightier end of the scale.

The relationship of the practitioner and Ms Cleland was very close, giving rise to an inference of likely influence and the practitioner was thus in a serious position of conflict.

Not only did the practitioner's duty and personal interests conflict, but he had a close personal relationship with Ms Cleland and an affection for her which would make it difficult, perhaps unwise, to act for her in any event.

Ms Cleland appears to have wanted to benefit the practitioner to the exclusion of others who had previously received the benefit of her estate. The practitioner's stated desire to please her and do what he was asked to do inevitably placed him in a position where he could not bring an impartial and disinterested gaze to bear on the task of preparing her will.

The presumption of undue influence is rebuttable.

As Dickson J in ***Johnson v. Buttress*** commented –

> *"... the party in the position of influence cannot maintain his beneficial title to the property of substantial value made over to him by the other was a gift, unless he satisfies the Court that he took no advantage of the donor, and that the gift was the independent and well understood act of a man in a position to exercise a free judgment based on information as full as that of the donee. This burden is imposed upon one of the parties to certain well known relations as soon as it appears that the relation existed and that he has obtained a substantial benefit from the other. A solicitor must thus justify the receipt of such a benefit from his client. The lawyer bears the onus of adducing evidence of this kind if the transaction is to be upheld."*

The onus ordinarily requires that the client has received independent legal advice, only advice given by a lawyer who is truly independent – that is, not given by a partner, associate or employee of the lawyer – and who has clearly been retained to address the issue of influence and not merely client understanding. ***Brusewitz v Brown (1923) NZLR 1106 at pp 1106-1109.***

FAILURE TO MAKE RECORD OF HIS INSTRUCTIONS

The particulars of this aspect of the Charge are contained in paras. 1.1.9, 1.1.10, 1.1.11, 1.2, 1.3 and 5.1.10, 5.1.11, 5.1.12, 5.2, 5.3 and 5.4.

In his response, the practitioner stated that he kept a computer file in which he had filed the January 2011 Will upon which he made notations that he says were Ms Cleland's instructions for the preparation of the October 2014 Will (BD 103) (4.11)

The practitioner reiterated the submissions with respect to Charges 3 and 7 – Ms Cleland's testamentary capacity - about the necessity to make notes.

At (108) of ***Ryan v. Dalton***, Kunk J said:

> *"In many cases which do come before the Court, the evidence of the solicitor will be critical. For that reason, it is essential that solicitors make full contemporaneous file notes of their attendances on the client and any other person and retain those file notes indefinitely."*

In his evidence, the practitioner confirmed that the only record he prepared were the handwritten notes for the amendments to the January 2011 Will. (T57) (112-113)

He made no record of his 10-15 minute discussion with Ms Cleland regarding the inclusion of his wife Valerie as a substitute beneficiary in the October 2014 Will. (T79)

He made no record of his advice that Sarah Southern should prepare Ms Cleland a new Will. (T118)

We refer to our Reasons with respect to the inclusion (and exclusion) of Valerie as a substitute beneficiary in our reasons with respect to charge 4. We incorporate them with respect to charges 1and 5.

The practitioner did not make any note or make any record of Ms Cleland's instructions that she wanted to "leave everything to him". (T62-64)

On behalf of the practitioner, it was submitted that there was no need for him to make any more notes than he did.

We do not accept that submission – the Tribunal considers that it is extraordinary that the practitioner made no notes, particularly in circumstances where he was both solicitor and beneficiary.

The practitioner made no further or other submissions on this topic including in his Submissions in Reply to the Commissioner's submissions.

CHARGING CLAUSE

The practitioner admitted he did not obtain instructions before inserting the Charging Clause (Clause 11) in the October 2014 Will. (T116)

It was submitted that this was another failure by the practitioner to obtain instructions from Ms Cleland where she was fully informed and obtain her consent.

It was submitted on behalf of the Commissioner that a Charging Clause is not a standard clause and cannot be dismissed as being part of a precedent Will or verbiage as the practitioner described it. (T116-117)

The practitioner was not charged with a breach of ASCR 12; he however gave evidence about it and was cross-examined.

It was submitted on behalf of the Commissioner that it is not unfair therefore for the Tribunal to make findings either with respect to the charging clause or to consider it together with other conduct in constituting professional misconduct. Alternatively, no finding need be made given the other conduct.

The Commissioner referred us to Rule 12.4.1 the substance of which we have referred to earlier in these Reasons.

In essence, where a solicitor is appointed as an executor and pursuant to the terms of the will is entitled to claim an executor's commission or legal costs in relation to the administration of the estate, the practitioner must inform the client in writing of those entitlements and in addition, inform the client that they could appoint someone as an executor who might make no claim for executor's commission.

