IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

KEITH F. ROBERTS,

Respondent.

_______________________________/

Case No. 86,975

TFB No. 95-10,469(13D)

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INITIAL BRIEF

OF

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SYMBOLS AND REFERENCES

In this Brief, the Florida Bar will be referred to as "The Florida Bar," or "the Bar." The Respondent, Keith F. Roberts, will be referred to as "Respondent."

"RR" will refer to the Report of Referee in Supreme Court Case No. 86,975 dated March 5, 1996.

"TR-1" will refer to the Transcript of testimony before the Referee in the disciplinary case styled THE FLORIDA BAR v. KEITH F. ROBERTS, TFB No. 95-10,469(13D), dated February 22, 1996.

"TR-2" will refer to the transcript of a sworn statement given by Respondent on June 23, 1995.

"TR-3" will refer to the transcript of a sworn statement given by Respondent on May 26, 1995.

"EXH (#)" will refer to Exhibits attached to the Complaint.

"Rule" or "Rules" will refer to the Rules Regulating the Florida Bar. "Standard" or "Standards" will refer to the Florida Standards for Imposing Lawyer Discipline.

STATEMENT OF THE CASE AND OF THE FACTS

This case involves Respondent's handling of the estate of Frank J. Barbarino, who died in 1990. The decedent's parents, Theresa Barbarino (hereinafter "Mrs. Barbarino") and Benjamin Barbarino, were the potential beneficiaries of the estate. The decedent's will named Mrs. Barbarino as personal representative of the estate, and Respondent began representing Mrs. Barbarino in that capacity in late 1990. RR at 1.

At all times pertinent to these matters, Mrs. Barbarino was a resident of the State of Maryland. During her son's final illness, she had stayed with him at his Florida domicile for a period of some three months. After his passing, she returned to her Maryland domicile, leaving and entrusting the matter of her son's estate to Respondent. Mrs. Barbarino paid the funeral expenses, house expenses and other bills attendant to her son's estate; all told, Mrs. Barbarino paid out over $11,778.00 in estate expenses.

Roughly contemporaneous with Mrs. Barbarino's stay in Florida, her son's automobile was repossessed by the lienholder, Citizens & Southern National Bank (hereinafter "C&S"). On December 6, 1990, C&S sold the car for $19,000.00. At that time, the lienholder's security interest in the vehicle and its costs

of repossession totaled $26,569.53. Thus, the sale of the vehicle reduced the decedent's outstanding debt on the car loan to $7,569.53. See EXH #2. The decedent's residence was sold shortly after his death, with the sale netting the estate $10,529.23. This cash asset represented, for all practical purposes, the sum total of the estate.

On December 7, 1990, Respondent filed with the probate court in Hillsborough County the documents necessary to create the estate, the case being styled In re Estate of Frank J. Barbarino, Case No. 90-02661-A. RR at 2. On December 13, 1990, the court issued an Order admitting the will and appointing Mrs. Barbarino as personal representative. Immediately thereafter, the clerk of court forwarded to Respondent a schedule of procedural due dates pertinent to the case. See EXH #1. According to these due dates, Respondent was to file an Inventory of Estate in the case by February 11, 1991. Id. On or about January 4, 1991, C&S filed a statement of claim against the estate for $7,569.53.

Respondent failed or refused to file the Inventory of Estate by February 11, 1991, as instructed. The court then issued, on June 25, 1991, an Order to Comply with an Informal Request to file the document, and directed Respondent to file the same by August 14, 1991. EXH #3. Respondent filed the Inventory of

Estate on August 9, 1991.

Thereafter commenced a prolonged period of inaction. The next significant development in the case occurred some 16 months later, in December, 1992, when Mrs. Barbarino received a letter from Respondent's paralegal, Anne Dempsey. Ms. Dempsey admitted that she had little or no knowledge of the status of the case, and inquired of Mrs. Barbarino whether any monies had been disbursed to her. See EXH #4. Ms. Dempsey likewise had no knowledge of whether the claim filed by C&S, for $7,569.53, had ever been paid. Id. Ms. Dempsey stated that, if the estate expenses and claim of lien had already been paid, then Mrs. Barbarino and her husband would each be entitled to receive $1,269.80. Id. Ms. Dempsey further requested Mrs. Barbarino to verify whether that intended beneficial disbursement was correct.

