IN THE SUPREME COURT OF FLORIDA

CASE 81,981
TFB 92-11532(12C)

THE FLORIDA BAR,

Complaintant,

vs.

JAMES ALFRED GARLAND,

Respondent.

AMENDED REPLY BRIEF OF RESPONDENT

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CITATION OF AUTHORITIES

STATEMENT OF THE FACTS AND CASE

In the Restatement of the Statement of the Facts and Case, The Florida Bar has not properly presented the testimony of a key witness, Mrs. Poppy Hyre. (TFB Brief P.5) These statements contained in the Statement of the Facts and Case by The Florida Bar are without reference to any transcript of record on appeal.

The record accurately reflects that Mrs. Hyre was the one who initially thought the computerized time record was not correct (R 238-R 239). She then prepared the handwritten time sheets and took them in to Respondent (R 219, R 239, R 243). This joint effort was an attempt to come up with an honest accounting (R 244) and not an attempt to match the fees charged (R 245).

It is interesting to note that during this final conference to arrive at an accurate accounting between Mrs. Hyre and Respondent, that Respondent had the file before him, along with the accounting of Mrs. Hyre. However, Respondent had no calculator available with which to add the time, (T 250) and never figured the total hours involved.

ARGUMENT

I

THE REFEREE'S FINDINGS ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND ARE CONTRARY TO THE EVIDENCE

A.

Rule 4-1.5(a)(1)

In the initial brief, Respondent demonstrates that the findings of fact by the Referee are not supported by clear and convincing evidence in the record. In an attempt to rebut this clear showing, The Florida Bar cites cases in which this Honorable Court has held that the Referee's findings of fact come to the Court with a presumption of correctness. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). The Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992). This statement is correct as far as it goes. However, the holdings of this Court go further to state that these findings will not be upheld if clearly erroneous or lacking in evidentiary support. MacMillan, Id. @ 459, citing Stalnaker, Id.

Respondent has clearly shown that most of these findings do not have evidentiary support, and are clearly erroneous when held up to the requirement of clear and convincing evidence.

The Florida Bar's reliance on the case of The Florida Bar v. Richardson, 574 So. 2d 60 (Fla. 1991), is misplaced. In that case, the attorney charged approximately fifty per cent (50%) of the value of the estate in fees. In the case at Bar, the fees for Respondent, as attorney, came to $22,837.50, and as Personal

Representative, $4,692.00 (T 284 and 291). Based on an estate of $592,000.00, the present statutory fee schedule would have allowed three per cent (3%) for personal representative fees, or $17,760.00 for personal representative. The statute also provides for attorneys fees consisting of time, plus two per cent (2%). The percentage of 2% equates to $11,800.00. Without adding time, the total of the two percentages in the statute equates to $29,560.00. This is clearly over the amount charged without the addition of a time element in the charges. Section 733.617 and Section 733.6171, Florida Statutes, 1993. Clearly, Richardson,Id. is not applicable in support of any contention that the fees in this case at Bar are excessive, and the record reflects that a finding of excessive fees is lacking in evidentiary support.

In an attempt to put the testimony of the expert witness, Mr. Cox, in proper perspective, it is noted that he testified that he personally charges $220.00 per hour (T 135), and his firm charges, for paralegal work, $60.00 to $110.00 per hour (T 152). It would be interesting to conjecture what his total fee estimate would be if Mr. Cox did not have the luxury of allowing paralegals to do estate work, and had to perform same at his hourly rate. Respondent did not have the advantage of paralegals (T 186). Respondent charged at $175.00 per hour.

Contrary to the statements in the brief of The Florida Bar, Mr. Cox never questioned that Respondent didn't do the work involved and never questioned that the time shown wasn't actually spent by Respondent (T 142). In addition, The Florida Bar accepted

the fact that the rate charged by Respondent was reasonable. (T-122).

If the hours are not questioned by the expert, and The Florida Bar acknowledges that the rate charged is reasonable, there is no evidentiary support for a finding of "Illegal, prohibited or clearly excessive fees" by the Referee.

B.

Rule 4-1.5(a)(2)

The Florida Bar, in argument on this point, goes to great extent to attack the testimony of Mrs. Poppy Hyre. Mrs. Hyre, as the prior secretary for Respondent, was called as a witness by The Florida Bar. Other than Respondent, her testimony is the only evidence as to how the accountings were prepared and finalized for presentation to the beneficiaries.

