

FILED
SID J. WHITE
APR 1 1991
CLERK, SUPREME COURT
By _____
Deputy Clerk

**IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE**

THE FLORIDA BAR,
Complainant,

v.
HUGH MacMILLAN, JR.,
Respondent.

Supreme Court Case No. 76,563

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

The undersigned was appointed as referee to preside in the above disciplinary action by order of this court dated October 2, 1990. The pleadings, transcript of final hearing and all other papers filed with the undersigned, which are forwarded to the court with this report, constitute the entire record in this case.

The final hearing was held on February 19, 1991. Respondent appeared in person and by Cecil H. Albury, Esquire. The bar was represented by David M. Barnovitz, Assistant Staff Counsel.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:

After hearing all of the testimony and evidence presented to me, I find as follows with respect to each of the counts alleged in the bar's complaint:

AS TO ALL COUNTS

A. Respondent is and at all times hereinafter mentioned, was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

AS TO THE BAR'S COUNT I

B. Heretofore, in or about 1985, respondent represented the estate of C. Thomas Ellison, deceased. (Admitted)*

C. One Scott T. Ellison ("Scott") decedent's son, was decedent's primary beneficiary. (Admitted)

D. Scott was an infant at the time of his father's death necessitating the appointment of a guardian of his property for purposes of accepting and holding Scott's distributive share from his decedent father's estate. (Admitted)

E. Respondent was appointed guardian of the property for Scott on or about March 5, 1985. (Admitted)

F. Among the property passing from decedent's estate to Scott and received by respondent as guardian of Scott's property, were six (6) pieces of jewelry which jewelry was entrusted to respondent for the specific purpose of holding the same for Scott and delivering the same to Scott upon Scott's attaining his majority. (Admitted)

* "Admitted" refers to respondent's response to requests for admission and/or stipulations entered into upon the final hearing.

G. On or about January 16, 1989, in anticipation of Scott's attaining his majority, respondent delivered three (3) of the six (6) pieces of jewelry entrusted to him as aforesaid to Scott's mother, who was also guardian of Scott's person, but failed to deliver then, or at any time, despite demand, the remaining three (3) pieces of jewelry consisting of the following:

1. One man's ring - white gold with three (3) diamonds.

2. One man's ring - white gold with sapphire and four (4) small diamonds.

3. One man's stickpin - gold with pearl.
(Admitted)

H. Respondent has claimed and continues to claim that he does not have in his possession and does not know the whereabouts of the three (3) pieces of jewelry specified hereinabove. (Admitted)

AS TO THE BAR'S COUNT II

I. As to count two (2) which alleges that the respondent knowingly misrepresented to Sandra Ellison that a certain ring was in fact one of the missing rings being held for Scott Ellison, I find the respondent not guilty. Having closely analyzed the testimony of both Sandra Ellison and Mr. MacMillan I do not find the evidence to be clear and convincing that there was a knowing misrepresentation made regarding the ring in question. While the argument

presented by The Florida Bar on this issue is logical, I nevertheless find the evidence to be insufficient to support a finding of guilt as to count two.

AS TO THE BAR'S COUNT III

J. Respondent was appointed guardian of the property of Scott on or about March 5, 1985. (Admitted)

K. As guardian, respondent received various assets from decedent's estate for the specific purpose of receiving, administering and applying such assets for the benefit of Scott. (Admitted)

L. On April 2, 1986, respondent, without notice to Scott, notice to Scott's mother and guardian of Scott's person, and without notice to or leave of the courts, issued a check from the Scott T. Ellison Guardianship Account to respondent's order in the sum of \$4,000.00. (Admitted)

M. Respondent negotiated such \$4,000.00 check by depositing the same to respondent's personal account. (Admitted)

N. Respondent applied the funds misappropriated by him for his personal uses. (78)*

O. When respondent misappropriated the funds, he had misgivings, knowing that such misappropriation was improper and inappropriate. (78, 79)

P. On April 16, 1986, respondent deposited to the guardianship account the sum of \$4,000.00 by a check drawn on his personal account. (Admitted)

Q. Respondent informed Scott's mother and guardian of Scott's person of the fact that he had taken and returned the \$4,000.00. (81)

AS TO THE BAR'S COUNT IV

R. Respondent filed a return of guardian of property covering the period of January 1, 1986 through December 31, 1986 and dated and signed the same below the following declaration:

Under penalties of perjury, I declare that I have read and examined the foregoing return and that the same constitutes a full and correct account of the receipts and disbursements of all of the property of Scott T. Ellison for the period January 1, 1986 to December 31, 1986, and includes a statement of the ward's assets at the close of said period. (Admitted. See also bar's Exhibit 1)

S. In truth and in fact, the declaration subscribed to by respondent, as aforesaid, 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. (80-82)

* All number references are to page(s) of transcript of final hearing.

AS TO THE BAR'S COUNT V

T. As to count five (5) of the complaint which alleges the collection of illegal fees, I find the respondent not guilty. While I personally believe that the methodology employed in this matter to obtain guardian fees was rather lax, nonetheless, the evidence is undisputed that the methodology in question was not a violation of the law as it existed at the time in question, and it was an accepted practice at the time in Palm Beach County. Therefore, I find the respondent not guilty as to the allegations contained in count five (5) of the complaint.