Respondent's paralegal, Ms. Dempsey, next communicated with Maryland attorney Bruce Lamdin (who represented Mrs. Barbarino's husband) by a letter dated January 6, 1993. EXH #5. Ms. Dempsey repeated her incorrect assessment regarding the hierarchy of disbursements which should take place upon closing the estate; i.e., she maintained that the bank's claim of $7,569.53 must be paid in full. In contrast to her letter to Mrs. Barbarino, however, the letter to Lamdin asserted that the remaining cash

assets of $3,739.60 would be paid solely to Mrs. Barbarino, as pro rata reimbursement of her total expenses of $11,778.00. In making these assertions, Ms. Dempsey stated that she had "reviewed the file with Mr. Roberts." See id.

The following month, February, 1993, Respondent attempted to close the estate. Another paralegal, Eric Bell, forward several closing documents to Mrs. Barbarino for her signature. EXH #6. Mr. Bell's letter of February 5, 1993 stated that "once the judge has reviewed these documents, he will sign the Order of Discharge and the estate will be closed." Id. Those documents forwarded were: 1) Waiver of Personal Representative's Fee; 2) Schedule of Creditors; 3) Statement Regarding Creditors; 4) Report of Distribution; and 5) Petition of Discharge. Id. Mr. Bell's letter was sent some 26 months after Respondent had opened the estate. Two necessary documents, a Waiver of Accounting and a Consent to Discharge, were not enclosed with Bell's letter.

Nine months after that, the clerk of court issued to Respondent another Informal Request, which noted that several documents were delinquent and needed to be filed in the case. EXH #7. Attached to the clerk's Request was a tentative Order to Appear and to Show Cause, which identified the delinquent items. The clerk gave Respondent until December 29, 1993 to bring the

case into compliance by filing the necessary documents, by which action Respondent could avoid the Order to Appear and Show Cause. Id.

Respondent failed or refused to comply with this second Informal Request, and, on February 15, 1994, the court issued an Order to Appear and Order to Show Cause. EXH #8. The Order incorrectly listed the personal representative's address as 11007 Kenbrook Drive, Riverview, Florida (Mrs. Barbarino's son's former residence which had been sold over three years before). The incorrect address for the personal representative appeared in the Order because Respondent never informed the court of Mrs. Barbarino's correct, permanent address, and he failed or refused to realize that Mrs. Barbarino would most likely never receive important documents from the court due to the incorrect and grossly out-of-date address shown on the documents. See TR-2 at 6-7; TR-2 at 16-17. Respondent failed or refused to inform Mrs. Barbarino of the Orders to Appear and to Show Cause. TR-2 at 11; TR-2 at 13. As a result, she had no knowledge of the delinquent filings, and made no appearance on behalf of the estate. See TR-2 at 16.

A hearing was held on March 18, 1994, at which Respondent appeared. The court continued the matter to April 22, 1994, and

directed Respondent to finalize the pending matters and to close the estate during that interim. EXH #11; see also EXH #14. Mrs. Barbarino was not advised of this hearing. TR-2 at 13. On March 24, 1994, paralegal Eric Bell forwarded to Mrs. Barbarino a Waiver of Accounting and a Consent to Discharge, for her to sign and return. EXH #13. The estate funds were disbursed shortly thereafter, according to the hierarchy of disbursements previously communicated by Respondent through his other paralegal, Anne Dempsey. That is, the claim of C&S (which by this time had merged into NationsBank) was paid off the top, and the remaining $2,857.04 was disbursed to Mrs. Barbarino. Respondent received $1,200.00 as attorney's fees, in addition to a $500.00 retainer deposit initially received from Mrs. Barbarino. See EXH #15. At this point in time, an Order of Discharge closing the estate had not been entered.

