IN THE SUPREME COURT OF FLORIDA

Case Number 87,466
Case Number 88,104

THE FLORIDA BAR,

Complainant,

vs.

ROBERT M. BRAKE,

Respondent.
_____/

BRIEF OF RESPONDENT ROBERT M. BRAKE

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STATEMENT OF THE CASE AND OF THE FACTS

Robert Brake was admitted to the Florida Bar in 1951, and has practiced law in Dade County, Florida since he became a member of the Florida Bar. He has been a member in good standing since he was admitted and had no prior disciplinary record in almost forty-eight (48) years of practice.

In this Brief, "T." will refer to the Transcript of the Referee Proceeding herein and the numbered pages correspond to the court reporters numbered pages; "ROR" shall refer to the Report of Referee and "App." shall refer to Brake's Appendix.

This case arises out of the sibling/in-law dispute between the four residuary beneficiaries of the estate of Eileen Ellis Murphy (hereinafter "Murphy"). Mrs. Murphy died on March 30, l988. See ROR, page 2. The four residuary beneficiaries in her will were her four children, Dennis Murphy, Jr., Joseph Murphy, Sr., Eileen Brake, and Richard Murphy. See ROR, page 2. Her son Joseph Murphy, Sr. died on July 11, l985 and Eileen Murphy executed a codicil substituting Eve Murphy, his widow, for her deceased son.

Mrs. Murphy's estate consisted of a small amount of cash, her personal effects, and 96% (96 shares) of the authorized and outstanding shares of Murphy Investments, Inc., a Florida corporation. See T. at 691-692. One share was held by the entireties by Dennis Murphy, Jr. and Diana Murphy, his wife. Another share was held by Joseph Murphy, Sr. and Eve Murphy his

wife. A third share was held by Eileen Brake and Robert Brake, her husband. The last share was held by Richard Murphy, who was not married at the time of the formation of the corporation.

The family dispute is over the disposition of a small commercial building owned by the corporation at 1830 Ponce de Leon Boulevard in Coral Gables. See ROR, page 2-3. After the dissolution of the corporation and the conveyance to the stockholders the commercial building was 96% owned by the estate of Murphy, which was to be distributed equally among the beneficiaries, and 1% by each of the four beneficiaries.

Eileen Brake was named as Personal Representative of her mother's estate in her mother's will. See ROR, page 2. Letters of Administration were issued to Eileen Brake in June, l988 and she retained her husband, Robert Brake to represent her. See ROR, page 2.

From time to time all shareholders except Richard Murphy loaned money to the corporation and received promissory notes and mortgages to evidence and secure the loans. At the time of the death of Eileen Ellis Murphy the corporation had the following outstanding liabilities: (1) a promissory note to Dennis Murphy, Jr., dated in l977; (2) a note and mortgage dated March 1, l985 to Eileen Brake; (3) another note and mortgage of the same date to deceased, which she assigned to Eileen Brake on February 23, l987; and (4) a note and mortgage to Eileen Brake dated February 23, l987. All of the notes and mortgages had been

signed by the decedent Murphy as corporate president. Richard Murphy, as corporate secretary, signed the first two notes and mortgages. See ROR, page 6-7.

On December 23, l988, the Brakes loaned money to the corporation to cover all remaining corporate debts. See ROR, page 7. Eileen Brake, as corporate president, executed a corporate note and mortgage to herself and her husband in accordance with the authority given to her by the Board of Directors (See T. at 690) and the recommendation of Thomas Korge, Esquire, the tax attorney employed by the corporation and beneficiaries to advise them in such matters. See T. at 571-596. Herbert Stettin's testimony was uncontroverted that authorized officers have the authority to sign the mortgages and notes for a corporation. See T. at 699. He also testified that the board normally does not sign such instruments. See T. at 699.

Mr. Herbert Stettin, who was later appointed as Administrator ad Litem, testified at trial that if all four of the heirs, acting in their capacity as directors, authorized the making of the mortgage by Mrs. Brake, then they would be estopped to come back and claim that it was done improperly. See T. at 693.

On December 29, l988, as president of the corporation, Eileen Brake signed a corporate deed conveying fee simple title to the property, subject to all mortgages, to the stockholders in proportion to their stock ownership interest. On December 30,

l988, Mrs. Brake signed and filed the papers as president of the corporation, dissolving the corporation pursuant to the authority of the board of directors and stockholders.

Mortgage Foreclosure Action

Beginning in June, l989, Eileen Brake advised the other co-owners that the Statute of Limitations would bar her from foreclosing on one of the l985 mortgages as of March 1, l990. Mrs. Brake offered to forego foreclosure and interest accruing after the offer, and wait until the property was sold to receive payment of the debts due the Brakes, if the others would waive the Statute of Limitations. Although the offer was repeated and kept open until the foreclosure action was filed on February 28, l990, the last day before the Statute would bar collection, only Dennis Murphy, Jr., agreed to the waiver, while the others refused. See ROR, page 10.

On December 14, 1989, prior to the filing of the foreclosure action, Herbert Stettin was appointed as Administrator Ad Litem pursuant to Probate Rule 5.120. See T. at 654-656. Accordingly, Mrs. Brake was entitled to pursue the foreclosure action. See ROR, page 9. Herbert Stettin was appointed to defend the estate in the foreclosure action and to take complete control of the property. See T. at 657-658. Herbert Stettin followed the wishes of Eve Murphy and Richard Murphy and also refused on behalf of the estate to waive the Statute of Limitations. See T. at 645. He and the other co-owners were named as defendants in

the foreclosure action.

Mr. Stettin testified that he would not have objected to the waiving of the Statutes of Limitation, but that the other co-owners did object to waiver. See T. at 645. He recalled being in favor of waiving the Statute of Limitations, but the others found it unacceptable. See T. at 686. The Third District Court of Appeal later held that the filing of the foreclosure action was not a breach of fiduciary duty nor taken in bad faith. See Eileen M. Brake v. Eve E. Murphy, 636 So.2d 72 (Fla. 3d DCA 1997).

