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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

vs.

HUGH MACMILLAN,

Respondent-Appellant.

_______________________________/

Supreme Court Case No. 76,563

The Florida Bar File No.
90-50,821 (15A)

ANSWER BRIEF OF THE FLORIDA BAR

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RULES

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COUNTERSTATEMENT OF FACTS

At page 5 of appellant's statement of the facts, it is suggested that the referee did not base his recommendations upon the evidence before him but rather arrived at his conclusions "swayed by the Bar counsel's characterization of Mr. MacMillan's actions. . ." Bar counsel respectfully suggests that the referee predicated his recommendations upon the evidence he heard. While a sterile record hardly substitutes for the human experience of the courtroom, the bar submits the following counterstatement which, even though bereft of appellant's courtroom demeanor, can shed some light upon what the referee heard and, it is respectfully submitted, afford an explanation for the referee's recommendations.

At page 1 of his statement, citing page 53 of the transcript of final hearing, appellant suggests that his motive for undertaking representation in the Ellison decedent's and guardianship estates was "an opportunity to improve the situation." Scrutiny of the record discloses no such altruistic motive. Appellant received whatever attorney's fees and guardian's fees that he requested. As the Honorable Edward Rogers (who was the probate judge who approved appellant's fees requests) testified: ". . .if the guardian or the attorney for the guardian came in with a consent, we just pretty much rubber stamped it and moved on" (91).* Appellant never filed with the probate court any petition for fees nor any document specifying the basis upon which he based his fees (85) and never furnished his ward's mother with any

* All page references are to transcript of final hearing.

similar documentation.

At pages 1 and 2 of his statement, appellant, in three (3) sentences makes fleeting reference to his storage of estate jewelry entrusted to him for purposes of maintaining the same until his ward attained his majority. The record, however, demonstrates a cavalier attitude of such gross neglect as to establish in appellant a willful disregard for his duties as a fiduciary. Appellant explained that C. Thomas Ellison had died, unattended at an apartment where decedent had resided by himself (52). The police had taken decedent's effects from decedent's apartment with the result that appellant had, in turn, received the effects, including a jewelry box containing various items of jewelry from the police at police headquarters (54). Despite the fact that appellant had not previously known of the existence of the jewelry and had never theretofore seen it, he made no inventory thereof (54,55). As a matter of fact, appellant never made a list of the contents of the jewelry box nor even counted the items contained therein (55). With no jewelry appraisal background (58), appellant culled out six (six) items of jewelry that he considered to be of value, placed such pieces back into the jewelry box and took it to his law office where he put it into an unlocked file box kept on his office floor (58 - 61). After a matter of days, appellant removed the jewelry box from the estate file and placed the box in a drawer in his desk (62, 63). The drawer was unlocked (63).

After several months, appellant removed the jewelry box from his office desk drawer and took the box to his home where he placed the box in a drawer in his home office desk (63,64). Appellant, while

expressing no present recollection of examining the contents of the box at the time of the move from office to home, opined that in the ordinary course he would have opened the box and taken note of the contents thereof upon such a move; that he would have noticed had the more valuable pieces been missing and taken action at that time (64,65).

According to appellant, the jewelry box remained in his desk drawer, at home, from 1985 through 1989 when he retrieved the box to give it and its contents to his ward (66). During the entire period he had custody of the box appellant never, ever, not even once, examined the box for any purpose (66). Appellant's wife was the only other occupant of appellant's home during the period of time in question (66). She assured appellant that she had no knowledge of the box and had not entered it (68).

After it was discovered that three (3) of the items of jewelry were missing and unaccounted for, appellant embarked upon a remarkable odyssey. He explained to the referee that he commenced an extensive search for the missing items including a search of various safe deposit boxes maintained by him (69). When asked why, if he had never, ever even looked into the box from the day he placed it in his desk drawer at home, no less taken anything from the box, he would expect to find the missing items in his safe deposit boxes, appellant simply had no answer (69,70). Appellant conceded that had the items been located in one or more of his safe deposit boxes, it would necessarily have meant that he had, in fact, invaded the jewelry box, a concession that appellant unequivocally refused to make (70).