Mrs. Barbarino's Maryland attorney, Donald C. Mulcahey, immediately objected to the improper disbursement, by way of a letter sent to Respondent dated March 28, 1994. Id. Respondent replied by letter dated April 15, 1994, in which he admitted that the bank's claim had been paid in error, and that he would seek reimbursement of the same from NationsBank. EXH #16; see also TR-2 at 10-13; see generally TR-3. Respondent acknowledged that the

closing of the estate would have to be postponed pending resolution of the incorrect disbursement. EXH #16.

NationsBank did not return the improper disbursement. The court-imposed deadline of April 22, 1994 for closing the estate passed, at which time the court closed the estate and revoked the Letters of Administration without prejudice to refile. EXH #17. The Order entered by the court again listed Mrs. Barbarino's address as Riverview, Florida, and the court again noted that she did not appear on behalf of the estate. Id. Respondent failed or refused to notify Mrs. Barbarino that the case had been dismissed. TR-2 at 15.

Thereafter, Respondent made some efforts to persuade NationsBank to return the improper disbursement, without success. See EXH #18; EXH #19, EXH #20. In his communications to the bank and to Mr. Mulcahey, Respondent made several misstatements. See RR at 5-6. Respondent failed or refused, however, to take any action to secure the return of the improperly disbursed monies, despite promising to do so on several occasions. RR at 6. The monies were never returned to the estate.

Mrs. Barbarino's Maryland attorney, Mr. Mulcahey, filed a Complaint with The Florida Bar on September 30, 1994, initiating the instant matter. As this disciplinary case progressed,

Respondent again made promises to restore the improperly disbursed amount to Mrs. Barbarino. Respondent never did so. In June, 1995, the Thirteenth Judicial Circuit Grievance Committee "D" issued a finding of probable cause that Respondent had violated several of the Rules Regulating The Florida Bar. The Bar filed a Complaint on December 5, 1995. Thereafter, the Bar filed a Motion for Default against the Respondent, and the referee entered an Order of Default on February 7, 1996. Thus, the allegations of the Bar's Complaint were deemed admitted, which allegations the referee adopted as findings of fact. These findings have been recounted in narrative form in the foregoing statement of facts.

The referee found Respondent guilty of violating Rule 4-1.1 (competence); Rule 4-1.3 (diligence); Rules 4-1.4(a) and 4-1.4(b) (communication); Rule 4-3.2 (failure to expedite litigation); and Rule 4-8.4(a) (violate or attempt to violate The Rules Regulating The Florida Bar). RR at 6. For this conduct, the referee recommended that Respondent be publicly reprimanded. Id. The Referee also recommended that Respondent make restitution to Mrs. Barbarino in the amount of $9,000.00. Id. The referee further recommended that Respondent be placed on probation for three years, the terms and conditions of which are set forth in detail

on page 7 of the Report of Referee. The Bar then filed a Petition for Review challenging the recommended sanction as too lenient in view of Respondent's egregious professional lapses. This Initial Brief followed.

SUMMARY OF THE ARGUMENT

The Florida Bar seeks review of the discipline recommended by the referee. Toward that end, the Bar urges this Court to consider Respondent's misconduct against the totality of circumstances surrounding same; specifically, the damage to the subject estate, the damage to the client, Mrs. Barbarino, and the vulnerability of Mrs. Barbarino. The Bar contends that the pertinent facts militate for suspension of this Respondent.

In further support of suspension as the appropriate sanction, the Bar contends that The Florida Standards for Imposing Lawyer Discipline and the relevant case authority provide clear authority for suspending this Respondent. The Bar further contends that the Standards and case law both call for a duration of suspension which shall be long enough to require Respondent to prove rehabilitation as a condition of reinstatement. Accordingly, the Bar herein argues that a 91-day suspension be imposed on Respondent by the Court.

Lastly, the Bar argues that imposition of a rehabilitative suspension for this Respondent would be entirely consistent with the threefold objectives of Bar discipline.

ARGUMENT

I. THE RECOMMENDED DISCIPLINE FAILS TO ADEQUATELY PROTECT THE PUBLIC BY FAILING TO ENSURE RESPONDENT'S COMPETENCY TO PRACTICE LAW.

