

Legal Profession Board of Tasmania

Medium Neutral Citation: **Complainant v A Practitioner [2018] LPBT 02**

Considered / Heard: 18 December 2017

Determination date: 7 February 2018

Jurisdiction: Legal Profession Board, Tasmania

Before: Mr K Pitt QC (Chairman)
Mr G Jones (Legal Member)
Mr A Mihal (Legal Member)
Mr D Lewis (Legal Member)
Ms J Paxton (Lay Member)
Mr P Dane (Lay Member)

Determination: The complaint is dismissed pursuant to section 433(1)(a) of the *Legal Profession Act 2007*.

Catchwords: **PROFESSIONS AND TRADES- Lawyers- Complaints and Discipline- Professional misconduct and unsatisfactory professional conduct- Australian lawyer engaged as court facilitator- allegations of intimidatory behaviour and anger to the Complainant.**

Legislation: *Legal Profession Act (Tas) 2007* ss 5, 421, 433(1)(a)

Category: Determination

Parties: (Complainant)
(Practitioner)

FileNumber: 2018/02

REASONS FOR DETERMINATION

Background

1. This matter comes to the Board by way of a complaint received on 8 August 2017.
2. The Practitioner is retired from legal practice and works on a contract basis as a conciliator/facilitator.
3. The Complainant has 2 children ('the Children') which were the subject of an application under the *Children, Young Persons and Their Families Act 1995* ('CYP&TF Act'). He separated from the children's mother ('the Mother') in February 2012. The children remained with their mother.
4. The Mother subsequently commenced a relationship with Mr K.
5. In March 2014, the Complainant moved interstate and commenced a relationship with Ms L and they now have a child aged 1 year.
6. In July 2015 a delegate of the Secretary of the Department of Health and Human Services (Child Safety Services) applied for an order that the children be placed in the care and protection of the Secretary for a period of 12 months. That application was successful and the Children were placed with a maternal aunt.
7. With respect to those proceedings, Ms O acted for the Secretary (the Applicant) and the Court appointed Mr A as the Children's Separate Representative.
8. A care and protection order relating to the Children was initially made for a period of 12 months pursuant to s 42 of the CYP&TF Act.
9. In early 2017 The Secretary's delegate made a further application to the Magistrates Court, pursuant to s 42(4)(d) of the CYP&TF Act, seeking care and protection orders until the Children attained the age of 18 years. In the course of the application, a Section 52 Conference ('the Conference') was scheduled for July 2017 for the purpose of resolving matters in dispute between the parties. The Practitioner was contracted to facilitate the Conference.
10. The Conference was held over 2 days with separate sessions, in response to the Complainant's concerns about the safety of his family following allegations of threats made by Mr K.
11. Neither the Complainant nor the Mother were legally represented. They each attended separate sessions with the Practitioner over the two days.
12. Staff from Child Safety Services also attended the Conference.
13. On the first day of the Conference the Complainant agreed to proposed orders which were subsequently drafted and emailed to the Complainant the next day ('the Proposed Orders').

14. The Proposed Orders were provided to the Mother at the conference on the second day. She consented to the Proposed Orders.
15. The Practitioner arranged for the matter to be listed before a Magistrate at the conclusion of the conference to seek final orders in terms of the Proposed Orders, as all the parties were due to leave Tasmania over the next few days.
16. The Complainant initially refused to attend before the Magistrate, until he was made aware of the security measures that had been put in place.
17. On returning to the Magistrates Court, the Complainant, with Ms L and their child were directed to a conference room for the purposes of considering the Proposed Order prior to the matter being called on before the Magistrate.
18. The Practitioner was one of several people who were initially in the conference room and then waited outside the room. Some minutes later the Complainant signed the Proposed Orders and the matter was then heard before a Magistrate. The Practitioner, Mr A, Ms O and the Mother all appeared in the Court room and the Complainant, Ms L and their child appeared by video link from the protected witness room at the Court.
19. The Magistrate duly made a final Order in terms of the Proposed Orders