The Third District Court of Appeal further stated that "[T]he trial of the foreclosure action took place when Mrs. Brake was acting in her individual capacity, not as personal representative, and the foreclosure action was defended on behalf of the estate by Herbert Stettin as administrator ad litem." See ROR, page 13, and Eileen M. Brake v. Eve E. Murphy, 636 So.2d at 74, supra.

Both Mr. and Mrs. Brake served in their respective capacities until October 1, l990, when Judge Robert Newman, *sua sponte,* removed them. See ROR, page 10. The Brakes were removed because on February 28, l990, the Brakes filed the foreclosure action mentioned above. The Order of October 1, l990 also appointed Herbert Stettin as Successor Personal Representative.

On December 24, 1991 the Third District Court of Appeal

reversed the Order which appointed Herbert Stettin as Successor Personal Representative and remanded the cause to the trial court with directions to appoint Dennis Murphy, Jr. as the Second Successor Personal Representative, because he was nominated as alternate personal representative by his mother in her will. Thereafter, Judge Newman appointed Dennis Murphy, Jr. to be Second Successor Personal Representative of his mother's estate. Mr. Murphy was represented then, as he was during the appeal and office purchase, by Carey Ewing, Esquire.

Representation of Second Successor Personal Representative

In April, 1992, Carey Ewing advised Dennis Murphy, Jr. that she was moving to North Carolina. Dennis Murphy, Jr. then asked Robert Brake to represent him. At the time Respondent was retained, the surcharge trial had ended, the mortgage foreclosure case had been completed, and the property had been sold to Dennis Murphy, Jr. and Eileen Brake. The only distribution that remained was to distribute a small amount of money and the proceeds obtained at the sale of the office building.

On April 17, l992, Judge Robert Newman signed a Stipulated Order authorizing the substitution of Robert Brake for Carey Ewing as attorney of record for Dennis Murphy, Jr. (App. 30) At no time thereafter did Dennis Murphy, Jr. make any complaint about his being represented by Robert Brake.

Nine months later, after many contested hearings on estate matters, Judge Newman granted the request of Edward Golden, as

attorney for Eve Murphy and Richard Murphy, to remove Robert Brake as attorney for Dennis Murphy. Dennis Murphy, Jr. appealed this Order, which was *per curium* affirmed without opinion by the Third District Court of Appeal in the case of Murphy v. Estate of Murphy, 621 So.2d 443 (Fla. 3d DCA 1993).

Judge Newman was removed as presiding judge over the four Murphy probate matters by the Third District Court of Appeal because he and Edward Golden, attorney for Eve Murphy, engaged in *ex parte* conferences to decide and then to draft an Order Surcharging Eileen Brake. See Eileen M. Brake v. Eve E. Murphy, 693 So.2d 663 (Fla. 3rd DCA 1997).

On February 1, 1990, Eve Murphy and Richard Murphy filed separate complaints with the Florida Bar against the Brakes for Eileen Brake's refusal to accept an offer (i.e., Degani) to purchase the building. The Bar Counsel closed or dismissed those complaints on Mr. and Mrs. Brake in 1990. This Complaint, filed by Eve and Richard Murphy was filed in December, 1993.

The Negotiations regarding the Sale of the Office Building to Prospective Buyers

On September 8, 1989, Yaron Degani and his wife met with the Brakes regarding the property for sale in Coral Gables. The Deganis spent more than two hours inspecting the building, and were offered the opportunity to further inspect the premises if they so desired. See ROR, pages 4-5.

On September 26, 1989, Yaron Degani sent a letter to

Respondent stating that he wished to purchase the office building for $700,000, setting forth the legal description of the building, and stating his offer would remain open 30 days. App. 2. He sent a similar letter to Joseph Murphy, Jr., offering to buy decedent Murphy's homestead. App. 3.

Eileen Brake contacted the co-owners regarding the Degani offer, and Richard Murphy authorized Mrs. Brake to negotiate and thereafter sell the office building and Mrs. Murphy's home for a million dollars, "as is". Dennis Murphy, Jr. authorized negotiations for a million dollars for both properties, "as is", and Eve Murphy stated that she would accept $950,000 for both properties provided the contract was "as is".

On October 2, 1989, six days after the initial offer from the Deganis, Eileen Brake submitted a proposed contract to the Deganis containing an "as is" provision. App. 4. On October 18, 1989, after several days of written and verbal negotiations, Yaron Degani submitted a reply offer. The proposal was not "as is", was for the office building only, and was for only $700,000.00. App. 12.

The next day, October 19, 1989, Edward Golden, the attorney for Eve Murphy, signed, filed and served a Petition incorrectly stating that: (1) Eve Murphy was the Personal Representative of the Estate; and (2) the Degani reply offer met with her approval. The petition asked the Court to enter an Order authorizing Eve Murphy to execute said contract to sell said property as Personal

Representative. See ROR, page 6. App. 14.

Eileen Brake and Dennis Murphy, Jr, filed objections to said Petition. See ROR, page 6. App. 15. Their objections were based on the merits of the Degani contract and not on the incorrect status of personal representative attributed to Eve Murphy in the Petition. After a hearing before the Honorable Harold Featherstone, Judge Featherstone upheld the objections of Eileen Brake and Dennis Murphy, Jr. See ROR, page 6. App. 18.

Thereafter, on November 1, 1989, less than one week after Judge Featherstone's Order was entered, Jeffrey Trinz, Esquire, the attorney for Yaron Degani, wrote a letter to Robert Brake stating that his clients would never sign an "as is" contract. Mr. Trinz's letter further stated that his clients would never raise the price they had offered and that they would only negotiate further if all five co-owners first signed the contract. App. 19.