A. Respondent's Serious Misconduct And His Personal Circumstances Require That He Be Suspended And Thereafter Make An Affirmative Showing Of Rehabilitation And His Fitness To Practice.

Respondent undertook to represent an elderly woman who lived out of state; the purpose of the representation was to probate the estate of the woman's son while Respondent's client, Mrs. Barbarino, acted as personal representative. Due to Respondent's neglect and mismanagement, the estate languished in the probate court for nearly three and a half years, though the estate was small and legally uncomplicated. At the end of this period, Respondent improperly disbursed estate funds to a secured creditor, instead of reimbursing his client for her considerable estate expenses. The improper disbursement made it impossible for Respondent to close the estate by the court-imposed deadline for doing so. The court revoked the Letters of Administration and dismissed the case without prejudice. Respondent never informed his client of these adverse events, and never informed the court of his client's correct mailing address. Respondent never pursued any legal means to ensure that the improper

disbursement was returned to the estate -- and never restored the funds himself -- though he repeatedly promised to do so. Respondent never refunded any of his legal fee in an effort to mitigate Mrs. Barbarino's loss, which had been brought about by Respondent's incompetence and neglect.

Respondent now argues that these harmful professional lapses warrant no more than a public reprimand coupled with probation. The Bar argues that, under the instant circumstances, a rehabilitative suspension plus probation would better protect the public, and better serve the objectives of Bar discipline.

Respondent's need for rehabilitation is twofold. First, he has been proven to be professionally incompetent; thus, he should be expected to demonstrate a level of proficiency sufficient to adequately advance his clients' legal interests. Second, Respondent's mental and physical state is closely linked to his attainment of professional competence. In the hearing on sanctions, Respondent admitted that he had "personal or emotional problems;" TR-1 at 39. Respondent also admitted, with scant elaboration, that he presently suffers from a "physical or mental disability or impairment. Id. The nature of Respondent's mental impairment appears, by his own admission, to be a depressive disorder, for which he continues to seek treatment. TR-1 at 20-

21. As for his physical impairment, Respondent admitted that he suffers from a "medical condition that is pretty serious." TR-1 at 22. No further evidence was adduced to explain the exact nature or severity of Respondent's illnesses; however, the record does show that his admissions regarding the same -- which the referee cited as a mitigator -- were uncontested by the Bar, and the parties and referee generally accepted that Respondent's personal condition was serious and continuing. See TR-1 at 39; TR-1 at 52.

The Bar asserts that Respondent has failed to show that such misconduct will not be repeated. Considering the blatant nature of Respondent's professional lapses, the harm those lapses caused, Respondent's failure to recognize his lapses before causing harm (or to thereafter mitigate the harm caused), and Respondent's admittedly impaired physical and mental state, the question presented to this Court is whether Respondent is in fact able to zealously and capably represent clients, i.e., after receiving the recommended public reprimand.

The Bar filed its petition in this case because the adduced facts do pose a serious and troubling issue regarding Respondent's fundamental competence. The Bar asserts that the instant misconduct is egregious enough to warrant Respondent's

suspension. Further, the Bar contends that, considering the instant misconduct and Respondent's condition, it should be the responsibility of the Respondent to show that he is fundamentally competent before this Court permits him to continue practicing law. The Bar also notes that Respondent has, for some years now, promised to pay restitution to Mrs. Barbarino; however, he has repeatedly failed or refused to pay -- or make any reasonable effort to obtain or to pay -- any such restitution. See TR-1 at 26-28; TR-1 at 55.

B. A Rehabilitative Suspension is Consistent with The Standards for Imposing Lawyer Discipline and The Objectives of Bar Discipline.

In reviewing a referee's recommended discipline, this court's scope of review is broad because it alone bears the ultimate responsibility to order an appropriate sanction in attorney discipline cases. The Florida Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989). The discipline imposed must serve three objectives:

> "First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be

severe enough to deter others who might be prone or tempted to become involved in like violations."

The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983) (emphasis and citations omitted).