Her testimony is clear and concise:

> "Did Mr. Garland charge the estate for work you performed as a legal assistant?
> In Probate no. It was all billed out at attorney time. (T 207)
> I didn't feel they (computerized time records) were correct, so I asked Mr. Garland to do over it with me. (T 238)
> No, I had these (computerized time records) in my box. I said, I need you to help me determine which was personal representative time and which is attorney time, because our computer didn't calculate it out that way for me.
> So we went in and he told me what was personal representative time and what was attorney time. (T. 241) (see also T. 219 -220).
> He had the file in front of him, and I was sitting on the other side of his desk and we went through and he called off dates and I would see if I had the dates, and he would see if a phone call was missed or if a letter was missed. I made sure I had everything in here. (T 222)
> Q. Well, isn't almost every entry on here changed?

A. Well no. Some of them aren't. Some are lowered some are higher because he didn't feel the time was correct (T 223)

I felt like some of them, more time was spent, and I needed him to go over and make sure that I had done everything right.

Q. What made you feel that way?

A. Because some of the things that they had on here, like it says it only took like half an hour, I knew it took longer (T. 239)

A. Mr. Garland and I went through the file and reconstructed. He looked at the file, I read off what I had, what time I had, he looked through the file for what I was talking about and determined whether the time was increased or decreased. Some were increased and some were decreased. (T 242).

A. That's correct. We did that together. He said, I need you to change this because this is how much time it took, and I need to decrease this. (T 248)

Q. You didn't have any reason to believe that the time wasn't spent, did you?

A. No, sir. He spent a lot of time on Mrs. Locke's estate.

Q. Let me state it another way. When you worked with him to come up and correct these figures and adjust them, did you do it in good faith, trying to come up with an honest accounting of time?

A. Yes.

Q. Do you believe you came up with an honest accounting of time?

A. Yes, I do. I do. (T 244).

Q. Did he ever indicate to you that the time valued at the figure he quoted, I think it was $175 an hour, totaled to $27,500? Did he ever say that to you that the time has got to come out this way?

A. No. He never said that to me. No. He never told me that I had--we had to come up with time to match the figure.

Q. You went at this in good faith, didn't you, to make these corrections.

A. Yes, sir.

Q. Do you have any reason to believe he wasn't operating in good faith?

A. No, sir.

Q. Do you believe he was operating in good faith?

A. Yes, sir. I feel that we spent this time, I mean, you know that we spent this time.

Q. When you say this time, we're talking about the time that was actually shown on that accounting if given to Mr. --

A. Mr. Stagg.

Q. --Mr. Stagg. Do you believe that reflects the time

actually spent?

A. Yes, I do. (T. 245)

Q. When you and Mr. Garland were considering the Exhibit 3 and 11 A and B and correcting the figures, did he sit there with a calculator figuring the hours and figuring the fee?

A. No.

Q. Did you see him ever try to figure it out, how many hours it took?

A. No. We went over and did the front and then we went out, and that was it. I figured it in the end." (T 250).

That is the testimony of the witness for The Florida Bar on how the accounting was prepared. This testimony is supported by that of Respondent (T 55-56), and is not rebutted by any evidence in the record. The conclusions of The Florida Bar on the bottom of P. 22, and top of P. 23, are an improper conclusion as they are not based on any testimony or document in the records. They are unsubstantiated conclusions which the Referee accepted and are lacking in evidentiary support.

Respondent acknowledges that subsequent to the accountings, funds were placed with his general account. It was his practice to maintain a reserve account (T 153). Due to an accounting error, these funds were placed in the general account. However, they have been accounted for completely, and disbursed to the beneficiaries through the $4,000.00 check to equalize distribution, and photocopies of the two checks attached to Respondent's Initial Amended Brief.

C.

Rule 4-8.1(a)

As indicated in the prior point, Respondent felt that the funds remaining were placed in a separate reserve account (T 170,

T 171). The error was discovered when Mr. Stagg questioned the disparity in distribution (T 170). Respondent is ultimately responsible, even though relying on bookkeepers, and is embarrassed that this occurred. However, as previously indicated, the monies have been properly transferred to the beneficiaries. The Florida Bar argues that Respondent tried to conceal his theft from the estate with the paper trail available. This can not be substantiated by the record. The Referee never called the actions a "theft". Certainly, more sophisticated means would have been used to cover acts, and records would not have been freely turned over to The Florida Bar Examiner at the onset of investigation if this case involved anything but a good faith effort to give an accurate accounting, and included a stupid mistake that put the reserve money into the wrong account.