Eventually, appellant discovered a ring which, he explained to the referee, he took to be one of the three (3) missing pieces (71). He

found it in a drawer in a separate piece of furniture at his home and notwithstanding that he insisted that neither he nor his wife ever opened or examined the jewelry box and certainly never removed any item therefrom, he believed the ring to be one of the missing items; somehow, in some inexplicable fashion, the ring had wended its way from a desk to a dresser (70 - 76). Appellant further explained that he concluded that the ring he discovered was one of the missing estate items even though he had inherited such ring from his "Uncle William" several years earlier and even though he found the ring in his personal jewelry box together with other items of jewelry that he had inherited from his uncle (72 -74, 84). Of course, when appellant attempted to pass his own ring off as the missing estate ring, he was rebuffed in his attempt by his ward's mother (33). Although the referee found appellant to be not guilty of attempting knowingly to misrepresent his ring as one of the missing items, the referee noted that ". . . the argument presented by The Florida Bar on this issue is logical. . ." (See report of referee, page 3, item I).

In his statement, appellant recites that he "ultimately paid $2,100 to Scott for the missing jewelry" (Appellant's brief, page 2). Ultimately is an excellent choice of words. As a matter of fact, appellant discovered that he was unable to deliver or account for the three (3) missing items of jewelry in January, 1989 (See paragraph 7 of the bar's request for admissions admitted to by appellant in paragraph 1 of his response to the bar's request). Appellant made no attempt to make restitution to his ward until after his ward's mother complained to The Florida Bar which occurred in January, 1990 (43). After the grievance was filed appellant ultimately made restitution by paying to

his ward the agreed value of the missing items in installment payments (39). Despite his own failure to safeguard the items entrusted to him, and despite the passage of over a year during which no restitution was made, appellant's reaction to his ward's mother seeking relief from the bar was anger and frustration (143).

Appellant discusses in his statement of the facts his taking of $4,000.00 from his infant ward's guardianship estate, explaining that he had "some reservations about the propriety of taking these future fees" (See appellant's brief, page 2). As a matter of fact, when appellant took the funds, he was suffering from financial stress and strain and needed the funds (82). He had more than just "some reservations" about taking the money. At the time that he took the funds he understood that the taking was improper and inappropriate. He testified:

> Q As a matter of fact, when you took that four thousand dollars from the guardianship account, you had misgivings about taking it, did you not, sir?
>
> A Yes, I did.
>
> Q And you understood, sir, at the time that this activity of taking money from a guardianship account was improper and inappropriate, did you not, sir?
>
> A Yes (78,79).

Appellant attempts, in his brief, to dismiss his knowing misappropriation as an "out-in" transaction (See page 3 of appellant's brief). As a matter of fact, the wrongful taking constituted more. It was an out-personal use-in transaction. Appellant took the funds, knew the taking was wrong (78,79), and applied the funds to his own, personal use (78). Even after the bar disciplinary process had run its inexorable course, appellant steadfastly refused to acknowledge any

impropriety in failing to account to the probate court regarding the misappropriation and in declaring in his account to the court, under penalty of perjury, that it (the account) "constitutes a full and correct account of the receipts and disbursements of all of the property. . ." In his response to the bar's request for admissions, appellant denied that his declaration to the court was inaccurate and false (See paragraph 22 of the bar's request for admissions denied by appellant in paragraph 1 of his response to the bar's requests). The referee was presented with the following testimony from appellant:

> Q You are familiar with the guardianship return that is attached to the Bar's complaint as Exhibit No. 1, are you not, sir?
>
> A Yes.
>
> Q In truth and in fact, sir, the declaration that you subscribed your name to appearing at the end of that account, was inaccurate and false, was it not, sir?
>
> A The four thousand dollar advance and the return of that four thousand dollars two weeks later is not reflected in the accounting.
>
> Q Well, then in truth and in fact that declaration was inaccurate and false; isn't that correct?
>
> A It is not complete to the extent it does not contain that transaction.
>
> Q Well, as a matter of fact, sir, for the account to have been accurate and true, it would have had to have disclosed your taking of the four thousand dollars, the uses to which you put it, and the return of it; isn't that correct, sir?
>
> A That is a reasonable conclusion.

