IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

HUGH MACMILLAN, JR.

Respondent.

CASE NO.: 76,563

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

This disciplinary proceeding involves an attorney, Hugh MacMillan, Jr., who has made public service a habit of his twenty years of professional life, but who made several mistakes in judgment regarding a single guardianship he chose to handle in order to improve a family's tragic situation.

This guardianship involved a minor ward, Scott Ellison, with severe mental and physical handicaps, whose father died intestate in 1985. (TR 26, 52, 56, 145)[1]. There was open hostility between Scott's mother, who had been divorced from his father, and Scott's paternal grandmother. (TR 52-53). The grandmother unfairly blamed Scott's mother for Scott's birth defects, creating an unworkable situation when trying to settle the property which would ultimately come to Scott. (TR 56-58). Seeing an opportunity to improve the situation, Mr. MacMillan became both the personal representative for the father's estate and guardian of Scott's property. (TR 53).

Part of the father's property consisted of a box of jewelry, of which Mr. MacMillan took possession as guardian for Scott. (TR 29, 54). Mr. MacMillan xeroxed a picture of six pieces of jewelry he thought were most valuable, and sent this picture to

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[1]References to the transcript of the proceedings before the Referee on February 19, 1991, will be designated as "TR" followed by the appropriate page number.

Scott's mother. (TR 58-60). The box of jewelry was stored in a file cabinet in Mr. MacMillan's office, and later stored at his home when he moved his office several times. (TR 61-65).

In 1989, after nearly four years, Mrs. Ellison, Scott's mother, requested the jewelry for Scott who had now turned eighteen. (TR 30-31, 65). Upon examining the contents of the box, Mrs. Ellison determined that three pieces of jewelry, which appeared in the photocopy, were missing from the box. (TR 30, 67). After searching for the missing items, Mr. MacMillan located a ring he thought was one of the missing items, but Mrs. Ellison determined that it was not. (TR 68-77). The missing jewelry was never located. Eight months after the estate was closed, Mrs. Ellison sent a demand letter with her appraisal to Mr. MacMillan and reported the matter concerning the lost jewelry to The Florida Bar. (TR 36-37, 142-43; Bar Exhibit 1). After obtaining separate appraisals, Mr. MacMillan ultimately paid $2,100 to Scott for the missing jewelry.

The other problem which surfaced with this guardianship involved a temporary transfer of $4,000 which Mr. MacMillan made from the guardianship account to his personal account in April, 1986. (TR 78). This transfer was an advance for future guardianship fees. Id. However, Mr. MacMillan had some reservations about the propriety of taking these future fees.

(TR 77-78). Thereafter, upon discovering that there was a specific statutory prohibition against advancing fees in a guardianship, he promptly reimbursed the guardianship account for the full amount. (Answer ¶ 19, attached as App. A; TR 147). See §744.454, Fla. Stat. (1985). Even though he needed the funds, this reimbursement was nevertheless accomplished only two weeks after the original transaction. (TR 79, 82).

Mr. MacMillan then promptly informed Mrs. Ellison about the mistaken two-week transfer. (TR 45). She stated that she was glad he had been forthcoming and had corrected the mistake. (TR 147). However, Mr. MacMillan neglected to include this out-in transaction in the annual guardianship report because he assumed that the disclosure to Mrs. Ellison, who then formally approved the report's filing, was sufficient. (TR 79; Resp. Exhibit 2). Mr. MacMillan's 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. (TR 118).

The Bar's prosecution of Mr. MacMillan was a highly publicized event, and a reporter from the Palm Beach Post sat through the hearing. (TR 13). Mr. MacMillan had left the Palm Beach County School Board and was running for circuit judge when the publicity of this disciplinary proceeding made the papers.

(TR 133). As is evident from the continuance of these proceedings, he was unsuccessful in his bid for judicial office. Further, based on this proceeding, Mr. MacMillan's position as a director of the First National Bank of Lake Park will be subject to reevaluation. (TR 132).