D.

engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

The Florida Bar argues that Mr. Stagg was quoted $150.00 per hour for services rendered. Respondent argues that he advised Mr. Stagg the charge would be $120.00 per hour for personal representative fees, and $175.00 per hour for legal. The hourly fee charged by Respondent is supported by the handwritten accounting prepared by Mrs. Hyre for attorney time and personal representative time (TFB Exhibit 4A and 4B and Answer Brief of The Florida Bar, page 21). Respondent's statements are verified by the testimony of Mrs. Hyre that she placed the hourly rate on top of the handwritten accountings (T 216). Bar Exhibit 11A and B verify

the rates quoted by Respondent.

It is respectfully submitted that this issue is moot. Mr. Stagg called the office of Respondent upon receipt of the accounting. He was advised by Mrs. Hyre that the fees charged by Respondent were $175.00 per hour for attorney time, and $120.00 per hour for Personal Representative time. (See Complaint, para. 17, Amended Complaint, para 17. See also Grievance Complaint by John Stagg, page 4). With this information, Mr. Stagg subsequently executed a Waiver and Consent to Discharge. His actions, and the above facts, show he acknowledged and approved the fees prior to any action that effected his payment of fees. There was no dishonesty, misrepresentation, deceit, or fraud in disclosing these fees to Mr. Stagg.

E.

Rule 4-1.15(a) and Rule 5-1.1

The procedure established by Respondent for accounting and transfer of money reflects that everything went into the trust account. This established a clear paper trail for all funds. Twice a month, Respondent would review these accounts to see what funds were earned fees and which were trust fees. Earned fees were transferred to the office or general account. Trust funds were left in the trust account. (T 104-105). Until the twice monthly transfers occurred, the funds were not determined to be earned fees by Respondent. This procedure provided a quick, clear determination of the application of any monies paid by clients to Respondent.

F.

Rule 5-1.1

The Florida Bar has separated this point in its Answer Brief. It is a re-statement of matters already discussed in the preceding points on appeal.

If the accounting problems were developed in the probate estate, the matters would have been adjusted and corrected at that time.

II

THE REFEREE'S RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED IS EXCESSIVE

In the Initial Brief, Respondent demonstrated that the recommended discipline was excessive in light of the standards set by the Court that discipline must be fair to society, fair to the attorney, and sufficient to deter other attorneys from similar misconduct The Florida Bar v. Carswell, 624 So. 2d 259 (Fla. 1993).

The Florida Bar has attempted to counter this showing by going to cases not related to the charges made in this case at Bar. In referring to The Florida Bar v. Schuminer, 567 So. 2d 430 (Fla. 1990), The Florida Bar tries to analogize a case involving mis-use of funds from a real estate transaction and a personal injury case. Clearly Schuminer knew he had no authority to withdraw these funds and use them for personal purposes. The case at Bar involves withdrawal of funds where Respondent felt same were earned or were properly to be charged to the estate.

The second case referred to by The Florida Bar is The

Florida Bar v. McMillan, 650 So. 2d 457 (Fla. 1992). This case involved negligent loss of jewelry out of a guardianship along with a misappropriation of $4,000.00 from the guardianship, and is inapplicable to the case at Bar.

The case of The Florida Bar v. Williams, 604 So. 2d 447 (Fla. 1992), is completely inapplicable to the facts at Bar. In that case the first count related to a failure to represent a client in a domestic case and a failure to refund a retainer. The second count involved an improper recording of a quit claim deed and obtaining an improper mortgage. The third count involved a worthless check. The fourth count involves depositing client trust funds into operating accounts. The fifth count involved trust account shortages. The sixth count involved retention of trust account interest. The seventh count involved an excessive contingency fee agreement. The eighth count involved failure to notify client of dismissal. This case is clearly not applicable to the case at Bar, and should not be presented as a basis for justifying the recommendations of the Referee in the case before this Court.

III

THE FINDINGS AND REPORT OF REFEREE REVERSE THE PRIOR DECISION OF THE CIRCUIT COURT, PROBATE DIVISION

The Florida Bar, in its Answer Brief, combined Point III with Point IV. Respondent, feels the issues are significant enough to present separately. The Florida Bar constantly refers to the allegations against Respondent as "fraudulent" or "fraud" (Answer

Brief p. 46). It is respectfully submitted that the report of the Referee is quite clear in that those words were never used, and it is submitted that coloring these proceedings with the use of that legal phraseology is overreaching.

As to the effect of the prior decision of the Circuit Court, Probate Division, in approving the fees and discharging the personal representative, this Court's attention is directed to the recently published National Probate Court Standards by the Commission on National Probate Court Standards. A copy of the cover of said published standards and the relevant pages 46, 47, and 48, are attached (Attachment 1). In these standards, the commission goes to lengths to develop the same position argued by Respondent.