On November 13, l989, Judge Featherstone orally ordered the appointment of Herbert Stettin as Administrator Ad Litem to defend the mortgage foreclosure case and conduct all further negotiations for sale of the property. A written Order was signed December 14, 1989. App. 20. The negotiations between Mrs. Brake and the Deganis were effectively ended since the Degani offer did not meet the "as is" requirement of the co-owners, nor the price that was established by the co-owners resulting in the Deganis refusal to negotiate any further, and

Eileen Brake's lack of authority to negotiate.

On these facts, Chief Judge Alan Schwartz from the Third District Court of Appeal stated, in his dissent in the case styled Eileen M. Brake v. Eve E. Murphy, 636 So.2d 72 (Fla. 3rd DCA 1994) found that there was no breach of fiduciary duty. In Eileen M. Brake v. Eve E. Murphy, 693 So.2d 663, supra, the remainder of the Court joined him in reversing the *ex parte* order.

The issues in this case were hotly contested at both trial and appellate levels between several of the co-owners. The Referee in its incomplete and somewhat prejudiced "Frivolous Pleadings" section, showed a bias against Mr. Brake. Contrary to what was stated in said section, most of the decisions and findings applicable to the issues in question were in Respondent's favor (not in favor of Eve or Richard Murphy). (See, Footnote #2).

In the above context, there were multiple cases where different courts were split or found for the Brakes. (See, Footnote #1).

Surcharge Action

On October 12, 1990, the Murphys filed a Petition to Surcharge Eileen Brake in the estate of her mother, Mrs. Murphy. See ROR, pages 11-12. The trial was spread out over 15 months, although only 15 days of testimony and actual trial was held. The trial concluded on March 9, 1992. See ROR, page 12. The

Court took another 15 months before entering the Order Surcharging Eileen Brake on June 20, l993. This Order was entered approximately 30 months after trial began. The Order, it later surfaced, was a product of *ex parte* conferences between Judge Robert Newman and Edward Golden, who was the attorney for Eve and Richard Murphy.

Quit Claim Conveyance to Respondent

In the 1992 time frame, Dennis Murphy, Jr., another residuary beneficiary of his mother's estate, and Respondent, in the name of Eileen Brake, filed a petition to purchase the estate's primary asset, the office building and parking lot at 1830 Ponce de Leon Boulevard in Coral Gables. They offered to match the price offered by a third party obtained through a broker. The request was made by Robert Brake in the name of Eileen Brake because she was a beneficiary and entitled to request distribution in kind under Florida Statutes Section 733.810(1) and under a prior court order. In the latter half of 1991, the court entered orders authorizing the sale of the office building. See ROR, page 6.

On May 7, 1992, the Estate, Eve Murphy and Richard Murphy sold their interest in the office building to Eileen Brake and Dennis Murphy, Jr. The Murphys stipulated in the deed case that the money used to purchase the Brake share of the property came from funds earned or inherited by Robert Brake during the marriage and deposited in entireties account [Exhibit 38, pages

93-94, 127-128]. Richard Murphy stated at a grievance committee hearing that he knew that Robert Brake had purchased the property. Eve Murphy was present and made no objection. [App. 29, page 158].

Under the laws of Florida, Eileen Brake held title as a resulting trustee (Foster v. Thornton, 179 So.2d 882, (Fla. 1937)). The Murphys also stipulated that on November 10, 1992, Eileen Brake executed a deed conveying the property to herself and her husband to create an estate by the entireties. [Exhibit 38, page 60, 64].

The deed was given to Respondent's secretary to record, and the Brakes left on vacation. The deed was mislaid and misfiled, and was not found and recorded until a search of papers to answer discovery requests in November, 1995. The Referee ignored this evidence, even though it was uncontroverted.

Because family members had reported to the Brakes that Joseph Murphy, Jr. had stated that his time in jail had given him contacts to have a "hit man take care of" Robert Brake, thus leaving title to entireties property solely in the name of Eileen Brake and subject to a writ of execution (see ROR, page 14), Eileen Brake insisted that the tenancy by the entireties be terminated to eliminate this threat to her husband. She executed a quit claim deed of her interest in the entireties property to Robert Brake. This deed was recorded on June 22, 1993 in the Public Records of Dade County, Florida. See ROR, page 14.

The Third District Court of Appeals held in Robert M. Brake v. Eve E. Murphy, 687 So.2d 842 (Fla. 3rd DCA 1996), that a resulting trust was a valid defense to an action under the fraudulent conveyance statute, reversed the judgment of the trial court [Exhibit 28] and sent the case back to be tried on that issue.

Proceedings before Judge Stein

On March 5, 1996, the Honorable Linda Singer Stein was appointed as referee in Respondent's matter. A trial before Judge Stein was held regarding Respondent on July 28, 30, 31, and August 4 and 5, l997. Final Argument was heard on October 16, l997. On March 27, l998, over five months after final argument was heard, the Referee entered her report. Judge Stein found Robert Brake guilty of violating the following bar rules:

(1) Bar Rule 4-1.7(b), Duty to Avoid Limitation on Independent Professional Judgment;

(2) Bar Rule 4-8.4(d), A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice . . .;

(3) Bar Rule 4-4.1(b), In the course of representing a client a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client;

(4) Bar Rule 4-8.4(c), A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or

misrepresentation;

(5) Bar Rule 4-1.16(a)(1), When a lawyer must decline or terminate representation.

SUMMARY OF THE ARGUMENT

1. Being a creditor of an estate does not disqualify an attorney from acting as the attorney for the personal representative.

2. An attorney cannot be found guilty of alleged bad faith in negotiations for the sale of estate property by his client where all of the co-owners agree that the property would have to be sold "as is" and the buyers refuse to make an "as is" offer.