Q Would you agree with me, sir, that regardless of Mrs. Ellison's consent to that account, and I make reference to the Bar's Exhibit No. 1 attached to its complaint, that that account, regardless of Mrs. Ellison's consent thereto, was also an account to the Probate Court?

A Yes, it was.

Q And would you agree with me that the Probate Court would have a legitimate interest in having disclosed to it all transactions affecting the underlying estate?

A I believed I had met that interest by correcting my mistake immediately and by disclosing that mistake to the client.

Q You are talking about the fact that after you determined to repay, make restitution of the money to the estate, you reported the incident to Mrs. Ellison, is that correct?

A Yes.

Q How would that inform the court as to what you had done?

A I believed that that was an appropriate and complete disposition of the matter.

Q Do you think that the Probate Court may have, upon seeing that transaction, be (sic) interested in asking some questions directed to you?

A I don't know.

Q Do you think that it may have even impacted on a judge's determination as to whether or not to remove you as fiduciary?

A I believe that I had addressed that mistake in a satisfactory matter (sic).

Q And that was by reporting it to Mrs. Ellison?

A By correcting it and advising the person who might potentially be adversely affected by the mistake.

Q I would like to define some terms. You say by correcting it. In using that terminology, are you making reference to the fact that you disclosed that to Mrs. Ellison?

A Yes.

Q That is what you mean by correcting it?

A Replacing the funds is the main thing I mean by correcting it.

Q By making restitution to the guardianship fund?

A And disclosure to the guardian.

Q And that is the extent of what you mean when you use the word correct or correcting?

A Yes.

Q Do you think, sir, that had you accurately reported the transaction on your account, that it may have had some legitimate, played some legitimate part in a judge's assessment as to the value of your guardianship fee?

A I don't know (79-82).

At page 3 of his statement, appellant recites, as fact, that the bar disciplinary proceeding "was a highly publicized event." Notwithstanding the fact the the Rules Regulating The Florida Bar as promulgated by this Court specifically provide that the proceedings are public, the record simply does not establish appellant's assertion. There are but two (2) references to indicate the public nature of this case. One appears at page 13 of the transcript indicating the presence of a reporter and the other appears at page 133 consisting of the

reference, "when this hit the paper." There simply is nothing in the record to indicate that this case was publicized less than, the same as or more than any other bar prosecution.

In his statement, appellant recites that his paralegal "who actually prepared the report, was aware of the transfers which she had been told were a mistake, but assumed that it wasn't necessary to include them in the report" (Appellant's brief, page 3). If such recitation is somehow designed to create an inference that appellant's paralegal orchestrated appellant's inaccurate account and misrepresentation to the probate court, the testimony presented to the referee more than dispels it. The paralegal made it abundantly clear that she presented the account in question to appellant and considered it his responsibility to review it (120). Appellant testified:

> Q I assume when she prepared the Bar's Exhibit No. 1 you examined it very carefully, did you not?
>
> A I certainly did.
>
> Q Did you and Helen Johnsen on that occasion discuss the four thousand dollar transaction?
>
> A No (87).