> "the probate court should determine the reasonableness of fees when a dispute arises that cannot be settled by the parties. . . when appropriate, the Court should review and determine the reasonableness of attorneys' and fiduciaries' compensation . . . "
> (Standard 3.1.5, page 46)

The Florida Bar attempts to argue in counter to this point that Rule 3-4.4, Rules Regulating The Florida Bar, is applicable to the case on appeal (Answer Brief, p. 47). This rule involves criminal action and states that an acquittal on criminal charges does not estop the civil or regulatory proceedings. There is no argument that criminal and civil remedies have always existed collaterally, and that standards for each differed. This co-existence has never been extended to allow two civil courts to make different decisions on the same facts and evidence, and The Florida

Bar cannot ignore the decision of the Probate Court.

IV

THE COMPLAINT SHOULD BE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL AND PRIOR CONSENT

In the Answer Brief to this count, The Florida Bar makes a statement that is a controlling factor in this entire proceeding:

> "without question, the residuary beneficiaries could have challenged Respondent's fees in the probate court; however, they felt it was not economically feasible to do so." (Answer Brief, p. 46, Line 12-15).

In making this statement, The Florida Bar acknowledged the validity of this point on appeal.

This Court has held that disciplinary actions cannot be used as a substitute for what should be addressed in private civil actions against attorneys. The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1983), and in choosing to go forward with this disciplinary proceeding, The Florida Bar has tried to ignore the proceedings in the Probate Court. John Stagg has successfully used The Florida Bar as his agent to object to fees that he should have objected to in the Probate Court. In doing so, considerable expense has been placed on The Florida Bar and Respondent for what would have been a simple hearing in Probate Court.

Mr. Stagg was one of two residuary beneficiaries in an estate valued in excess of $590,000.00. While there were specific bequests, he received funds in excess of $150,000.00. It is ludicrous to say that he could not afford to contest the fees in the Probate Court (See Initial Letter of Complaint), and for The Florida Bar to argue that he could not economically contest the

fees.

Controversies concerning the reasonableness of fees charged to and paid by clients are matters which, by the very nature of the controversy, should be left to the civil courts, in proper proceedings, for determination. The Florida Bar v. Winn,) 208 So. 2d 809, (Fla. 1968) Cert.Den. 393 U.S 914, 89 S. Ct. 236.

What might be reasonable fees in one area of the state, i.e. Manatee County, could be unreasonable in another, i. e. Collier County, and the Court can take judicial knowledge of the fact that opinions of reputable lawyers concerning reasonable fees often are as far apart as the poles. Id. @ p. 811.

It is respectfully shown that the Referee did not find these fees to be extortionate or fraudulent.

This Court has likewise held that care should be taken to avoid the use of disciplinary action as a substitute for what is essentially another type of civil proceeding. The Florida Bar v. Neale, 384 So. 2d 1264, (Fla. 1980).

If we take the issue of fees from this case and acknowledge them as correct and as approved by the Probate Court, the meat of these proceedings are removed, and the findings of the Referee are without support. The findings then would be lacking in evidentiary support as required by this Court. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986) and The Florida Bar v. MacMillan, 600 So. 2d 457 (Fla. 1992).

This case should never have been commenced without requiring proceedings in Probate Court on fees.

Likewise, since further proceedings in the Probate Court were not required, the closing of the estate and dismissal of the personal representative must give judicial credence to the fees, and they can be nothing but correct. Any other conclusion reflects as a claim of error by the Probate Court.

CONCLUSION

The findings of the Referee are without evidentiary support, and in direct conflict with the Order of the Circuit Court, Probate Division. They are not based on clear and convincing evidence.

Accordingly, the Report of Referee should not be accepted, and this case should be dismissed.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been sent by U. S. Mail this 4TH day of OCTOBER, 1994, to Bonnie L. Mahon, Bar Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C - 49, Tampa, Fl. 33607, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Appalachee Parkway, Tallahassee, Fl. 32399-2300.