3. Where one pays the consideration for the purchase of property and there is no intent to make a gift, a resulting trust arises and a conveyance by a trustee to a beneficiary is a conveyance supported by consideration and is not fraudulent against creditors.

4. Where an attorney for the personal representative is removed for alleged conflict of interest, and that alleged conflict is thereafter resolved, the representation of a second personal representative does not, in and of itself, constitute a violation of any ethical duty by the lawyer.

5. The discipline recommended by the Referee is unconscionable under the circumstances.

ARGUMENT

I. Being a creditor of an estate does not disqualify an

attorney from acting as the attorney for the personal representative.

The Florida Supreme Court in numerous cases has upheld the right of a creditor of an Estate to act as a Personal Representative, see Deans v. Wilcoxon, 7 So. 163, 176 (Fla. 1889).

The Florida Statutes have never prohibited such representation. The probate statutes and rules specifically provide for such representation by requiring the appointment of an Administrator ad Litem who is entitled to have his own attorney represent him, whenever the Personal Representative is enforcing her claim against the Estate. See Florida Statutes 733.308 and Florida Probate Rule 5.120(a).

In addition, the Personal Representative is authorized to advance funds for the protection of the Estate, which makes the personal representative a creditor. See Florida Statutes 733.612(14). When the Personal Representative and attorney perform services to the Estate they become entitled to fees, and thus creditors of the Estate. This alone does not disqualify them.

The mortgages were executed by the corporation on corporation land, and became liens on the land distributed to the stockholders on dissolution. Under corporate law they never became debts personally due by the stockholders.

The Referee was in error as a matter of law in stating that the mere holding of the mortgages was a conflict of interest between Robert Brake and the Personal Representative, and a

violation of Bar Rule 4-1.7(b), which prohibited Robert Brake from acting as attorney for the Personal Representative.

II. The Attorney for the Personal Representative cannot be found guilty of bad faith in negotiations for the sale of estate property where all of the heirs, who are also co-owners, agree that the property would have to be sold "as is" and the buyers refused to make an "as is" offer.

In finding that Mr. Brake did not negotiate in good faith with the Deganis, Judge Stein asserts in her report that:

> ". . . a main defense raised by Mr. Brake is that the Degani offer was not accepted because the Deganis allegedly required inspections of the property after a contract would have been executed. Mr. Brake maintains that if those inspections were unacceptable, the Deganis could rescind the deal. The evidence demonstrates, though, that the inspections could have been done before any contract was finalized. In other words, the requested inspections did not preclude the execution of an "as is" contract. Thus, Mr. Brake's argument on this point is without merit."

It is obvious that, in the five month period between final argument and actual decision, the Referee overlooked the uncontradicted testimony of Eileen Brake that she told the Deganis that they could make any inspections they wanted to before a contract was signed, but that after a contract was signed the sale would have to be "as is". Mrs. Deganis corroborated this. Finally, the Deganis personally inspected the property for more than two hours on September 8, 1998. T. 550, 551.

The Referee overlooked the fact that Eve Murphy testified that she never saw the contract offer of the Deganis and that had she seen it she would have rejected it because it was not "as is". T. 372-375. The Referee also overlooked the uncontradicted testimony

of Richard Murphy that he did not see the Degani offer, and that at all times he maintained the contract should be "as is". T. 463-473.

The Referee overlooked and failed to consider the fact that Herbert Stettin testified that he, as personal representative, would not have accepted the initial letter offer from the Deganis because it was in an incomplete form. See T. at 646. The offer simply set out the amount of cash and not much else, other than the legal description. See T. at 646; App. 2.

The Referee overlooked the fact that Eve Murphy's attorney, Edward Golden, signed a petition (under penalties of perjury) under the name of Eve Murphy, stating that Eve Murphy wanted to have the contract accepted. App. 13. She overlooked the fact that Eileen Brake and Dennis Murphy, Jr. jointly filed objections to the merits of the petition (App. 14) and Judge Harold Featherstone sustained the objections. App. 17.

Eileen Brake promptly pursued negotiations. The time lapse between September 26, l989, the date of the initial Degani letter, and November 1, l989, the date of the ultimate letter of the Deganis' attorney stating that Deganis would never sign an "as is" contract, was only thirty five days. The time lapse between September 26, l989, the date of the initial Degani letter and October 2, l989, the date Robert Brake mailed Eileen Brake's counteroffer to the Deganis, was only 6 days. The testimony was that negotiations continued orally during these periods.

As Judge Schwartz noted in his dissent in Eileen M. Brake v. Eve E. Murphy, 636 So.2d 74, supra, a personal representative is not held to be a guarantor of business success but only to exercise reasonable and prudent judgment. See First Trust and Savings Bank v. Henderson, 101 Fla. 1437, 136 So. 370 and In Re Wilson's Estate, 1959, DCA 2, 116 So.2d 440. The uncontradicted evidence shows that each of the five sellers insisted that the contract be "as is", but that the potential buyers, the Deganis, insisted that they would never sign an "as is" contract. If the co-owners would not sell their interests except "as is", then the sale of the Estate's interest to the Deganis was not possible because Deganis would not buy only a fractional interest. In advising Eileen Brake to follow the wishes of the majority of the beneficiaries and/or co-owners, Robert Brake exercised reasonable and prudent judgment.

Finally, Robert Brake is not responsible, as attorney, for the ultimate decisions of his client on the acceptability of the Degani contract or on any agreement with her siblings. Any contrary ruling is not only novel, but contrary to public policy and Florida Bar Rule of Professional Conduct 4-1.2 (a).

There is no evidence whatsoever that Robert Brake failed to assist negotiations or give advice in good faith. The Referee was in error in recommending as a finding. That Bar Rules 4-1.7(b) or Bar Rule 4-8.4(d) were violated.