In the bar's view, the foregoing presents some flavor of what pricked the referee to conclude, independent of any summation by bar counsel, that:

> As aggravating factors in this matter I find the following. The respondent has substantial experience in the practice of law. He was admitted to the bar in 1970 and has practiced law continuously. While the disappearance of the jewelry in question appears to be the result of gross negligence, I find

that the misappropriation of $4,000.00 from the guardian's funds were the result of a dishonest or selfish motive. At the time of the taking of the $4,000.00 the respondent admits to needing the funds (82), and knowing at the time it was improper and inappropriate (79). Furthermore, I find that there was a pattern of misconduct regarding the handling of this guardianship of property. Jewelry entrusted to the respondent disappeared. Funds were misappropriated. And finally, in an apparent cover-up to the Court, respondent neglected to account for the transactions involving his taking, use and restitution of the $4,000 in question. Finally, an additional aggravating factor includes the existence of multiple offenses. (Report of Referee, pages 9 and 10).

SUMMARY OF ARGUMENT

In one representation, appellant committed the three most serious violations in the hierarchy of attorney discipline. He knowingly misappropriated funds entrusted to him in two (2) fiducuary capacities, viz., attorney and guardian; he misrepresented his misappropriation to the probate court by failing to reveal any of the particulars regarding his taking, use and return of his infant ward's funds upon his accounting, declaring, nonetheless, under penalty of perjury, that his account included all disbursements; and he dealt with personal property entrusted to him for a specific purpose in such a grossly negligent fashion so as to deprive his infant ward of three (3) of what appellant, himself, determined to be the most valuable items entrusted to him.

Whether one applies this Court's precedent or looks to Florida Standards For Imposing Sanctions, appellant's misappriation, absent mitigation, would warrant disbarment. The same is true regarding appellant's perjury to the probate court. His reckless disregard of his responsibilities regarding the personal effects entrusted to him serves to enhance the consequences of the other misconduct.

The referee's whittling of the veneer of the presumption of disbarment is precise. In a meticulously crafted report, the referee has specified precisely what aggravating and mitigating circumstances he considered in sculpting his suggested sanction. His recommendation should not be disturbed.

I.

THERE IS CLEAR AND CONVINCING EVIDENCE THAT APPELLANT MISAPPROPRIATED HIS WARD'S FUNDS AND THEREAFTER CONCEALED HIS WRONGFUL TAKING FROM THE PROBATE COURT.

It is axiomatic that a referee's findings of fact are presumed correct and will be upheld unless clearly erroneous. The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). The test on review is whether the findings are supported by competent, substantial evidence, which, if present, will preclude the Supreme Court of Florida from substituting its judgment for that of the referee. The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987).

Appellant argues that the evidence regarding his intent at the time he took his infant ward's funds is "highly obscure." (Appellant's brief, page 9). In fact, his intent is clearly manifested by the circumstances surrounding his taking and, more importantly, by his own description of his mind-set at the time of the taking.

The circumstances surrounding the taking are described by appellant, as follows:

> Q At the time that you took that four thousand dollars from the estate, sir, you personally were suffering from some financial stress and strain, were you not?
>
> A I needed the funds (82).

Appellant's description of his mind-set at the time of the taking establishes his intent beyond doubt. He explains:

> Q As a matter of fact, when you took that four thousand dollars from the guardianship account, you had misgivings about taking it, did you not, sir?
>
> A Yes, I did.

> Q And you understood, sir, at the time that this activity of taking money from a guardianship account was improper and inappropriate, did you not, sir?
>
> A Yes (78,79).

Appellant suggests that notwithstanding his concession that he was financially stressed, needed the funds that he took and knew that the taking was wrong, the "entirety of the circumstances" was somehow overlooked by the referee. In fact, the entirety of the circumstances hardly portrays appellant in a favorable light. In reviewing the entirety of the circumstances one is inexorably led to appellant's handling of the jewelry entrusted to him. The referee, as do all trial judges, had the opportunity not only to hear the evidence presented to him, but to observe appellant and assess his demeanor and credibility. That the referee took into consideration the entirety of the circumstances is manifested by the pattern he describes in his report.