Prior to this event, Mr. MacMillan has maintained an unblemished professional record for twenty years, highlighted by his commitment to improving our social and legal systems. In particular, he helped found the Florida Legal Systems Corporation for providing legal services to the poor, and made certain that funding was available. (TR 122-26). He has been heavily involved with the Florida Justice Institute and The Florida Bar Foundation as a board member of these organizations. Id. Through both of these organizations, he has worked in an effort to provide legal services to the poor. Id. He remains active in these organizations. (TR 126). He was also instrumental in helping to address problems with school racial integration. (TR 133-34).

Mr. MacMillan diligently cooperated with the Bar in its prosecution of his case. See Report of Referee at 10. He admitted most of the underlying factual allegations in this proceeding which the Bar was successful in establishing, including his negligent loss of the jewelry, his transfers of the

$4,000, and his omission of the transfers from the annual guardian report. See Report of Referee at 2-5. However, he denied that he intended to steal Scott's money or that he tried to cover-up a theft of the money by concealing it from the probate court. (Answer; TR 78-80; 115-19; 147).

Nevertheless, the Referee, swayed by the Bar counsel's characterization of Mr. MacMillan's actions as the most unseemingly imaginable, found that in addition to negligently caring for the jewelry, Mr. MacMillan also misappropriated $4,000 from Scott and tried to cover-up this misappropriation by "neglecting" to include the transfers in the annual report. (TR 157; Report of Referee at 7-9). The Referee recommended suspension for two (2) years, together with retaking the ethics portion of the Bar exam. However, anticipating that this Court might perceive the two-year suspension as excessively harsh, the Referee recommended that, in the event this Court imposed a shorter sanction, a condition of probation should be attached to Mr. MacMillan's service as a fiduciary. Id. at 11.

SUMMARY OF ARGUMENT

This Court recently made clear that the Bar must establish a violation involving dishonesty, fraud, deceit, or misrepresentation by offering clear and convincing evidence of the intent to misappropriate funds. The record evidence concerning Mr. MacMillan's specific intent to steal his ward's monies is, at best, highly obscure, and does not support a conclusion that Mr. MacMillan took the funds with such an intent.

Further, there is no record evidence to support the Referee's conclusion that the omission of the two-week transfer from the guardian's report was a dishonest effort to conceal a misappropriation. Indeed, the evidence is inconsistent with such a conclusion, since the explanations for the omission indicate only an error in judgment. Furthermore, the Referee's explicit finding that Mr. MacMillan "neglected" to include the two-week transfer is entirely inconsistent with a conclusion that the omission was an effort to conceal a misappropriation of funds.

Considering Mr. MacMillan's twenty years of unblemished service to the Bar, his intense involvement with organizations which provide fundamental legal services to the poor, his forthcoming disclosures of the matters to his client, his punishment through the devastating publicity of this proceeding during his bid for judicial office, and other such factors, the

Referee's recommendation of a two-year suspension is excessively harsh. Based on sanctions imposed in cases with similar circumstances, a more appropriate discipline would be a 91-day suspension, followed by a two-year probationary period.

I.
THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT MACMILLAN INTENDED TO MISAPPROPRIATE FUNDS FROM HIS WARD

Regarding the two-week transfer, if the redundancy in the Referee's report is eliminated, the gravamen of the charge for which Mr. MacMillan was found guilty was dishonesty, fraud, deceit, or misrepresentation associated with holding money in trust for a client. See Fla. Bar Code Prof. Resp., D.R. 1-102(A)(4); Fla. Bar Integr. Rule, Art. XI, Rule 11.02(4).

To prove a violation of these rules, the Bar must present clear and convincing evidence that the rules have, in fact, been violated. See The Florida Bar v. Ragano, 403 So.2d 401 (Fla. 1981); The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973). A party seeking review of a referee's finding need show only that the finding is "lacking in evidentiary support" to sustain that party's burden on review. See The Florida Bar v. McClure, 575 So.2d 176, 177 (Fla. 1991), (citing The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968)).

Furthermore, this Court has recently made clear that in order for the Bar to establish a violation involving dishonesty, fraud, deceit, or misrepresentation, there must be a specific finding that the attorney "knowingly, willfully, or intentionally misappropriated funds". The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991). These elements must also be established by clear

and convincing evidence because "[i]ntent is a major and necessary element in finding guilt for dishonesty, fraud, deceit, or misrepresentation." Id.