III. Where one pays the consideration for the purchase of property and there is no intent to make a gift, a resulting trust arises, and a conveyance by a trustee to a beneficiary

is a conveyance supported by consideration and is not fraudulent against creditors.

Eileen Brake properly executed a deed conveying her interest in the building to herself and her husband to create an estate by the entireties on November 10, 1992. The deed was given to Respondent's secretary to record, and the Brakes left on vacation. The deed was mislaid and misfiled, and was not found and recorded until November, 1995. The Murphys stipulated to the execution of the deed. The Referee ignored this evidence.

Due to fears of threats by Joseph Murphy, Jr. on Respondent's life, Eileen Brake insisted that the tenancy by the entireties be terminated to eliminate any incentive. She executed a quit claim deed of her interest in the entireties property to Respondent. This deed was recorded on June 22, 1993 in the Public Records of Dade County, Florida. App. 21.

Where one pays the consideration for the purchase of property and there is no intent to make a gift, a resulting trust arises, and a conveyance by a trustee to a beneficiary is a conveyance supported by consideration and is not fraudulent against creditors.

On the above issue the Referee stated that she found that Mrs. Brake's interest in the property was conveyed **without consideration** to Mr. Brake resulting in a fraudulent conveyance.

The Referee overlooked the stipulation of Eve Murphy and Richard Murphy during the trial of the deed case that the money used to purchase the Brake share of the property from the Estate at

closing came from the Brakes' entireties accounts, which consisted of money earned or inherited during the marriage by Robert Brake.

Herbert Stettin testified as an expert witness that a resulting trust is a valid defense to the Statute of Fraudulent Conveyances because there is adequate consideration for the conveyance. See T. at 714. He further testified that "[i]f there is a conveyance of property for adequate consideration, regardless of whether or not a judgment or a claim exists, as long as there is adequate consideration paid, there is no fraudulent conveyance." T. at 714. "If a person has an interest in property as a result of a resulting trust, the consideration was paid sometime prior, because that's the predicate for a resulting trust, that there was a consideration paid." T. at 714-715.

The leading Florida case on this issue, Foster v. Thornton, 179 So. 882, 887 (Fla. 1937), is a case in which the Florida Supreme Court held that the fraudulent conveyance rule "does not apply to cases where a tort-feasor holds title to land in trust for another and makes a conveyance to the cestui que trust, the owner of the beneficial interest in the property ..." The conveyance was simply what "equity would have required h[er] to do." Id. at 887.

Such a remedy is granted where entireties funds have been used to purchase property and title is taken only in the name of one person. In that situation, the other spouse "could thereafter demand a conveyance jointly to [both spouses] and have the deed reformed, the effect of which would be to create an estate by the

entireties. Id. at 888.

Robert Brake accepted title to property for which he had furnished the consideration. The Report is in error in stating his actions violated Bar Rule 4-8.4(c) or (d) or other Bar rules on this point. The Referee's recommended finding in this regard was in error.

Furthermore, the conveyance was in no way fraudulent as it was recorded in the public records of Dade County, and therefore, constructive notice was given. The Referee was in error in recommending a finding that Respondent failed to disclose the fraudulent conveyance to the beneficiaries/co-owners. See ROR, page 25.

This was a family matter. All family members knew what was going on with regard to the alleged conveyances. The June 1993 conveyance was witnessed by Dennis Murphy, Jr. Bar Exhibit 25, App. 21. At the time of the execution of both deeds, he was Personal Representative of his mother's Estate. The Third District Court of Appeals ruled in Robert M. Brake v. Eve E. Murphy, 687 So.2d 842 (Fla. 3rd DCA 1996) that the Personal Representative, and not Eve and Richard Murphy, was the proper party plaintiff.

The Murphys and the Estate, as co-owners and sellers, knew of the existence of this property and its status, i.e., had actual notice of same. They had no trouble locating the deed within the public records. Further, notice of the individuals who were not the proper parties to contest the conveyances, was not required by

law or by the Rules of Professional Conduct. There was no clear and convincing evidence of a violation of Bar Rule 4-8.4(c) or Bar Rule 4-4.1(b).

IV. Where an attorney for the personal representative is removed for alleged conflict of interest, and that alleged conflict is thereafter resolved, the representation of a second personal representative does not, in and of itself, constitute a violation of any ethical duty.

On October 1, l990 Judge Robert Newman signed an order removing both Eileen Brake as Personal Representative and Robert Brake as attorney for the Personal Representative. Judge Newman then appointed Dennis Murphy, Jr. to be Second Successor Personal Representative of his mother's estate. Mr. Murphy was represented then, as he was during the appeal and office purchase, by Carey Ewing, Esquire.

In April 1992, Carey Ewing advised Dennis Murphy, Jr. that she was moving to North Carolina. Dennis Murphy, Jr. then asked Robert Brake to represent him. At the time Respondent was retained, the surcharge trial had ended, the mortgage foreclosure case had been completed, and the property had been sold to Dennis Murphy, Jr. and Eileen Brake. The only distribution that remained was to distribute a small amount of money and a purchase money mortgage obtained at the sale of the office building.

In April l992, Judge Robert Newman signed a Stipulated Order authorizing the substitution of Robert Brake for Carey Ewing as attorney of record for Dennis Murphy, Jr. App. 28.

The Order of October 1, 1990 removing Respondent as attorney

for the personal representative, does not, by its terms, prohibit Robert Brake from accepting representation of a successor personal representative. App. 29.

There was no dispute that the four residuary beneficiaries and co-owners were entitled to share equally in those assets. Robert Brake was not a beneficiary and had no direct interest in the distribution of the estate. There was, therefore, no conflict of interest between Respondent and the personal representative or the co-owners.