The Bar argues that a rehabilitative suspension will protect the public from Respondent's present lack of fitness. It follows then that Respondent's suspension would not deny to the public the services of a qualified attorney. Likewise, a rehabilitative suspension is fair to the Respondent, under the instant findings, because Respondent may use the period of suspension to attain a more legally proficient status. Further, a 91-day suspension will sufficiently punish Respondent's breach of ethics while it encourages Respondent to reform his conduct and his approach to practicing law.

While the deterrent aspect of attorney discipline should always be considered, the Bar argues that the instant case militates not so much for exemplary deterrence as it calls for protecting the public and encouraging Respondent's reform. However, the Bar does argue for punitive measures in one respect: Respondent made many promises, over a number of years, in which he acknowledged his debt to Mrs. Barbarino for incompetently disbursing funds from her son's estate, and affirmed his duty to

ensure that the funds were restored Mrs. Barbarino. Yet, Respondent has repeatedly and utterly failed or refused to perform any affirmative act whereby Mrs. Barbarino might be restored, either wholly or in part. The referee specifically found, in aggravation, that these continuing lapses constituted an indifference to making restitution. RR at 7. The Bar contends that this finding and these lapses militate for imposition of an exemplary penalty.

The Florida Standards for Imposing Lawyer Discipline (Standards) likewise provide for suspension as the appropriate sanction for this respondent's misconduct. Standard 4.52 states that "suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence, and causes injury or potential injury to a client." Here, Respondent admitted that he lacked competence in probate matters. He testified that he had previously "been involved" with "two or three" other probate cases handled by another attorney. See TR-1 at 25-26. Thus, the Barbarino estate appears to be Respondent's first attempt to represent an estate in his own right. The facts clearly show, and Respondent freely admitted throughout the course of this proceeding, that Respondent erroneously paid funds to an estate creditor to the severe detriment of his own client,

the personal representative, to whom the funds should have gone as reimbursement of estate expenses. The evidence shows that Respondent was not aware, and never made himself aware, of which probate documents and forms to file at various stages of the proceeding. Thus, the record shows that Respondent knew or should have known that he lacked the minimum requisite competence to efficiently and correctly probate even an uncomplicated estate, and it is irrefutable that his client suffered financial harm as a direct result. Therefore, under the Standards, suspension is the only appropriate sanction for Respondent's incompetence.

Regarding Respondent's lack of diligence, Standard 4.42(a) states that suspension is appropriate "when a lawyer knowingly fails to perform services for a client" and thereby harms the client. Standard 4.42(b) militates for suspension when a lawyer "engages in a pattern of neglect and causes injury or potential injury to a client." The Bar contends that either Standard can arguably apply to the instant facts. Respondent missed filing deadlines for various documents, even after the probate court prompted him to do so. Accordingly, suspension is the appropriate sanction for Respondent's neglect of the Barbarino estate matter.

C. Relevant Case Authority Supports Imposition of a Rehabilitative Suspension as the Appropriate Sanction for Respondent's Misconduct.

The single most important concern in this Court's defining and regulating the practice of law is protecting the public from incompetent, unethical, or irresponsible representation. The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). Here, the referee found Respondent to have been incompetent in his representation of the Barbarino estate, and found, in mitigation, that Respondent's physical and mental condition was such that it may tend to excuse or explain such incompetence. Respondent has made no affirmative showing that his impaired condition is anything but ongoing, or that it has ended, or been alleviated in any way. The Bar argues that Respondent's ongoing physical and mental state should be seriously considered by this Court in determining the appropriate discipline.

In The Florida Bar v. Goldin, 240 So.2d 300 (Fla. 1970), the respondent was disbarred for 18 months for converting client funds to his own use. The referee recommended that the disbarment continue thereafter until the respondent made restitution. Id. The Bar and this Court both agreed that, under the facts, Mr. Goldin's reinstatement should not be predicated on the fact of restitution. Id. at 301. However, the Court held

that Goldin should not be automatically reinstated, due to the respondent's personal circumstances. The Court explained:

> "It appears from the record that this man suffers from a neurotic condition which places a cloud over his current professional ability and sense of responsibility to his clients and to the public. We are, therefore, not willing to restore him to the practice of law routinely merely upon the passage of time. Before he is readmitted, it should be shown that he is mentally and temperamentally competent to undertake the grave responsibilities of an attorney.