The client needs to give an informed consent to those terms.

It was submitted on behalf of the practitioner that the consideration of the paragraphs in the will with respect to charging legal fees and commission introduced the equivalent of a new Charge.

It was further submitted on behalf of the practitioner that the practitioner's evidence on 22 November 2018 was that Pam told him he could charge her for doing the October 2014 Will and he said that he would not do so. That was said on the night she told him she wanted him to do a will or the next morning when he took his equipment.

It is submitted that the evidence on 20 November 2018 is consistent with evidence on 22 October 2018 that he would not charge the estate for his work as executor

We accept that the practitioner is not specifically charged with a breach of Rule 12.4.1.

We find however that the obligations imposed upon a solicitor to provide written advice to a client about certain charging and commission clauses in a will is quite a separate issue to a solicitor charging for the preparation of the will.

It has not been suggested and we accept that the practitioner did not behave in any way inappropriately with respect to charging with respect to the making of the will.

The issue raised by the Commissioner relates to the insertion in the will of a charging clause for the work in administering the estate

We note with respect to Charges 1 and 5 that the particulars included the interests of Ms Cleland receiving or having the opportunity to receive advice from a solicitor in respect of all matters that would be usual for a testator to consider in the making of a will.

We consider that the issue with respect to the charging clauses falls within the parameters of charges 1 and 5.

Additionally, the Tribunal is conducting an inquiry into the Practitioners conduct.

This topic arose in the course of the inquiry and the practitioner was given every opportunity to respond.

It would be usual and indeed mandatory for the practitioner to inform a client in writing of several matters including the entitlement of the practitioner to claim executor's commission or legal costs in relation to the administration of the estate and further advising that the client would appoint as executor, a person who might not make claim for executor's commission.

As with every other matter pertaining to taking instructions and advising, the practitioner was not aware of the relevant ASCR nor his obligations with respect to taking and recording instructions.

We consider the practitioner's conduct and behaviour in including such terms in a will without seemingly any instructions to do so and without rendering any advice to Ms Cleland at all, let alone in writing, to be a serious breach of the practitioner's obligations.

The seriousness of that breach is not ameliorated by the assertion of the practitioner that in fact, given that he was to receive the residuary estate, it would make no difference to him.

That of course begs the question of why it was inserted in the first instance if that was the practitioner's view and belief.

Determination with respect to Charges 1 and 5

The Tribunal finds that the practitioner had an obligation to Ms Cleland with respect to the October 2014 and December 2014 Wills in accordance with ASCR 12.1 and

the practitioner's common law obligations as a fiduciary to act in the best interests of Ms Cleland.

The evidence to which we have referred establishes that:

- Ms Cleland was 87 years of age;
- Ms Cleland was closely connected with the practitioner and trusted him above others to prepare her amended wills;
- The practitioner was to receive a substantially increased benefit as a result of the October 2014 Will which continued through to the December 2014 Will;
- The practitioner did not inform himself about his duties and obligations as a solicitor preparing a will under which he was a beneficiary and was not aware of ASCR 12.
- The practitioner did not discuss with Ms Cleland the potential for conflict or influence by him.
- The practitioner provided no advice to Ms Cleland about the potential for conflict and that she should obtain independent legal advice.
- The drafting of the October 2014 will included clauses that were not included in the 2011 will, no notes were made of any instructions with respect to those clauses.
- The practitioner made no notes of any instructions received from Ms Cleland other than the notes on the 2011 will he made at the time of taking instructions for the October 2014 will.
- The practitioner included a charging clause including for commission in clause 11 of the October 2014 will. The practitioner had no written or any other instructions to include a charging clause.
- The practitioner provided no advice to Ms Cleland.
- There was no basis upon which it could be found that Ms Cleland provided any informed consent.
- The practitioner included Valerie as a residual beneficiary in the October 2014 will and removed her in the December 2014 will.

The practitioner, pursuant to Rule 12 and indeed his obligations as a fiduciary at common law, had an obligation not to engage in situations where his or her own interests do or may conflict with the duty owed to the client except with the latter's fully informed consent.

PROFESSIONAL MISCONDUCT

Section 68 of the LPA defines unsatisfactory professional conduct as including conduct of a legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of public is entitled to expect of a reasonably competent legal practitioner.

Section 69 of the LPA defines professional misconduct, which relevantly includes:

a. unsatisfactory professional conduct of a legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

The Commissioner submitted that the practitioner's conduct falls within the more serious category of professional misconduct as his breaches of competent and diligent practice were obvious, repeated and consistent as well as substantial given his conflict of interest was a substantial financial gain and not a minor legacy.