The record evidence concerning Mr. MacMillan's intent is, at best, highly obscure. When viewed together with the explanation provided in his Answer ¶ 19 (App. A), it is apparent that he did not admit that he intentionally misappropriated Scott's funds, as mischaracterized by the Bar before the Referee. Rather, when viewed in the entirety of the circumstances, Mr. MacMillan admitted only that he viewed the general practice of taking an advanced fee as improper and inappropriate. This candor was inappropriately stretched by the Bar to equate to an admission that he knowingly stole Scott's funds.

Moreover, any inference that Mr. MacMillan stole these funds because he "needed" them is flatly refuted by his repayment of the entire amount in only two weeks. The very brevity of the time over which this transaction occurred, plus the prompt disclosure of it to the client, are entirely inconsistent with a showing by clear and convincing evidence that Mr. MacMillan intended to steal his ward's funds.

Nor can the omission of this transaction from the guardian report be used to bolster the lack of clear and convincing evidence of a deliberate theft. As discussed more fully in the

next point, the only evidence in the record supports that this omission was based on the assumption by both Mr. MacMillan and his paralegal that the inclusion of this mistaken transaction in the accounting was unnecessary since the client had been told and ultimately approved the accounting. Furthermore, the Referee inconsistently found that this omission was a result of "neglecting to report" the transfers. Report of Referee at 8. This is directly at odds with a conclusion that Mr. MacMillan knowingly stole his ward's money and tried to conceal his activities. Therefore, the omission from the guardian report cannot supply the requisite clear and convincing evidence of intent to steal.

Thus, based on the totality of the circumstances and the opaque nature of the evidence concerning Mr. MacMillan's specific intent to steal Scott's money, the Bar has failed to satisfy the standard established in Bar v. Burke by presenting clear and convincing evidence on the intent element of the charged offense. Conversely, the record lacks sufficient evidence to sustain the Referee's conclusion that Mr. MacMillan knowingly stole his ward's money.

II.
THERE WAS NO EVIDENCE WHATSOEVER TO SUPPORT THE REFEREE'S CONCLUSION THAT THE OMISSION OF THE TRANSFERS FROM THE ANNUAL REPORT WAS AN INTENTIONALLY DISHONEST ACT, AND SUCH A CONCLUSION DIRECTLY CONFLICTS WITH THE REFEREE'S EXPLICIT FINDING OF "NEGLECT"

There was no question that the two-week transfer was omitted from the guardian's annual report filed by Mr. MacMillan as a complete report. However, the omission itself was the only proof concerning whether the omission was an intentional and knowing effort to misrepresent and cover-up the transfers. Thus, under the standards of Bar v. Burke, there was simply no proof which established that this omission was an intentional and knowing fraud.

Indeed, the only record explanation for the omission was entirely inconsistent with such a conclusion. Mr. MacMillan stated that he omitted the transaction because he thought having informed the client of the matter and immediately corrected the mistake were sufficient. Likewise, his paralegal also reached the same conclusion that the inclusion of this neutral transaction, which was viewed as a mistake, need not be included. Further, her testimony is unequivocal that Mr. MacMillan did not direct her to omit the transfers from the report. (TR 118). Therefore, this testimony is all supportive of a neglect to include a transaction which a more prudent attorney might well

have included in the report. Thus, not only is there a lack of clear and convincing evidence that Mr. MacMillan intended to commit fraud when he filed the annual report, but there is a complete lack of any evidence on this issue of intent.

Furthermore, the Referee's own findings reflect an internal inconsistency which mirrors this lack of proof as to intent to commit fraud on the court in filing the annual report. On two separate occasions in his report, the Referee finds Mr. MacMillan guilty of "neglecting to report the [transactions] to the court" and that "in an apparent cover-up to the court, respondent neglected to account for the transaction." Report of Referee at 8, 10 (emphasis added). Although the Referee concludes that the incomplete annual report, which was certified as complete, was an "apparent cover-up", this conclusion is directly inconsistent with the Referee's own findings of neglect. These inconsistent findings, coupled with the utter lack of evidence that Mr. MacMillan intended to commit fraud on the court, warrant the reversal of the Referee's finding of guilt as to a knowing or intentional effort to commit fraud on the court. See Rule 4-8.4(c), Rules Regulating the Fla. Bar.