Only after Edward Golden made the assertion that there was a conflict of interest, nine months after Judge Newman signed the stipulated order substituting Respondent for Carey Ewing, did Judge Newman enter a second Order removing Robert Brake as attorney for the second successor personal representative.

Accordingly, the recommendation of the Referee that Bar Rule 4-1.7(b) and Bar Rule 4-1.16(a)(1) were violated, is not supported by any evidence, much less "clear and convincing" evidence, and therefore, should be rejected.

V. Factual Inaccuracies/Legal Errors.

Throughout her Report, the Referee has made more than forty factual and legal statements that are inaccurate. These inaccuracies demonstrate her lack of understanding of the issues, the law and the facts. These justify the rejection of her factual findings and recommendations. A detailed listing of these statements and an explanation of the inaccuracies is set forth in

the Appendix. App. 22.

VI. Referee's Comments and Remarks on the "Frivolous Pleadings" Section of her Report influenced her findings that resulted in Legal Errors.

The Referee, in her opinion findings and recommendations, gratuitously raises the issue of "frivolous pleadings". In the majority of the appeals filed by Eileen Brake which were decided by the Third District Court of Appeals, there were favorable rulings.[1]

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[1]In Brake v. Estate of Murphy, 559 So.2d 1146 (Fla. 1991), the court reversed the appointment of Herbert Stettin as Administrator Ad Litem and directed that Dennis Murphy, Jr., who had been named Successor Personal Representative in her mother's will, be appointed. (In the interim, a Motion to Dismiss the Appeal was denied with a written opinion in 573 So.2d 424.)

In Eileen M. Brake v. Eve E. Murphy, 693 So.2d 663 (Fla. 3rd DCA 1997), the Third District Court of Appeal disqualified Judge Robert Newman because of ex parte activities between Judge Newman and Edward Golden, the attorney for Eve and Richard Murphy. This ruling in effect reversed prior rulings denying disqualification in 608 So.2d 819 and 642 So.2d 1374. This ruling also reversed Order of Judge Newman requiring Eileen Brake to post a $50,000.00 bond before filing any further pleadings in the Murphy matter before him, and fining Robert Brake $1,000.00 for acquiescing in the request of Carlos Machado, attorney for the Personal Representative of the Dennis Murphy, Jr. Estate, for a continuance of a hearing on a petition by the Murphys.

In Eileen M. Brake v. Eve E. Murphy, 636 So.2d 72 (Fla. 3rd DCA 1994), the court reversed that portion of Judge Newman's Order surcharging Eileen Brake for filing the mortgage foreclosure. Judge Schwartz, in dissent, stated that the entire surcharge judgment should be reversed.

In Robert M. Brake v. Eve E. Murphy, 687 So.2d 842 (Fla. 3rd DCA 1996), the court reversed a judgment setting aside the deeds given by Eileen Brake to Robert Brake. The court ruled that a resulting trust was a valid defense to the challenge to the deeds. The court also held that the Murphys were not the proper party plaintiffs.

In Brake v. Brake, 697 So.2d 1257 (Fla. 3rd DCA 1997), another case challenging the deeds which was brought by Edward P. Swan as Third Successor Personal Representative of the Estate of Eileen Ellis Murphy, the court reversed an Order of the Court below rejecting the resulting trust defense as a matter of law

There is no evidence to support the Referee's opinion on "frivolous pleadings". She does not cite the number and nature of the pleadings, nor does she cite case law supporting her apparent finding. On the contrary, the appeals taken by the Brakes show that their positions had sufficient merit to warrant consideration by the Court.

A look at the appeals filed by the Brakes, and their outcomes show that the positions taken by them were legally appropriate and in a number of instances resulted in divided courts or reversals based on the positions asserted by Mr. Brake.

At the trial court level, Judge Featherstone upheld the objections of Eileen Brake and Dennis Murphy, Jr., to the Petition to Authorize Sale of the Property filed by Eve Murphy (Exhibit 316, App. 17).

The Brakes were successful in the mortgage foreclosure case, which was not appealed. (App. 27). They were successful in the house partition case brought by Eve Murphy in having Judge Rivkind order that Eve Murphy's debt to Suntrust Bank, secured by the Brake's securities, be paid by the Clerk of the Court from Eve

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because the issue was made moot by the decision in 687 So. 2d 842.

In Eileen M. Brake v. Eve E. Murphy, 688 So. 2d 403 (Fla. 3rd DCA 1997), the court reversed a sua sponte Order of Judge Newman disinheriting Eileen Brake and threatening to disinherit Dennis Murphy, Jr.

The Court also reversed an Order awarding attorney's fees by the Murphy's attorney for his services in the deed case, which had been reversed. Eileen M. Brake v. Eve E. Murphy, 688 So.2d 403 (Fla. 3rd DCA 1996).

Murphy's share of the proceeds of the sale (App. 23). The Partial Motions for Summary Judgment filed in these Bar proceedings each addressed a separate factual situation. Many were granted.

Finally, this Court has often noted that probate proceedings are different from ordinary litigation. Probate involves multiple rulings over extended periods of time. Many of those rulings conclude the rights of numerous parties. Each set of facts deserves separate consideration, including separate trials and separate appeals. None of this activity shows "frivolousness". Instead, it shows a lawyer vigorously or zealously defending his client in a multiplicity of claims brought by tenacious opponents with many lawyers at their call. What it does not show is the violation of the Rules of Professional Conduct recommended to this Court by the Referee.

VII. If the Court accepts the recommendation of the Referee that rules were violated, then the disciplinary recommendation is unconscionable under the circumstances and not factually nor legally sustainable based on the record in this case and the presence of substantial mitigating circumstance.

Should this Honorable Court affirm the Referee's factual and/or legal findings as to Robert Brake's violation of one or more of the Rules of Professional Conduct which Mr. Brake allegedly violated, the recommended punishment of a one year suspension is unconscionable under the subject facts and circumstances and applicable legal precedents.