In defining what conduct may be capable of constituting unsatisfactory professional conduct or professional misconduct, Section 70(a) includes "conduct consisting of a contravention of this Act, the Regulation or the Legal Profession Rules".

Clause 2.2 of the Rules states that "in considering whether a solicitor has engaged in unsatisfactory professional conduct or professional misconduct, the Rules apply in addition to the common law".

Additionally, in Clause 2.3 the Rules note that a breach of the Rules is capable of constituting unsatisfactory professional conduct or professional misconduct and may give rise to disciplinary action by the relevant regulatory authority.

The Commissioner referred us to ***Legal Services Commissioner v. Pierpoint (2018) NSWCA 160 at 32.***

In that case, a solicitor prepared a will for a close friend in circumstances where the solicitor was the major beneficiary. The Tribunal found that the misconduct constituted professional misconduct.

The solicitor after preparing several wills, convinced the client to obtain independent legal advice and have a subsequent will prepared by another solicitor.

The practitioner did advise the client to obtain independent legal advice and in fact a new will was prepared by an independent lawyer.

The Court determined however that the practitioner's conduct should be characterised as professional misconduct.

In ***Pierpoint***, the practitioner was not aware of the equivalent of ASCR Rule 12. That lack of knowledge was part of the Tribunal's reasoning that the practitioner's conduct was professional misconduct. (see 57-58)

The Commissioner also referred us to ***In Re a Practitioner Full Court of the Supreme Court (1927) SASR*** endorsed and followed in ***Re A Practitioner of the Supreme Court (1937) SASR 316*** which considered the meaning of the words "professional misconduct" and found it included conduct which may reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.

In the submissions on behalf of the practitioner, it was submitted that the case in ***Pierpoint*** is not on all fours with this Inquiry.

It was submitted that it was a worse instance of the breach of the Professional Conduct Rules because of the relevant rule in NSW (Rule 11) which expressly said that a solicitor who was instructed to prepare a will which left a substantial benefit to him or her was to decline to accept the instructions and because there were more wills which had been made by the practitioner than were made by the practitioner in this case.

We accept that the relevant rule in the ***Pierpoint*** case was expressed in mandatory terms.

We assess the conduct of the practitioner in light of the relevant ASCR 12.1.

The submissions made on behalf of the practitioner were effectively that the conduct of the practitioner was not conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner (unsatisfactory professional conduct) or unsatisfactory professional conduct that involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence (professional misconduct).

The nub of the submissions on behalf of the practitioner was that if he went wrong, it was that he did not know of Rule 12.1. The practitioner has made a mistake and not done anything deliberately wrong.

The submissions on behalf of the practitioner go so far as to refer to what is asserted were mistakes made by the Commissioner in the course of the investigation and mistakes by counsel in what the practitioner submitted was not knowing the effect of Section 120 of the Administration and Probate Act concerning the tender of wills.

Those submissions on behalf of the practitioner, in the view of the Tribunal, do no more than attempt to trivialise the conduct of the practitioner likening it to no more than a mistake as to the existence of ASCR 12.

That the practitioner should so trivialise his conduct, describing it at worst as making the mistake in not advising Ms Cleland to obtain alternative advice, is to completely misunderstand and misconstrue the nature of his conduct and the seriousness of the conduct.

The Tribunal can have no confidence that even now, the practitioner has even the most fundamental understanding of his duties and responsibilities as a legal practitioner in taking instructions for any will and in particular a will where he is a substantial beneficiary in addition to being the solicitor preparing the will

We find that the practitioner's conduct is conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner. In addition, we find that the conduct involves a substantial failure to reach or maintain a reasonable standard of competence and diligence.

We find additionally, that taken in conjunction with the conduct the subject of the other charges and our findings in relation thereto, the practitioner's conduct involves a consistent failure to reach or maintain a reasonable standard of competence and diligence.

CHARGES 2 AND 6

In summary:

Charge 2

- The practitioner engaged in professional misconduct when taking instructions from Ms Cleland for the preparation of the October 2014 Will.
- The practitioner did not provide any or any adequate specific and detailed legal advice to Ms Cleland in relation to the instructions provided by her in relation to the proposed changes to the January 2011 Will.
- The practitioner failed to discuss those instructions with Ms Cleland and failed to provide her with any or any adequate advice in respect of those instructions.

CHARGE 6

This charge relates to the December 2014 Will and is in substantially similar terms to Charge 2 which relates to the October 2014 Will.

In AR 5 the practitioner admits that he did not advise Ms Cleland with respect to the legal issues and consequences which might arise from the October 2014 will but says he had no duty to so advise.