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Commission on
National Probate Court Standards

NATIONAL PROBATE COURT STANDARDS

SJI State Justice Institute

s are minors or incapacitated adults, unborn, unascertained, or persons whose idresses are unknown. In order that the court will have jurisdiction to enter a fully nding order, their interests must be represented by others. In some cases the only ay to do this is to appoint a guardian ad litem. Consistent with the preceding andard (Standard 3.1.3, Other Court Appointees), however, the expense of a ıardian ad litem should be avoided where possible by using virtual representation. ɔr example, if a will leaving property to the testator's issue is challenged, and some 'those issue are competent adults whose interests are identical to that of the minors ıd unborn issue, appointment of a guardian ad litem may be unnecessary. The ɔncept of virtual representation is reflected in some statutes,[37] but it has also been ɛcognized without explicit statutory support.[38]

The court should ensure that virtual representation is not used inappropriately. 'or example, a trustee of a testamentary trust may represent the beneficiaries in ealings with the executor (e.g., when examining or approving the executor's ac- ounts). However, when the trustee and the executor are the same person, a potential onflict of interest exists, and the beneficiaries, if incapacitated, should be represented ɣ an independent person.

The question of virtual representation may arise in connection with the decision ɔ appoint a guardian ad litem, or when an earlier judgment is challenged by someone vho was not formally represented. In the latter situation, the court may decide that he challenge is barred because the challenger was virtually represented by another ıt the time of the prior decree.

Standard 3.1.5 Attorneys' and Fiduciaries' Compensation

(a) Attorneys and fiduciaries should receive reasonable compensation for the services performed.

(b) The probate court should determine the reasonableness of fees when a dispute arises that cannot be settled by the parties directly or by means of alternate dispute resolution. When appropriate, the court should review and determine the reasonableness of attorneys' and fiduciaries' compensation on its own motion.

Commentary

When an application for or an objection to compensation for services rendered to an estate is filed, the court should carefully review and determine fees and commissions for attorneys and fiduciaries. Generally, the standard for determining the appropriateness of such fees should be whether they are "reasonable."[39] Factors that should be considered in determining reasonable compensation include:

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[37] *See, e.g.*, N.Y. SURR. COURT PROC. ACT § 315 (McKinney Supp. 1991); UNIF. PROB. CODE § 1-403 (1991).

[38] *See* WILLIAM M. MCGOVERN, SHELDON F. KURTZ, & JAN E. REIN, WILLS, TRUSTS AND ESTATES 703 (1988).

[39] Some states still have fee schedules, which predetermine the compensation of fiduciaries and attorneys. *See, e.g.*, CAL. PROB. CODE §§ 10800-10805 (personal representative); §§ 10810-10814 (attorneys) (West 1991).

compensation on its own motion. For example, the court may review fees to be awarded to the personal representative where the personal representative is the drafting attorney and the will contains an unusually generous fee provision. Similarly, the court may review fees if the court observes a pattern of fee abuse.

In supervised administration of estates, unless all affected parties consent, attorneys and fiduciaries seeking payment of fees from an estate should submit to the court sufficient evidence to allow it to make a determination concerning compensation. (See Standard 3.2.1, Unsupervised Administration, for a discussion of the distinction between these two types of estate administration.)

Determination of fees is a sensitive matter. Adequate compensation is important to attract and enable competent lawyers, law firms, and fiduciaries to work in the probate field.[44] At the same time, the public must be satisfied that fees are rationally determined and represent fair value for the services performed.

Fee disputes can be particularly acrimonious and can involve litigation costs eventually borne by the estate or the parties far in excess of the amount in controversy. The court should identify, encourage, and provide opportunities for early settlement or disposition of these disputes through settlement conferences and alternate dispute resolution procedures.

Standard 3.1.6 Accountings

Fiduciary accountings in the probate court should be complete, accurate, and understandable.

Commentary

The form of accounting should be established by the court. An accounting should include all assets, the distribution of those assets, the payments of debts and taxes, and all transactions by the fiduciary during the administration of the estate. The schedules and text of the accountings (including the formats used) should be readily accessible and understandable to all interested persons, particularly those persons with limited experience with and knowledge of estates and trusts. Although the court reviews many accountings, others are prepared for beneficiary use and review in unsupervised estates and trusts. The same accounting format should be used in both cases.

A proper accounting should enable an interested person to understand the process of the administration of the assets. Unless waived, the fiduciary should distribute copies of status reports and accountings to persons interested in the estate. The accounting entity, not the court, should have the responsibility for distributing the accountings to interested persons, and should incur the cost as an expense of administration.

If all interested persons agree, the court may waive a review of accountings. Many estates have expenditures that are relatively straightforward, and court review of the accountings may unnecessarily deplete the estates' resources. A waiver of an

[44]The levels of compensation may be established by statute and may differ depending on the nature of the appointment. For example, there may be a statutory distinction in the compensation to be awarded guardians and conservators. *See* CAL. PROB. CODE § 2640 (guardian or conservator of estate); § 2641 (guardian and conservator of person) (West 1991 & Supp. 1993).