> . . . The respondent has substantial experience in the practice of law. He was admitted to the bar in 1970 and has practiced law continuously. While the disappearance of the jewelry in question appears to be the result of gross negligence, I find that the misappropriation of $4,000.00 from the guardian's funds were the result of a dishonest or selfish motive. At the time of the taking of the $4,000.00 the respondent admits to needing the funds (82), and knowing at the time it was improper and inappropriate (79). Furthermore, I find that there was a pattern of misconduct regarding the handling of this guardianship property. Jewelry entrusted to the respondent disappeared. Funds were misappropriated. And finally, in an apparent cover-up to the Court, respondent neglected to account for the transactions involving his taking, use and restitution of the $4,000.00 in question. . . (Report of Referee, pages 9 and 10).

When appellant filed his account with the probate court without any reference to his taking of funds, his use thereof for his personal purposes and his repayment thereof, he declared, under penalty of perjury that his account was a true and accurate recitation of all disbursements for the period embraced thereby (Bar's exhibit 1 in evidence). In its complaint, the bar charged that "[I]n truth and in fact, the declaration subscribed to by respondent . . . was inaccurate and false in that respondent did not report to the court the $4,000.00 appropriated by him for his own uses and purposes as hereinabove recited" (See paragraph 24 of the bar's complaint and paragraph 22 of the bar's request for admissions which contains the same allegation). Appellant denied such allegation in his response to the bar's request for admissions (See paragraph 2 of appellant's response to admissions requests). Thus, the stage upon which appellant presented himself to the referee constituted a denial of the undeniable.

Appellant then proceeded to confess to the fact that he knew at the time that he did it that his taking of his infant ward's funds was wrong and that that the taking was at a time when he was financially stressed and needed the funds (78 - 80). He further conceded that his account to probate court was inaccurate to the extent that he failed to report the subject transaction and that the only way that it could have been accurate was by the disclosure of his taking of the funds, his uses thereof and his repayment (The full colloquy is recited at pages 6 through 8 in this brief). While appellant testified that he did not discuss the $4,000.00 transaction with his paralegal when he examined his account, his paralegal explained how she specifically brought the transaction to appellant's attention as she compiled the various data

for purposes of preparing the account. She testified:

> Q Now, you became aware of an incident where Mr. MacMillan disbursed to himself four thousand dollars out of the Ellison guardianship account?
>
> A Yes, I did. It happened six months or half a year there in '86. When I came back to work for him again, I was reviewing all the files to figure out what had transpired while I was gone and tried to get myself back into the thing.
>
> I happened to see this. Well, you wouldn't see it, it was in the checkbook, where there was four thousand dollars taken out payable to him and four thousand put back maybe a week later or something like that, maybe a week and a half, something like that. I can't remember.
>
> So I went in there and I said, "What was this for?" And Hugh said, "Don't worry about it. It was a mistake I did. Don't worry about it. I have talked to Sandra and it is taken care of." So I left it out and figured it was in and out and it was nothing to worry about. (115,116).

This undisputed evidence establishes that appellant did not simply forget about the transaction in rendering his report to probate court. He had it specifically brought to his attention and consciously and deliberately determined to keep the matter between himself, his secretary and Mrs. Ellison. Coupled with his longevity at the bar, his admittedly wrongful taking and his acknowledgement of the need to include such transactions in an account in order to make it accurate, it is respectfully submitted that the referee had presented to him very substantial evidence upon which to predicate his recommendations.

Appellant's reliance upon The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991) is misplaced. In Burke, unlike the case at bar, the referee made no specific findings of misappropriation; there was no concession by the respondent of a wrongful taking as in the instant case.

Finally, appellant's attack upon the referee's use of the words "neglecting" and "neglected" constitutes quibbling pettifoggery. The bar is content to refer the Court to the report of referee and respectfully suggests that the referee's selection and contextual use of the subject words is bold, precise, concise and susceptible to no hint or possibility of misinterpretation.

II.