The Complaint

20. The Complaint alleges the Practitioner has conducted himself such that it would justify a finding that he is not a fit and proper person to engage in legal practice in that he-
 - a. On 13 July 2017 contacted the Complainant by telephone to attend court before a Magistrate and pressured the Complainant into attending, when he knew the Complainant was in fear of his family's safety and he had failed to take the Complainant's concerns seriously;
 - b. Was angry during his telephone call to the Complainant on 13 July 2017;
 - c. On 13 July 2017 stood outside the door to a conference room with Mrs O and Mr A, preventing the Complainant's exit;

in circumstances where he knew the Complainant felt intimidated and trapped and in fear of his family's life and that the time allowed was insufficient for the Complainant to read the order, or obtain legal advice or consider amendments to reflect his wishes as known to him.

Relevant legislation and the law

21. The Practitioner is an Australian lawyer within the meaning of s 5 of the *Legal Profession Act* 2007 ('the Act'). He does not hold, and is not deemed to hold, a current practising certificate, either locally or interstate.
22. The Practitioner in his role as a conciliator/facilitator is not engaged in conduct which occurs in connection with the practice of law. Accordingly, there is no jurisdiction to deal with a complaint unless the conduct complained of falls within the definition of professional misconduct.
23. Section 421 of the Act relevantly defines professional misconduct:
professional misconduct includes –
 - (a) ...
 - (b) *conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.*
24. Section 421 provides that for a finding that a legal practitioner is not fit and proper, regard may be had to the suitability matters that would be considered if the practitioner were an applicant for admission to the legal profession or the renewal of a practising certificate.
25. Suitability matters are set out in s 9 of the Act. Those matters include that a person must be of 'good fame and character', solvency, and conviction for offences amongst other matters.
26. The Board has had regard to each of the parties detailed written submissions.
27. The Board recognises that the circumstances surrounding the conference and the final Orders were difficult for all involved parties, not least the Complainant and his family. The Complainant has described the Practitioner as being angry, and the Practitioner admits to being exasperated and terse with frustration.
28. The Complainant does not allege that the Practitioner physically prevented him from leaving the room but says that he 'felt' intimidated by the Practitioner's presence outside. He does not say that he said anything to the Practitioner or anyone else at that time by which the Practitioner could have become aware of his feelings or his fears.
29. Accepting that the Complainant felt pressured into attending the Court despite his fears for his family, the conduct as complained of, even if established, could not justify a finding that the Practitioner is not a fit and proper person to engage in legal practice.
30. Accordingly, the Board is satisfied that no part of the complaint can be substantiated, and that it is therefore misconceived or lacking in substance.

DETERMINATION

The complaint is dismissed pursuant to section 433(1)(a) of the *Legal Profession Act 2007* ('the Act') as the Board is satisfied that the complaint is misconceived and lacking in substance.

Legal Profession Board of Tasmania

Per: 

David N. Lewis
Board Member

Please note that within 21 days after the date of this determination the complainant or the legal practitioner, the subject of the complaint may apply to the Disciplinary Tribunal or Supreme Court to have this matter heard by the Disciplinary Tribunal or Supreme Court and may make an application to the Disciplinary Tribunal or Supreme Court to stay the determination pending the finalisation of such an application.

Please be aware that an application made to either the Disciplinary Tribunal or Supreme Court may, in the event that application is unsuccessful, result in a costs order against you. Accordingly, it is recommended that independent legal advice is sought prior to making such an application.

Any application to the Disciplinary Tribunal must be in accordance with the form prescribed under the Legal Profession (Disciplinary Tribunal) Rules 2010 (see <http://www.lpbt.com.au/policy-and-guidelines/>).

The contact details of the relevant bodies are as follows:

Disciplinary Tribunal Secretary Mrs Maria Dwyer, Ogilvie Jennings: 6272 6860

Supreme Court, General Enquiries: 1300 664 608