No evidence or case law has been cited in support of this action, and in fact, appellate case law on this Estate and related

matters have largely resulted in favorable outcomes for the Brakes.

Furthermore, Respondent has been a member of the Florida Bar for 47 years, and this is his first bar disciplinary offense. A suspension from the practice of law for one year is much too severe for the actions which occurred. Mr. Brake has been a prominent member of the Florida Bar and a respected public official for many years. He is in the twilight of his career, and to receive a suspension for one year under the subject factual circumstances and sully a distinguished and respected career as an attorney, public official and contributing member of our community in many areas, is harsh and unjust. (See Resume, App. 20).

With regard to the probate litigation at the trial and appellate levels, the positions taken by Mr. Brake were viable, legally defensible, and legally appropriate for an attorney to assert on behalf of his client, Mrs. Brake, as personal representative of the estate.

This Honorable Court has disciplined others, in cases where the misconduct was much more serious than Respondent's, and has imposed materially less severe punishment(s) than that recommended to the Court in Mr. Brake's case.

For example, in The Florida Bar v. Price, 569 So.2d 1261 (Fla. 1990), the Referee recommended a private reprimand and this Court then recommended a public reprimand. In Price, the respondent failed to consult with his clients about dismissing their bankruptcy action, dismissed the action without their knowledge or

consent, and failed to tell them of the dismissal. He was found guilty of violating multiple Disciplinary Rules, including engaging in conduct prejudicial to the administration of justice and failing to seek the lawful objectives of his client. The respondent in Price received a public reprimand for violating three serious rules. Here, the Referee is astonishingly recommending a suspension of one year for representing his wife, and eventually, his brother-in-law, under circumstances wherein trial and appellate courts have sustained most of Mr. Brake's asserted legal position and facts.

The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992) is another case where the respondent was disciplined less severely than in the instant case. In Poplack, the respondent was charged with conduct involving misrepresentation and dishonesty and appropriate proof was presented to support it. The respondent lied to a police officer regarding a vehicle which turned out to be stolen, respondent was arrested, and subsequently charged with grand theft, and thereafter referred to a pretrial intervention program. The Referee recommended a thirty day suspension, followed by an eighteen month probation. Poplack's facts are clearly far more serious than the instant case because the respondent in Poplack was intentionally dishonest, and Respondent Brake's alleged rule violations in no way involved intentional dishonesty, nor was

there any such finding by the Referee.[2]

In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), the respondent in Lord was charged and pled guilty to five rule violations, all stemming from respondent's failure to file federal income tax returns for twenty-two years. The Referee recommended a suspension for three months, and this Court raised that period to six months. Respondent Brake is accused of violating disciplinary rules which are far less serious than those which the respondent violated in Lord, and Respondent Brake has never engaged in long term criminal misconduct as the respondent in Lord.

Another case is The Florida Bar v. Adler, 505 So.2d 1334 (Fla. 1987). In Adler, the respondent was found guilty of knowledge or complicity in the fraudulent backdating of tax documents, which the Bar found reflected upon his fitness to practice law. The respondent had full knowledge of the backdating of documents by other participants in the investing group. The Referee recommended a public reprimand and payment of costs. This Court then suspended the respondent for ninety days. The dishonest conduct of the respondent in his "cover up" in Adler is much different from the

[2]Even though the referee found Respondent guilty of a fraudulent conveyance, the Referee did not specifically make a factual finding that Mr. Brake lied. She simply found that his testimony was not credible regarding the quit claim deed, and found that there was a fraudulent conveyance. The Third District Court of Appeals said that the issue of resulting trust was a valid and lawful defense against an allegation of fraudulent conveyance, and the Referee did not try that issue, which now remains to be tried before another circuit court judge.

conduct of Respondent in the instant case; yet the Referee has recommended a far more serious penalty in this case. The respondent's behavior in Adler was intentional, as opposed to the behavior of Respondent Brake, which was not intentionally wrong, and, as he understood it, consistent with the responsibilities of an attorney zealously representing a client on hotly contested issues.

In addition to the above, further mitigating factors in the instant case are strong and compelling: (1) absence of a prior disciplinary record; and (2) good character or reputation. The Referee has recommended that Respondent Brake be found guilty of violating disciplinary rules, and this is his first offense; yet the Bar is seeking more serious punishments than in all of the cases cited above, which is totally unreasonable and inappropriate from the Record of these proceedings.

The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), involved a case where the respondent was found guilty of violating multiple, severe disciplinary rules, and yet only a private reprimand was recommended, as opposed to Brake's recommended discipline. This Court subsequently recommended that a public reprimand and six months probation was the more appropriate punishment. In Vernell, the respondent was charged and convicted in federal district court of failure to file income tax returns, and such offense led to the disciplinary rules being violated.

The Florida Bar v. Jones, 543 So.2d 751 (Fla. 1989), is where

the respondent was charged with and found guilty by the Referee of violating six disciplinary rules including: (1) conduct that reflects adversely on his fitness to practice law; (2) intentionally failing to seek the lawful objectives of his client; (3) neglecting a legal matter entrusted to him; (4) intentionally failing to carry out a contract of employment with his client; (5) failing to act with reasonable diligence; and (6) failing to keep his client reasonably informed as to the status of his case. Furthermore, the respondent did not cooperate with the Bar during the proceedings, and did not file a brief after three notifications by this Court that his brief was overdue. The Referee recommended a ninety-one day suspension, which this Court felt was appropriate. The discipline in the Jones case is materially less severe than that recommended for Respondent, although the violations are many times more serious in Jones.