III.
UNDER THE TOTALITY OF THE CIRCUMSTANCES, A MORE FITTING PUNISHMENT FOR THESE ACTIONS IS A SUSPENSION OF 91 DAYS

Mr. MacMillan recognizes that any mismanagement of a guardianship account and property is a serious matter. However, under the circumstances here, where he has already suffered severe punishment though the devastating publicity of his disciplinary proceeding during his unsuccessful race for circuit judge, extended suspension will not serve the Court's purposes in choosing an appropriate discipline to protect the public.

As Justice Drew wrote in The Florida Bar v. Hirsh, 342 So.2d 970 (Fla. 1977), the purpose of disciplinary proceedings is not simply to punish "but to reclaim those who violate the rules of the profession or the laws of the Society of which they are part." Id. at 971. In this case, Mr. MacMillan has shown himself to be an exemplary member of the Bar for twenty years, with the exception of this single episode involving this one guardianship. He undertook this difficult guardianship because of an unworkable family feud revolving around a ward with serious birth defects. He took great efforts to deal with Scott's special needs at school, and helped Scott's mother find steady employment. (TR 145-47). He also helped find and purchase a more suitable home for Scott and his mother. (TR 147-49).

These activities reflect a consistent course of serving his clients and serving the public before serving himself. His past in-depth involvement in establishing Florida Legal Services Corporation and work with other associations which provide legal services to the poor reflect a commitment to the profession, rather than a commitment to his personal financial gain. As Justice Drew quoted from Henry S. Drinker's Legal Ethics,

> "[O]ne who has been consistently straight and upright can properly be trusted not to repeat an isolated offense unless of such a nature as of itself to demonstrate a basically depraved character."

Bar v. Hirsh, 342 So.2d at 971 (footnote omitted).

One of the principal aims of this Court is to "encourage reformation and rehabilitation." See The Florida Bar v. Sommers, 508 So.2d 341, 343 (Fla. 1987). Punishment is not the objective of the penalty:

> The penalty assessed should not be made for the purpose of punishment . . . . The purpose of assessing penalties is to protect the public interest and give fair treatment to the accused attorney. . . . The discipline should be corrective and the controlling considerations should be the gravity of the charges, the injury suffered, and the character of the accused.

The Florida Bar v. Thomson, 271 So.2d 758, 761 (Fla. 1973) (citations omitted).

Based on these guidelines, Mr. MacMillan's public service through helping in a substantial manner to provide fundamental legal services for the poor and twenty years of unblemished service to his profession demonstrate the character of a person not prone to repeat the mistakes he made in this case. Furthermore, he was forthcoming with his client after promptly correcting his error by replacing the entire amount within two weeks. If this Court imposes too severe a penalty on an attorney who promptly corrects his mistakes and then immediately informs his client, it could potentially signal to other members of the Bar that being so forthcoming may not be prudent. Furthermore, since there is no evidence to establish that Mr. MacMillan intended to commit fraud on the court when he submitted the annual report, this factor alone warrants a reduction in the two-year suspension recommended by the Referee.

Moreover, it is clear that Mr. MacMillan cooperated completely with the Bar in this proceeding, and admitted most of the allegations in the three counts which the Bar was ultimately able to establish. The Referee explicitly found that Mr. MacMillan cooperated. See Report of Referee at 10. This is an important factor, as this Court has displayed considerable leniency when the attorney cooperates with the investigation. See, e.g., The Florida Bar v. Fertig, 551 So.2d 1213 (Fla. 1989)

(attorney who committed felony by knowingly assisting in money laundering for drug smuggling but who cooperated with investigation suspended 90 days).

Despite these strong mitigating factors, the Bar argued to the Referee that several aggravating factors were present including dishonest or selfish motives and multiple offenses. Mr. MacMillan's prompt and full reimbursement of the funds to the guardianship account and his immediate disclosure to the client belie any allegation of selfish or dishonest motives. Furthermore, his several mistakes in judgment in his dealing with this one guardianship do not strongly support the notion that there were multiple acts of misconduct.