The practitioner responded similarly in AR 9 with respect to the December 2014 will.

The Practitioner's Submissions

The practitioner submitted that the inquiry is about David and Pam – not about a solicitor and a person known to him or her only as a client.

This inquiry is in fact about the practitioner's conduct occurring in the course of his practice as a legal practitioner. The fact that the practitioner had a close relationship with Ms Cleland and he knew her not only as a client goes to the core of the issue he now confronts.

The practitioner submitted that the wills he prepared were not wills in respect of which he started from scratch or was asked for any advice or suggestion about but rather made wills which made changes Pam had directed to earlier wills.

If this submission is intended to suggest that a solicitor taking instructions from a client about updating a will has no duty or obligation to inform the client about any

issues surrounding the preparation of the will, or provide any advice about the proposed contents of the will, the Tribunal does not accept that submission.

It was submitted on behalf of the practitioner that Ms Cleland's best interests were "to believe from the execution of the document (he had prepared to be her will) that she had properly executed a will in the terms in which she wanted it to be." (AR 4.2(a)).

We observe at this stage that this submission appears to be somewhat inconsistent with the practitioner's own explanation and evidence as to why he included his wife Valerie as the substituted residuary beneficiary in the event that he predeceased Ms Cleland.

The clear intention was to avoid a partial intestacy. We refer to this topic later in these reasons when we consider Charge 4 we have also addressed them in relation to charges 1 and 5.

The submissions made on behalf of the practitioner were that the practitioner's interests were to do what Pam wanted him to do – do a will for her in accordance with her directions which involved preparing it and seeing to the execution of it.

The practitioner admitted that he did not provide any advice, including advice from a solicitor in respect of all matters that it would be usual for a testator to consider in the making of the will.

The submission on behalf of the practitioner appears to be that in drafting Ms Cleland's will, he had no obligation at all to provide any advice to her about any matter and that he did not do so.

It was further submitted by the practitioner that there was no evidence called about whether Ms Cleland had advice in relation to any of the matters about which he did not advise from another solicitor.

The practitioner submitted that Ms Cleland had the opportunity to obtain advice in relation to those matters because she had a document in the terms which became the October 2014 Will for 3 or 4 weeks before she executed that will.

The nub of the submissions effectively shifts the onus to Ms Cleland to recognise the need for her to obtain independent advice, the reasons for that, and then to obtain the advice.

The Tribunal does not accept that submission. It is for the practitioner to advise about conflict or potential conflict and any issues arising from the will.

It was submitted on behalf of the practitioner that it could never be said that Ms Cleland had a valid will until it had been proved in either solemn or common form either in a Court in a probate action or by the registrar of probates. The Will could not be received into evidence.

The proceedings are not about proving a will, or the validity of the will.

They relate to the practitioner's conduct surrounding the preparation of the October 2014 and December 2014 Wills.

That does not absolve the practitioner from rendering to Ms Cleland all of the necessary advice to ensure that the will was valid and that she was alive to any relevant matters surrounding the preparation and execution of the will.

It is of significant concern to the Tribunal that the practitioner considered himself to have no obligation to provide any advice to Ms Cleland of any description. It is a fundamental miscarriage of the practitioner's obligations.

The Tribunal finds that this is tantamount to an admission by the practitioner of a breach of duty and when coupled with his obvious conflict, makes his acting in this matter extremely serious.

It is particularly concerning as the submissions on behalf of the practitioner appear to rely upon the following.

The practitioner prepared the wills at Ms Cleland's request -

("*I want you to do a new will for me and that this is what I want")* T p. 54 lines 21-23

("I want you to do another will") T p. 96 line 5

A reasonable inference was that Ms Cleland did not consider it appropriate to prepare the will herself and that she considered the practitioner an appropriate person to do so.

It was common knowledge and submitted on behalf of the practitioner that Ms Cleland was a retired legal practitioner and that she was nearly 87 years of age at the time of the October 2014 Will and 87 years of age at the time of the December 2014 Will.

Ms Cleland told the practitioner what she wanted in each will by going through a previous will with him, clause by clause, and directing the deletion of the clause or the changing of the clause with the addition of a clause. She did not ask for any advice. David did not give her or offer to give any advice. He simply noted her directions. (T p. 63 lines 27-31)

The explanation given by the practitioner included - "*he did not want to think that he was influencing her".*

This was a revealing piece of evidence from the practitioner.

In his letter to the Commissioner dated 4 June 2015, BD 116 at 117, the practitioner said:

> *"Secondly, I took her instructions without comment or discussion so that it could not be said that I had influenced her in any way."*

The practitioner in his communication with the Commissioner would appear to be stating that he consciously made a decision to take instructions without any comment or discussion including providing any legal advice, so that he could not effectively be accused of influencing Ms Cleland.