In The Florida Bar v. Fath, 368 So.2d 357 (Fla. 1979), the respondent was found guilty of violating three disciplinary rules stemming from his failure to represent his client despite acceptance of a fee. The respondent failed to appear in court on behalf of his client and failed to advise his client that the court issued a bench warrant for his client's arrest and suspended the client's driver's license for five years. The respondent told his client that he would take care of the matter and then made no attempt to rectify the court's actions. The Referee recommended a public reprimand and a three month suspension, which this Court

upheld. In the Fath case, the conduct, or intentional absence of conduct, by the respondent in Fath was also more serious than the alleged misconduct of Respondent Brake in the instant case.

Another less severely disciplined respondent is the respondent in The Florida Bar v. Harper, 518 So.2d 262 (Fla. 1988). In Harper, the respondent knowingly and willfully overdrew trust accounts, failed to keep trust account records, and used the trust account funds for improper purposes. The respondent pled guilty to violating six disciplinary rules and the Referee recommended a suspension of three months. This Court felt that a six month suspension followed by a two year probationary period was more appropriate under the circumstances. The respondent in Harper acted knowingly and intentionally. Considering the facts in Harper, the discipline recommended by the Referee for Respondent Brake is not proportionate to those which this Honorable Court has handed down in the past.

The Florida Bar v. Schilling, 486 So.2d 551 (Fla. 1986) is another case where the respondent was found guilty of neglecting his responsibilities as an attorney in two separate cases. The Referee recommended a public reprimand and a six month suspension. A key factor in this case was that the respondent had past misconduct. Though this Honorable Court did not specifically outline the nature of that prior misconduct, it was probably quite serious or was similar in nature to his current violations based on the severity of the penalty rendered therein. The respondent in

Schilling neglected two matters that were entrusted to him, as opposed to the alleged violations for which Respondent Brake was found guilty. Any "pattern of neglect" concept alluded to by The Bar's counsel must involve separate cases such as the facts in Schilling. Furthermore, since Respondent Brake had no previous misconduct, the Schilling case clearly shows that Brake's recommended discipline is not proportionate.

The Florida Bar v. Jones, Jr., 457 So.2d 1384 (Fla. 1984), is another case where the discipline was less than that recommended in the instant case, though the conduct was more serious. The respondent was charged and found guilty of violating two disciplinary rules, including engaging in conduct involving "intentional" misrepresentation and neglecting a matter entrusted to him. The Referee recommended a six month suspension based on previous misconduct by Jones, which this Court upheld. The respondent in Jones, Jr. had intentionally misrepresented to a hospital regarding a settlement for his client. In Jones, Jr. the respondent had cumulative misconduct, unlike the present case where the alleged violations are Respondent Brake's first such disciplinary findings against him.

In The Florida Bar v. Gunther, 390 So.2d 1192 (Fla. 1980), the respondent failed to notify the client of a granting of the charter, failed to have shares of stock issued, failed to have his client named as president, and failed to deliver certified articles of incorporation to client. The Referee recommended that the

respondent be suspended for one year. These violations for which the respondent was found guilty of, were much more damaging and severe than those for which Respondent Brake is alleged to have violated based on the applicable facts and circumstances.

On numerous occasions, this Court has ruled that:

> "Bar disciplinary proceedings must serve three purposes: 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; 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; and third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations." (emphasis added)

Poplack, *supra*, 599 So.2d at 118.

The Referee's recommendation of one year suspension does not meet the criteria set out in Poplack. A one year suspension is in no way fair to society, and the judgment is absolutely unfair to the Respondent, who has had a distinguished legal career and has prominently and honorably served as a public official, member of the military and community activist during the last 47 years.

As to mitigating circumstances, in his forty-seven year legal career in Dade County, Mr. Brake has been active in civil rights matters (he is currently a member of the Florida Advisory Committee to the U.S. Commission on Civil Rights), charitable and religious organizations (including ecumenical organizations) and civil and professional organizations. He has been elected to public office as a city commissioner, county commissioner and State

Representative. He retired as a full colonel in the Air Force Reserve after active and inactive service from 1945 to 1983.

Mr. Brake has never had a disciplinary record with the Florida Bar. His character and reputation in the community is of the highest order. A look at the record will show an absence of selfish motive. When his sister-in-law, Eve Murphy, was faced with a lien of execution on her property, he secured a loan for her with his negotiable assets. When his in-laws needed money to save the building from its creditors, he loaned them money to do so. He offered to forego foreclosure, interest and attorney's fees if they would only waive the statute of limitations. His helping hand has been unfairly slapped by these proceedings and their unfair outcome.

The unreasonable delay in processing this case has caused extreme prejudice to him. His primary family witness, Dennis Murphy, Jr., died of cancer pending the protected grievance committee proceedings. Neither Bar counsel nor Bar investigators questioned him before his death, although they were asked to do so on at least two occasions. The testimony of Dennis Murphy, Jr., so impressed Judge Bloom in the mortgage foreclosure case that he commented on its in praising the Brakes for their assistance to the family. (App. 26, p. 22).

CONCLUSION

The record supports a conclusion that Respondent Brake did nothing wrong. The recommendations should be overruled and this

case dismissed. Not only is the evidence of wrongdoing not "clear and convincing", it is virtually non-existing.

Should this Court find otherwise, Respondent strongly asserts that the recommendation by the Referee for a one year suspension is far too harsh and severe for the alleged misconduct. There are significant facts that the Referee does not mention in her report, and multiple material factual inconsistencies as well as erroneous legal conclusions that result therefrom. Those erroneous factual findings and legal conclusions may at least be in part attributable to the lengthy delay that took place from the end of Respondent's trial until the date on which the Referee drafted her Report that led to a misapprehension of the facts and law applicable hereto.

Respectfully submitted

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By_____
Jerome H. Shevin

Case No. 87,466
Case No. 88,104

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and mailed to Cynthia Lynn Bloom, Esq., The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, this _____ day of June, 1998.

By_____
Jerome H. Shevin