III. RECOMMENDATIONS AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY:

I recommend that the respondent be found to have committed the following violations with respect to each of the bar's counts:

COUNT I

A. As to count one (1) of the complaint, regarding Mr. MacMillan's failure and inability to deliver three (3) items of jewelry that came into his possession in 1985 as guardian of the property for Scott T. Ellison, I find that the respondent violated Florida Bar Integration Rule, Article 11, Rule 11.02(4) and/or Rule 5-1.1, Rules Regulating Trust Accounts, which both provide that property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose and a refusal

to account for and deliver over such property constitutes a conversion. I find a violation of one or both rules because it is impossible to determine when the three (3) missing pieces of jewelry went out of trust. They came into Mr. MacMillan's possession in 1985 and could not be delivered upon demand in January, 1989. Furthermore, I find the respondent guilty of violating Rule 4-1.15(a), Rules of Professional Conduct, which mandates that a lawyer must hold in trust, separate from the lawyers own property, property in the lawyer's possession in connection with a representation and that such property shall be appropriately safeguarded.

COUNT III

B. With regard to count three (3) concerning the misappropriation of \$4,000.00 from the assets of Scott Ellison in 1986, I find the respondent guilty of violating Florida Bar Integration Rule, Article 11, Rules 11.02(3)(a) and 11.02(4) which provide respectively, that the commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise, constitutes a cause for discipline, and money or other property entrusted to an attorney for a specific purpose, is held in trust and must be applied only to that purpose. Also I find that the conduct in question constituted a violation of Rules 1-102(a)(1), 1-102(a)(4) and 1-102(a)(6) of the Code of

Professional Responsibility which provide respectively that an attorney shall not violate a disciplinary rule, engage in conduct involving dishonesty, fraud, deceit or misrepresentation, and shall not engage in any conduct that adversely reflects on his fitness to practice law.

COUNT IV

C. Regarding count four (4) concerning the improper, inaccurate and false subscription of the respondent's name to the Return of Guardian of Property executed on February 19, 1987, I find that the respondent intentionally misrepresented to the court the receipts and disbursements of the property of Scott T. Ellison for the period January 1, 1986 to December 31, 1986. While it is undisputed that Mr. MacMillan returned the \$4,000.00 taken to the account of Scott T. Ellison within a short period of time and reported it to Sandra Ellison, it is clear that the respondent had an obligation to report that series of transactions on the return in question. While Sandra Ellison, the guardian of the person of the minor ward, was notified of this series of transactions nonetheless, the respondent had a duty to report these transactions to the court as well in the annual return. By neglecting to report the same to the court in his Return of Guardian of Property and by representing to the court in said Return of Guardian that the return constituted a full and correct account of the receipts and

disbursements, I find that the respondent violated Rule 3-4.3, Rules of Discipline, which provides that the commission by a lawyer of any act which is unlawful or contrary to honesty and justice may constitute a cause for discipline. Such conduct also violated Rules 4-8.4(a) and 4-8.4(c), Rules of Professional Conduct, which provide that a lawyer shall not violate the Rules of Professional Conduct nor engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

IV. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that as a result of the violations as hereinabove enumerated, respondent be suspended from the practice of law for a period of two (2) years. Further, I recommend that the respondent take and pass the ethics portion of the Florida Bar Examination.

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 \$4,000.00 in question. Finally, an additional aggravating factor includes the existence of multiple offenses.

As mitigating factors I find that there is an absence of a prior disciplinary record and the respondent displayed a cooperative attitude toward the proceedings. Additionally, I find that there was a timely good faith effort to make restitution. Concerning the misappropriation of the \$4,000.00 from the guardianship account, the respondent replaced the funds within two (2) weeks. Furthermore, he reported the matter to the ward's mother before the misappropriation had been discovered by anyone. Concerning the restitution for the missing jewelry, I find that once the guardian of the ward submitted her appraisal of the missing jewelry the respondent made restitution of the "monetary value", although it was done by means of three monthly payments. Finally, I find that the respondent's character and reputation is a mitigating factor. It is clear that over the years the respondent has been involved

in numerous community and civic activities and that he has served on various Florida Bar Committees.

I believe a two (2) year suspension from the practice of law is fair to the respondent and is sufficient to punish his breach of ethics; is severe enough to deter others who might be prone or tempted to become involved in like violations; and is fair to society in order to protect the public from unethical conduct. Should the Court impose less than a two (2) year suspension I strongly recommend that there be probationary conditions attached to the respondent's future practice of law as to his serving in fiduciary capacities or in his supervision of fiduciary accounts.

V. PERSONAL HISTORY:

Respondent is 48 years of age and has been a member of The Florida Bar since May 18, 1970.

VI. STATEMENT AS TO PAST DISCIPLINE:

Respondent has no disciplinary record.

VII. STATEMENT OF COSTS OF THE PROCEEDING AND RECOMMENDATIONS:

The costs of these proceedings were as follows:

Administrative Costs (Rule 3-7.5(k)(5))-----	\$ 500.00
Auditor -----	341.10
Grievance Committee Court Reporter-----	127.95
Service of Subpoena-----	68.20
Deposition (Respondent)-----	258.25
Trial Transcript-----	706.90
Referee Travel Costs-----	153.07
<u>TOTAL</u>	<u>\$2,155.47</u>

I recommend that such costs be taxed against the respondent.

RENDERED this 28th day of March, 1991 at Fort Myers, Florida.



JOHN W. DOMMERICH, REFEREE

cc: David M. Barnovitz, Bar Counsel
Cecil H. Albury, Esquire