When other cases are compared and such strong mitigating factors are present, the tendency of this Court is to impose a penalty of approximately 91 days, which would also require a showing of rehabilitation. Thus, in the most recent case dealing with a similar situation, a legislator-attorney was given a 91-day suspension where specific proof of intent to commit theft from his trust accounts was lacking. See Bar v. Burke. In that case, the legislator-attorney failed to disburse trust accounts as order by the court and appropriated almost $10,000. He did not repay this amount until after a Grievance Committee hearing on the matter, and had already been disciplined once for the same

type of misconduct. The Bar argued that such conduct involving trust accounts warranted disbarment, even if there was no intent to steal a client's monies. This Court disagreed, requiring the Bar to clearly demonstrate an intent to steal the funds, and imposed a 91-day suspension.

As one would expect, it is impossible to find another case with facts similar to those of the case at hand, in which the attorney transferred a sum to his account from a trust account for a two-week period, realized his mistake, reversed the transfer, and then promptly informed his client of the mistake. Nevertheless, other cases involving some similar factors resulted in sanctions of between 60 days and six months, depending on the individual circumstances.

In The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985), the attorney misused his client's trust account funds for the attorney's purposes. This Court noted the Referee's considerations, including substantial legal aid work, the lack of complaint by a client, the attorney's cooperation, and his value to the public, and imposed a 60-day suspension, plus a probationary period. In The Florida Bar v. Davis, 577 So.2d 1314 (Fla. 1991), this Court recently imposed a 90-day suspension, followed by a two-year probation, on an attorney who failed to

keep trust accounts, failed to account for a client's money, and who had not made restitution of the missing monies.

In several cases involving trust account violations and dishonest acts by an attorney, this Court has imposed a sanction of a six-month suspension in certain circumstances. For example, in The Florida Bar v. Dancu, 490 So.2d 40 (Fla. 1986), the attorney dishonestly earned interest from a client's trust funds, and then lied about this income to the client. The Court found a direct violation of trust by "stealing a client's money, compounded by lying about it," and imposed a six-month suspension. Id. at 42. This same length suspension was accompanied by a two-year probation in The Florida Bar v. Harper, 518 So.2d 262 (Fla. 1988), where the attorney knowingly drew on trust account funds for his personal use, mishandled trust funds, maintained improper trust accounts, and engaged in dishonest or deceitful conduct. The attorney was concurrently suspended for three months for neglecting a legal matter entrusted to him.

In The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980), the attorney used $24,000 of funds in a client's account for his personal benefit over a two-year period, and used a portion of another client's monies for his own purposes. The attorney was aware he had shortages in his clients' accounts, but eventually

made restitution. The Court again imposed a suspension of six months followed by a two-year probation.

These cases outline the appropriate penalties for isolated misconduct relating to trust account violations, even when a lawyer has committed a dishonest act. Mr. MacMillan's mistakes in judgment in dealing with the jewelry and his ward's account, particularly when viewed in light of his overall service to the public, warrant a discipline somewhere within the range of these cases. Considering all factors, especially Mr. MacMillan's forthcoming and candid manner of dealing with his mistakes and his cooperation with the Bar in the investigation of his case, the appropriate penalty is a 91-day suspension, followed by a two-year probationary period, which was recommended by the Referee if a reduced sanction was imposed. Under the totality of the circumstances, such a sanction will best achieve the aims of this Court to protect the public.

CONCLUSION

Mr. MacMillan recognizes that he made mistakes in dealing with his ward's property and money. Nevertheless, he attempted to correct his mistakes promptly and to fully disclose all matters to his clients. He further recognizes that a more prudent lawyer may well have included the two-week transfer in the annual report. But he respectfully urges that, in view of the entire circumstances, a more appropriate punishment for these mistakes is a 91-day suspension, followed by a probationary period.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing and the attached Appendix have been furnished by U.S. Mail to DAVID M. BARNOVITZ, ESQ., The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309 and JOHN T. BERRY, ESQ., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 12th day of July, 1991.

Attorney

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