The Tribunal finds the practitioner's explanation extraordinary.

In some ways, it highlights the very difficulty and conflict that confronted the practitioner.

The practitioner was clearly alert to and concerned about the notion of his capacity to influence Ms Cleland. His solution to the dilemma was to offer no advice to Ms Cleland about any topic surrounding the preparation of her will (other than with respect to Valerie as a substitute beneficiary), nor to suggest that she obtain independent legal advice. He did not alert Ms Cleland to the potential of influence.

Whilst alert to the issue, the practitioner made no notes of his instructions or dealings with Ms Cleland.

The reality is that the practitioner made no attempt to give even a base level of legal advice to Ms Cleland and his admission in that regard was particularly serious given the apparent conflict between his legal obligations and duties to give that advice and the very significant personal benefits which Ms Cleland was seeking to bestow upon him.

The practitioner preferred his own interests over his duty to advise his client and the interests Ms Cleland had in receiving proper and independent advice about the dispositions she wished to make.

In the submissions on behalf of the Commissioner, the Commissioner referred us to the evidence of the practitioner (T105) that after the complaint was made to the Commissioner and published to him, he considered there could be something that could reflect on the validity of the December 2014 will.

The practitioner considered it to be prudent to ask someone independent to prepare a new will for Ms Cleland. He informed Ms Cleland that there may be questions about the December 2014 will and that she should have a new will prepared by an independent solicitor.

We note that he recommended his colleague, Sarah Southern.

The practitioner gave evidence that Ms Cleland refused to have her will redone by anyone else.

As with all other advice of the practitioner, he did not make any record of it, this was in circumstances where the complaint had already been lodged in respect of his conduct.

The practitioner had not mentioned this during the course of the investigations at all.

The first reference was in AR 3.4.

At AR 3.4 the practitioner asserted that he told Ms Cleland of the complaint and advised her to do a new will with an independent solicitor.

It is incomprehensible to the Tribunal that in circumstances where the practitioner was aware of not only the complaint having been made, but in all of the sundry communications with the Commissioner about the practitioner's conduct and relevant ASCR rules, that he made no mention of advising Ms Cleland of the complaint and advising her to do a new will with an independent solicitor.

The practitioner does not assert that he informed Ms Cleland of the potential for conflict or undue influence.

If the practitioner indeed by that late stage was having concerns about the will, its efficacy and validity, it is incomprehensible that the practitioner would not make a note of that advice and the instructions he received from Ms Cleland.

The Commissioner submitted that the advice given by the practitioner in accordance with his own evidence was totally inadequate. We agree with that submission.

The belated attempt by the practitioner to give inadequate, and it may well be, merely self-serving advice in circumstances where he was the residuary beneficiary, does not absolve the practitioner of his obligations to provide advice to Ms Cleland at the time and prior to the preparation and execution of her wills.

We refer to our discussion of the relevant legal principles with respect to professional misconduct in relation to charges 1 and 5

We find that the practitioner's conduct is conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner. In addition, we find that the conduct involves a substantial failure to reach or maintain a reasonable standard of competence and diligence.

We find additionally that, taken in conjunction with the conduct the subject of the other charges and our findings in relation thereto that the practitioner's conduct involves a consistent failure to reach a or maintain a reasonable standard of competence and diligence.

CHARGES 3 AND 7

Charge 3

The practitioner engaged in professional misconduct when he failed to take any or any adequate steps to assess the testamentary capacity of Ms Cleland when he took instructions from her for the preparation of the October 2014 will in circumstances where he should have taken steps to ensure that Ms Cleland had sufficient testamentary capacity to give him instructions to make a new will. At the time of those instructions, Ms Cleland was approximately 91 years of age.

We note that Ms Cleland was in fact 87 years of age.

Charge 7

Charge 7 which relates to the December 2014 will is substantially similar in terms to Charge 3 which relates to the October 2014 will.

The testamentary capacity of Ms Cleland

The particulars of the Charges allege that the practitioner knew that Ms Cleland was unable to recall who had prepared the January 2011 Will, nor the terms of the January 2011 Will and the practitioner in those circumstances should have been alerted to the possibility that Ms Cleland lacked the requisite testamentary capacity to provide instructions for the preparation of the October 2014 Will.

It was further alleged that the practitioner made no notes or records of material, facts, matters and aspects or observations of and/or instructions received from Ms Cleland that may be relevant to the assessment of testamentary capacity.

Ms Cleland was approximately 87 years of age. The practitioner was a beneficiary under the January 2011 and October 2014 Wills. The October 2014 Will substantially altered the terms of the January 2011 Will.