THE REFEREE'S SANCTION RECOMMENDATION COMPORTS TO COURT PRECEDENT AND TO FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND SHOULD BE CONFIRMED

Absent mitigating circumstances, both precedent and the Florida Standards for Imposing Lawyer Sanctions support imposition of a disbarment for the misappropriation and perjury indulged in by appellant. In The Florida Bar v. O'Malley, 534 So.2d 1159 (Fla. 1988), this Court addressed the subject of an attorney's perjury stating: "When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment" (1162).

In The Florida Bar v. Shanzer 572 So.2d 1382 (Fla. 1991), the Court reiterated its presumption of disbarment in cases involving misuse of client funds. In The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991), the Court emphasized how seriously it views misappropriation of client funds stating:

> On the other hand, anything less than a three-year suspension may not sufficiently deter other attorneys who might be tempted to avail themselves of their clients' readily accessible funds. Regardless of the mitigating circumstances involved, the intentional misappropriation of client property remains a most serious offense. (809).

Standard 4.11 of Florida Standards calls for disbarment when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury. Standard 6.11 calls for disbarment when a lawyer with the intent to deceive the court, knowingly submits a false document.

Both the Standards and the Court take into consideration

aggravating and mitigating factors in fashioning the appropriate sanction. There was a mixture of both factors which was duly considered by the referee.

Section 9.22 of the Standards specifies the factors which may be considered in aggravation. Appellant's knowing and deliberate misappropriation establishes a dishonest or selfish motive (9.22(b)). He testified that he was experiencing financial stress and despite knowing that his dipping into the guardianship funds was improper, nonetheless proceeded to do so. Standard 9.22(c) is concerned with a pattern of misconduct. The case is replete with appellant's mishandling of funds and property entrusted to him for a specific purpose. Jewelry entrusted to him disappeared. Funds were misappropriated. In a cover-up to the court, respondent neglected to account for the transactions involving his taking, use and restitution of the $4,000.00 in question. Standard 9.22(d) refers to multiple offenses which are certainly present. Standard 9.22(g) defines as an aggravating factor an attorney's failure to acknowledge the wrongful nature of his conduct. The Court's attention is once again respectfully directed to the colloquy recited at pages 6 through 8 of this brief which demonstrates appellant's absolute unwillingness to concede his responsibility to have reported his misappropriation, use and return of the $4,000.00 to the probate court.

Standard 9.22(i) regards an attorney's substantial experience at the bar as an aggravating factor. Appellant was admitted to the bar in 1970 and has practiced law continuously (47 - 51). Standard 9.22(j) refers to an indifference to making restitution as an aggravating circumstance. While appellant made restitution, he exhibited an

indifference thereto. The evidence conclusively established that appellant discovered in January, 1989, that he did not have certain jewelry entrusted to him when he had a meeting with his ward for purposes of turning such jewelry over to him (67). A second meeting was had in March, 1989 when appellant attempted to deliver one of the missing items only to find that the piece of jewelry he had was not one of the missing items (77). It was not until after the grievance was filed with the bar in January, 1990 that appellant, eventually, entered into an agreement wherein and whereby he made restitution to the guardianship by making installment payments, a lapse in excess of a year.

The bar certainly acknowledges that mitigating factors as defined by the Standards were also involved. Absence of a prior disciplinary record, cooperation with the bar's investigation and good character and reputation as testified to by various witnesses established mitigation as defined in Standards 9.32(a), (e) and (g). While restitution of the missing jewelry was not made prior to the filing of the bar grievance, appellant made timely restitution of the funds he improperly appropriated. The referee took all such mitigating factors under consideration and noted appellant's reporting of his misappropriation to his ward's mother, before discovery, as a mitigating factor.