Id. (emphasis added).

The Florida Bar v. Theed, 246 So.2d 745 (Fla. 1971) presents facts reasonably consistent with the instant case. In Theed, the respondent, who had not previously been disciplined, was found to have incompetently represented an estate in probate. Due to Mr. Theed's incompetence, the closing of the estate was delayed for two years, and Mr. Theed improperly handled estate funds. Id. Like Respondent, Theed had never before been disciplined. Like Respondent, Theed admitted his misconduct. Id. at 746. The referee recommended that Theed be given a three-year suspension, but this Court rejected that sanction as "too severe," calling the incident "an isolated one." Id. Unlike Respondent, however, Theed fully restored the funds prior to the disciplinary hearing. Id. The Court suspended Theed for one year and thereafter until proof of rehabilitation. Id.

In The Florida Bar v. Reed, 249 So.2d 417 (Fla. 1971), the respondent was disciplined for being grossly ineffectual in her representation of an estate, and for causing inexcusable delays in disbursing estate funds to the two beneficiaries of the estate. Though some improper handing of estate funds had occurred, there was no finding of conversion or misappropriation, as there had been in Theed, supra. The opinion gives no indication that Ms. Reed had any previous disciplinary record; it does, however, state that "at the time of the hearing the Respondent either had or was in the process of paying all amounts in controversy to the beneficiaries. Id. at 418. Nevertheless, the Court imposed a rehabilitative suspension of two months and thereafter until proof of rehabilitation. Id. Thus, the pertinent facts of Reed are fundamentally consistent with the instant facts -- but for the fact that, in the instant matter, Respondent made no effort whatsoever at restitution.

The Florida Bar v. Shannon, 376 So.2d 858 (Fla. 1979), is also consistent with the case at bar. Like Respondent, Mr. Shannon incompetently and neglectfully represented an estate. Like the estate of Frank Barbarino, the estate in Shannon had been dismissed *sua sponte* by the probate court, "for lack of action or inquiry." Id. at 859. The referee found that:

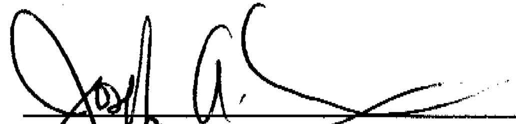
". . . respondent's failure to properly handle the [] estate is of such magnitude that it constitutes an intentional failure to carry out the contract of employment with . . . the estate. [] I find that respondent's failure . . . has resulted in prejudice or damage to [the estate] by failure to disburse to those entitled to receive the proceeds of the [] estate their funds in a timely manner.

Id. (emphasis added). Also similar to the instant case, there is no mention in Shannon of any previous discipline imposed. The Court suspended Shannon for 91 days and thereafter until proof of rehabilitation. Id.

CONCLUSION

For all the foregoing reasons, this Court should disapprove the referee's recommended sanction of public reprimand and probation, and should instead impose on Respondent a 91-day suspension and thereafter until Respondent makes restitution, and further until Respondent proves his fitness and ability to practice law in this State. Further, Respondent should be ordered to pay the restitution within 30 days of this Court's disciplinary Order and, upon reinstatement, should be placed on probation for three years, according to the terms and conditions set forth in the Report of Referee.

Respectfully submitted,



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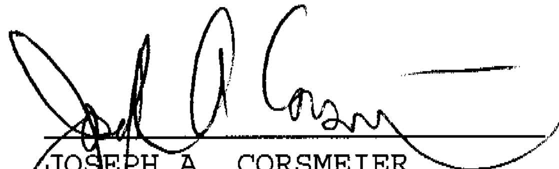
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Opening Brief has been furnished by regular U.S. Mail to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy by regular U.S. Mail to Paul M. Tabio, Counsel for Respondent, at 705 N. Parsons Avenue, Brandon, Florida 33510; and a copy by regular U.S. Mail to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, all this 2nd day of May, 1996.



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