The Commissioner alleges that practitioner should have been aware that there was a material risk that upon the death of Ms Cleland, the validity of the October 2014 Will might be challenged by a person interested under an earlier will or the will may be required to be established by the person propounding the October 2014 Will.

It is common ground that the practitioner did not turn his mind to Ms Cleland's capacity to provide instructions and he did not assess her testamentary capacity. ASCR 6.2

In submissions on behalf of the practitioner, it was submitted and the practitioner's evidence was that he did not know of the Law Society's 2012 Guidelines about testamentary capacity. It was submitted that those Guidelines are not in evidence and thus there can be no finding with respect to the practitioner's failure to meet those standards.

Additionally, it was submitted that there is no allegation in the Charges that his conduct did not comply with them.

In the general sense, the relevant case law to which we refer covers many of the matters covered in the guidelines. The practitioner was cross-examined about those matters.

We do not consider that we need to address the guidelines specifically or to find whether it has been established that there was a failure to comply with those standards in particular.

We do observe however that the practitioner was not aware of them just as he was not aware of ASCR 12 – that is, the practitioner seemingly had no understanding of, and did not inform himself about, what his obligations may be. The practitioner's attitude to his duties and obligations as a solicitor taking instructions for and preparing a will can be described, at best, as cavalier.

The effect of the evidence of the practitioner is that he was substantially uninformed about highly relevant matters with respect to instructions for and preparation of wills.

Additionally, the practitioner submitted that there was no need to keep more records than he did as he, inter alia, did not assess Ms Cleland's testamentary capacity or think of doing so.

It was submitted on behalf of the practitioner that he had no need to assess Ms Cleland's testamentary capacity as he knew that she had such capacity and she had given no indication otherwise.

The practitioner gave evidence that he saw Ms Cleland for about an hour during each working week and Sunday lunch each week.

AR 25 the practitioner asserted his observations by January 2014 of the extent of Ms Cleland's knowledge about her financial affairs and her family relationships and that she was free to give her estate to whomsoever she wanted.

It was submitted on behalf of the practitioner that the mere fact that Ms Cleland was 87 years of age was not an indication that she lacked testamentary capacity or that there was any disorder of her mind which affected her disposing of her property, which if her mind had been sound, would not have been made.

The practitioner referred us to ***Banks v. Goodfellow (1870) LR 5QB 549 at 565.***

It was submitted that the law presumed that Ms Cleland had testamentary capacity when she executed the Wills until there was some evidence that she did not.

The issue is not whether Ms Cleland had testamentary capacity but whether the practitioner should have at least turned his mind to that issue.

It was further submitted that the complainant, Penelope Lyons, who lodged the complaint with the Commissioner resulting in the investigation, was urging Pam to change her Will during the October to December 2014 period ie. the inference to be drawn is that Ms Lyons also considered that Ms Cleland had testamentary capacity.

On behalf of the Commissioner, it was submitted that the practitioner was not aware of the Law Society statement of principles with guidelines regarding client capacity (2012) (T 106).

The practitioner did not consider assessing the testamentary capacity of Ms Cleland either prior to the execution of the October 2014 Will or the December 2014 Will (AR 6.2 and 10.2) (T 113).

The practitioner failed to make any adequate notes or records of these advices and assessments (AR 4.11) (T 57, 112-113).

It was submitted on behalf of the Commissioner that a reasonably competent and diligent lawyer in the practitioner's position should have turned his mind to the issue of testamentary capacity given that Ms Cleland was 87 years of age in October 2014 and at times, could not remember what she had done in her January 2011 Will.

The Commissioner also submitted that with respect to the inclusion of Valerie as a beneficiary in the circumstances in which it was done, it raised the possibility that Ms Cleland was malleable to the advice of the practitioner and implies possible undue influence and/or lack of testamentary capacity.

In AR 2.7(b)(10)(A&B) the practitioner asserted that he omitted the provisions relating to the interpretation of administration and effectiveness of the will he had included in the October 2014 will *"...because it seemed to him from his conversation with Pam about the October 2014 will that she would prefer that they were not there..."*

The practitioner seemingly admits that notwithstanding his discussion with Ms Cleland about the inclusion of Valerie as residuary beneficiary after she indicated her concerns about that, and in fact persuading her to agree to the inclusion of that clause, it seemed to him from his conversation with Ms Cleland, about the October 2014 will that she would prefer that they were not there. Accordingly, without any instruction and without advising Ms Cleland, he left them out of the December 2014 will subsequently executed by Ms Cleland

There were of course no notes about any of this.

The effect of the Practitioner's response is that he included those clauses although he knew that Ms Cleland would prefer that they were not there.