There are factors involved which, it is respectfully submitted, should properly be taken into account in assessing the magnitude of the misconduct and the appropriate sanction to be imposed. By failing to safeguard the jewelry entrusted to him, appellant's ward, Scott Ellison, was deprived of mementos from his deceased father's estate. While money has been paid, the special value associated with personal effects from a

deceased parent can never be measured. Appellant cannot understand the fact that by his failure to disclose his misappropriation, the probate court, in its unique position of surrogate, was deprived of the opportunity to assess respondent's misconduct and to act appropriately. The bar does not regard it as improbable that had appellant fulfilled his accounting obligations, there was great likelihood that the probate court would have revoked his letters of guardianship forthwith and may have taken other action, as well, including reduction or forfeiture of guardian's fees and/or attorney's fees.

Appellant has cited several cases decided prior to this Court's January, 1991 trilogy of misappropriation cases. In The Florida Bar v. Shanzer, supra, The Florida Bar v. McShirley, supra and The Florida Bar v. McClure, 575 So.2d 176 (Fla. 1991), it appears that the Court has determined to implement the warning it issued to the bar in The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980), viz., that "henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client is injured." Even in McShirley, where restitution was made prior to the bar's involvement, the Court determined that "anything less than a three-year suspension may not sufficiently deter other attorneys who might be tempted to avail themselves of their clients' readily accessible funds." McShirley did not involve the added features of misrepresentation to a court nor gross negligence in maintaining personal effects resulting in loss. McShirley did not involve the failure to make restitution for missing jewelry until over a year after the discovery thereof and after a grievance was filed with the bar.

The Florida Bar v. Davis, 577 So.2d 1314 (Fla. 1991) cited by appellant, is inapposite to the case at bar. There was no finding of

misappropriation, no misrepresentation to a court and no grossly negligent loss of jewelry. The findings in Davis centered exclusively about respondent's failure to maintain proper trust account records and his failure to account in accordance with prescribed trust account procedures.

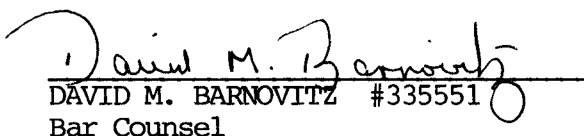
It is respectfully submitted that the Court's deterrence concern as expressed in McShirley is equally applicable in the case at bar. If a message is to be delivered that financially stressed attorneys are to face modest sanctions for short term "borrowings" from the readily accessible funds of their unsuspecting clients then the price might well be worth the risk. The potential for disaster is evident. Consider the consequences befalling the victims should death, disability, bankruptcy, etc. of the lawyer occur prior to restitution. No lawyer should ever place his client in such peril. Appellant was concededly suffering from financial stress and strain which magnified the potential for injury to his ward in the event of any of the referenced vicissitudes.

CONCLUSION

Appellant's misconduct did not, as appellant's brief would have one believe, consist solely of a short term misappropriation followed by a mea culpa and restitution. While misappropriation, for whatever duration, constitutes an offense at the top of the hierarchy of attorney misconduct, this case involved far more. Appellant consciously and deliberately determined not to include the taking of his infant ward's funds upon his account to the probate court and then misrepresented to the court, under penalty of perjury, that his account was correct receiving the court's blessings vis a vis guardian's and attorney's fees. As if the foregoing were not sufficient, appellant so grossly mishandled jewelry entrusted to him so as to lose several items thereof which he failed to restitute until after a complaint was filed with the bar.

The cumulative nature of appellant's misconduct was analyzed by the referee who took pains not only to make his recommended sanction, but to specify in the greatest detail the aggravating and mitigating circumstances he wove into his recommendations. It is respectfully submitted that the referee's report, based not only upon his carefully crafted findings and recommendations, but upon his observations and assessment of appellant, in the flesh, should in all respects, be affirmed.

All of which is respectfully submitted.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished to Alan C. Sundberg, Esquire and to F. Townsend Hawkes, Esquire, attorneys for appellant at 410 First Florida Bank Building, Post Office Drawer 190, Tallahassee, Florida 32302 by mail this 25th day July, 1991.

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