This is significant conduct by the practitioner which not only raises issues pertaining to Ms Cleland's testamentary capacity and malleability to the practitioner's will but also the practitioner's capacity to exert undue influence on Ms Cleland and to prefer his interests to hers.

The Commissioner referred us to the case of ***Petrovski v. Nasev (2011) NSWSC 1275 at 87*** referring to an unreported decision of ***Pates v. Craig*** where Santow J refers to the importance of solicitors when preparing a will to take detailed notes of all instructions and observations and in particular, concerning the testamentary capacity of the testator.

In ***Ryan v. Dalton (2017) NSWSC 1007*** Kunk J at 101-108 set out the need for file notes to be made regarding the assessment of the capacity of a testator, in particular, any testator over 70 years of age.

In the submissions on behalf of the Commissioner, it was not suggested that Ms Cleland did not have capacity.

The essence of those submissions was that the practitioner should have been alert to an issue about capacity and at least turned his mind to that topic.

The practitioner was alert to the fact that other beneficiaries were questioning the exclusion of Grant Thonemann from the October 2014 Will, particularly by the time of the December 2014 Will.

Whilst no issue about capacity had been raised by any third party, the practitioner was clearly on notice that some disquiet was being expressed by other persons who were also seemingly close to Ms Cleland.

We find that in the circumstances in which the practitioner took instructions from Ms Cleland in October 2014 and December 2014, the practitioner should have turned his mind to the testamentary capacity of Ms Cleland at the time of taking instructions with respect to each will.

We accept the submissions of the Commissioner and in particular, the Tribunal finds that given the age of Ms Cleland at the time of the making of the wills, that is 86 and 87 years, her uncertainty in early 2014 about her will made in January 2011 and the changes made to her October 2014 will some 2 months later in the December 2014 will, particularly where there had been some disquiet expressed about the changes made by the October 2014 will, that a practitioner taking instructions from Ms Cleland would ordinarily have been expected to consider the issue of testamentary capacity and to make notes about it.

It is inexplicable that the practitioner thought he need not consider that issue or that his assumption that she had capacity was sufficient.

We refer to and incorporate our observation and findings with respect to the taking and making of notes with respect to Counts 1 and 5.

We refer to our discussion of the relevant legal principles with respect to professional misconduct in relation to Charges 1 and 5.

We find that the practitioner's conduct is conduct 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. In addition, we find that the conduct involves a substantial failure to reach or maintain a reasonable standard of competence and diligence.

We find additionally that taken in conjunction with the conduct the subject of the other charges and our findings in relation thereto, the practitioner's conduct involves a consistent failure to reach or maintain a reasonable standard of competence and diligence.

CHARGE 4

Charge 4

In summary:

The practitioner engaged in professional misconduct in relation to the October 2014 will when he drafted Clause 9(b) of the will providing that if the practitioner did not survive Ms Cleland or did not inherit from her for any other reason, the balance of Ms Cleland's estate be left to Valerie (the practitioner's wife).

The practitioner failed to provide any or any adequate advice to Ms Cleland particularly in circumstances where the practitioner drafted Clause 9(b) without having obtained instructions from Ms Cleland to do so.

The particulars of this Charge also refer to the removal of Valerie as a residuary beneficiary in the December 2014 will.

In AR 7.2 the practitioner asserted that he did provide advice to Ms Cleland about clause 9(b) of the October 2014 will and that it was drafted without instructions.

He further asserted AR 7.3 that he drafted the clause without providing Ms Cleland with the opportunity to seek independent advice as to the consequences of it, however she had the opportunity to obtain the advice after the will was prepared.

The Practitione'rs rationale for drafting the clause is contained in AR 7.4. He did so thinking that it was a clause which would appeal to Ms Cleland because it would achieve the disposition of her residuary estate he thought she would want if he died before she did.

On behalf of the Commissioner it was submitted that Valerie is an associate of the practitioner for the purposes of ASCR 12.1 and her inclusion as a beneficiary is conduct in breach of that Rule.

The Commissioner referred to the transcript of the evidence of the practitioner that:

- He did not provide advice to Ms Cleland about an alternative substitute beneficiary. (T79-80)
- He thought Ms Cleland would want to leave things to his estate if he died and that was Valerie. (T80)
- Ms Cleland chastised the practitioner for including Valerie as a substitute beneficiary saying – *"You should not have done that."* (T79)
- The practitioner spent 10-15 minutes discussing Valerie's inclusion with Ms Cleland. (T79) The practitioner made no notes of that conversation.
- The reason he gave to Ms Cleland for including this clause was that if he died, and the clause was not there, then a Court would have to work out what was to happen and further, if the clause was not there then her will would be of no effect if he died first without a substitute beneficiary. (T81)
- The Clause inserting Valerie as a substitute beneficiary was deleted in the December 2014 Will. The deletion was not done pursuant to any instructions from Ms Cleland. (T119)

It was further submitted on behalf of the Commissioner that the practitioner's conduct in including Valerie in the October 2014 Will and excluding that Clause in the December 2014 Will without instructions demonstrates that Ms Cleland was malleable to the practitioner's advice. A court considering a challenge to the Will could infer possible undue influence on the part of the practitioner.

The Commissioner submitted that the inclusion of Valerie as the substitute beneficiary in the October 2014 Will is:

- evidence of possible undue influence by the practitioner;
- evidence of a possible lack of testamentary capacity on the part of Ms Cleland;
- an additional ground of conflict of interest;
- evidence of the practitioner not maintaining the standard of a competent and diligent practitioner;
- a further matter in respect of which the practitioner should have recorded any advice.

Similar observations were made with respect to the deletion of Valerie as the substitute beneficiary in the December 2014 Will.

The Commissioner additionally submitted that the evidence indicated that the practitioner included provisions in the Will for which he had not obtained any instructions.

The Commissioner submitted that the practitioner's conduct demonstrated the practitioner's failure to act in the best interests of his client and demonstrated a complete disregard of the importance of obtaining clear and informed instructions and appropriately documenting and keeping a record of those instructions.

On behalf of the practitioner, it was submitted that he accepted that he did not have instructions to include the clause substituting Valerie as residuary beneficiary but considered that he thought it was what Pam would want (T80) and says that he gave her adequate advice about the clause and she accepted it.

The practitioner gave no advice and had no instructions to remove that Clause in the December 2014 Will. The potential for partial intestacy became an issue again. The practitioner gave no credible evidence as to why he did that

It was submitted on behalf of the practitioner that there was no evidence of undue influence which was coercion in probate law.

That is not relevant and completely misconceives the nature of the practitioner's conduct which is the subject of these proceedings

It was submitted on behalf of the practitioner that he did provide advice to Pam about the insertion of Valerie in the Will. He explained to Pam why he had done so and she accepted his advice that it was a sensible thing to do.

We find it extraordinary that the practitioner would, without any instructions at all, without having canvassed Ms Cleland as to her instructions or her views as to what should happen with her estate if the practitioner predeceased her, make the assumption that she would intend that the residuary estate should go to his family. He thought it would appeal to her because he thought that is what Ms Cleland would want.

Over Ms Cleland's protestations that the practitioner should not have done that, he spent some 10-15 minutes explaining to her why it was appropriate and made no

notes of that or the basis upon which he persuaded Ms Cleland that it was appropriate.

There was clearly no note and the practitioner gave no evidence of having discussed other options with Ms Cleland including making provision for Grant Thonemann or the practitioner's siblings in the event that he predeceased her.

The practitioner's conduct in that regard is a significant and serious breach of the practitioner's obligations to Ms Cleland, it raises serious issues about the capacity of the practitioner to prefer his own interests and also his capacity to exert his will over Ms Cleland.

It is a prime example of the conflict between the practitioner's duties as a solicitor and his role as a residuary beneficiary.

This conduct is rendered more egregious when the practitioner, at the time of the December 2014 will, seemingly, and without any instructions to do so, simply removed Valerie as the residuary beneficiary without note or explanation.

The practitioner in his AR and his evidence does not refer to any discussion with or instruction from Ms Cleland with respect to the removal of Valerie as the residuary beneficiary.

This, in circumstances where the practitioner's evidence is that he sought to avoid an intestacy and spent 15 minutes persuading Ms Cleland to his views at the time of the October 2014 will, is virtually impossible to fathom within a solicitor-client framework

This conduct of the practitioner, for which there is simply no credible explanation, exposed the will to the very issue which he had identified, which is the potential for a partial intestacy.

We refer to our discussion of the relevant legal principles with respect to professional misconduct in relation to Charges 1 and 5.

We find that the practitioner's conduct is conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner. In addition, we find that the conduct

involves a substantial failure to reach or maintain a reasonable standard of competence and diligence.

We find additionally that taken in conjunction with the conduct the subject of the other charges and our determinations in relation thereto, the practitioner's conduct involves a consistent failure to reach or maintain a reasonable standard of competence and diligence.

DETERMINATION

We find that the Practitioner's conduct the subject of charges 1-7 constitutes Professional misconduct

We will hear the parties as to penalty.

DATED the 3rd **day of** June **2020.**

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M Pyke QC	**Professor G Davis**	**R Kennett**