

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CASE NO.: 94,171

TFB FILE NO.: 98-10,679(6A)

PHILIP W. DANN,

Respondent.

RESPONDENT'S REPLY/ANSWER TO CROSS APPEAL BRIEF AFTER REMAND

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SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

- Resp. Exh. = Respondent's Exhibit from final hearing
- TFB Exh. = The Florida Bar's Exhibit from final hearing.
- R.R. = Report of Referee dated July 6, 1999
- Amended R.R. = Report of Referee on Remand dated July 10, 2001
- Supp. R. R. = Supplement to Report of Referee regarding Recommended Sanction and Taxing of Costs Dated November 30, 1999
- R. = Transcript Page of Final Hearing before Referee on April 5-9, 1999
- T. = Evidentiary hearing transcript dated March 27, 2001 and April 24, 2001

ARGUMENT

I. THE FLORIDA SUPREME COURT PROPERLY REMANDED THIS MATTER TO THE REFEREE AND THE REFEREE'S DECISION TO HOLD AN EVIDENTIARY HEARING WAS SUPPORTED BY FLORIDA LAW. (*Restated by Respondent*).

From the beginning of his investigation, Complainant has theorized that Respondent manipulated an elderly gentleman who lacked the requisite testamentary capacity to dispose of his estate to the beneficiary of his choosing. Complainant created this theory based on the representations of Suzanne Goldstone. Ms. Goldstone's testimony at the disciplinary hearing was the primary evidence supporting the Referee's conclusion that Mr. Vossiek lacked testamentary capacity at the time he executed the second amendment of the trust which left his entire estate to Respondent. In fact, Complainant was unable to cite to any further evidence of the absence of Mr. Vossiek's testamentary capacity when asked to do so by this Court during oral argument held prior to the remand of this matter. The truthfulness of Suzanne Goldstone's representations is critical to the validity of the Referee's original finding that the Respondent knew or should have known that Mr. Vossiek lacked testamentary capacity. Yet, Complainant urges this Court to ignore credible evidence that Ms. Goldstone's disciplinary hearing testimony was false.

Complainant has created multiple disparate arguments to persuade this Court and the Referee that there is no procedure by which to examine Ms. Goldstone's subsequent inconsistent sworn statements in order to avoid scrutiny of her testimony. Complainant previously argued to the Referee¹ that the Referee's recommendation to the Court was a final judgment and thus, the one-year time limitation of Florida Rule of Civil Procedure 1.540(b)(2) prevented consideration of Ms. Goldstone's subsequent statements. As Complainant now views that argument as unsuccessful, Complainant asserts that it is "self-evident" that the Referee's recommendation was not a final judgment and consequently, Rule 1.540 is not even applicable. (Cross Appeal Brief After Remand, p. 16). Complainant resorts to such illogical machinations to deflect consideration away from whether the Referee's findings were supported by clear and convincing evidence.

The procedure by which Ms. Goldstone's subsequent statements are examined is set forth in the Florida Rules of Civil Procedure because there is no procedural rule to the contrary in the Rules Regulating The Florida Bar. See R. Regulating Fla. Bar 3-7.6(e)(2). Florida Rule of Civil

¹. See Complainant's Memorandum of Law in Opposition to Respondent's Brief Requesting Relief Pursuant to Fla. R. Civ. P. 1540(b)(2)and(3), p. 7.

Procedure 1.540(b)(3) is applicable because evidence was subsequently discovered which raised a significant question concerning whether the complaining witness, Ms. Goldstone, made misrepresentations during her disciplinary hearing testimony.² Under Florida Rule of Civil Procedure 1.540(b)(3), an evidentiary hearing is required if the moving party raises a "colorable entitlement" to relief. Southern Bell Telephone and Telegraph Co. v. Welden, 483 So. 2d 487 (Fla. 1st DCA 1986)(citing Rosenthal v. Ford, 443 So. 2d 1077 (Fla. 2d DCA 1984); Pelekis v. Florida Keys Boys Club, 302 So. 2d 447 (Fla. 3d DCA 1974), *cert. denied*, 312 So. 2d 751 (Fla. 1975); Stella v. Stella, 418 So. 2d 1029 (Fla. 4th DCA 1982). See also Estate of Willis v. Gaffney, 677 So. 2d 949, 951 (Fla. 2d DCA 1996)("[t]he credibility of allegations

². An evidentiary hearing would also be warranted for consideration of "newly discovered evidence" under Florida Rule of Civil Procedure 1.540(b)(2). In contrast to Rule 1.540(b)(3), the allegations of "newly discovered evidence" must be raised within one year of a one year of a final judgment in the matter. Since the Referee's findings are not "final" but merely recommendations to this Court, the one year time limitation is not applicable. Another difference between Rule 1.540(b)(2) and (3) is that evidentiary hearings are only justified if the "newly discovered evidence" would probably produce a different result. Since Ms. Goldstone's disciplinary hearing testimony was the only evidence of Mr. Vossiek's alleged lack of testamentary capacity, her sworn statements to the contrary are so significant that the evidence would (and did) produce a different result. Under Rule 1.540(b)(2) or (3) an evidentiary hearing was properly held.

[contained in a motion filed pursuant to Rule 1.540(b)(3)] should only be determined by the trial court after an evidentiary hearing thereon." (quoting Rosenthal v. Ford, 443 So. 2d 1077, 1078 (Fla. 2d DCA 1984). Evidentiary hearings concerning allegations of fraud and misrepresentation are liberally permitted due to the "courts' and the public's abhorrence of false testimony." Louisville and Nashville R. Co. v. Hickman, 445 So. 2d 1023 (Fla. 1st DCA 1983), *review dismissed*, 447 So. 2d 887 (Fla. 1984).

The policy rationale supporting Florida Rule of Civil Procedure 1.540 is equally applicable to attorney disciplinary proceedings. Just as civil court proceedings eschew perjured testimony and any verdict resulting therefrom, so too should attorney disciplinary proceedings hold in disdain false testimony and the ensuing unreliable factual findings. In fact, The Florida Bar, through the same Bar staff counsel, has previously advocated that the interests of truth and justice justify further examination based upon newly discovered evidence and has asserted such when it suits its purpose.³

³For example, in Supreme Court Case No. 96,031, The Florida Bar requested the Referee to reopen the evidentiary portion of the proceedings arguing that "newly discovered evidence should be considered sufficient to reopen the evidence in this matter in the interest of truth and justice." The Referee denied the Bar's motion because the "newly

The Florida Bar should always endeavor to seek truth and justice; this goal should not shift according to which party ultimately benefits.

The Florida Bar repeatedly complains in its Brief that Ms. Goldstone's sworn statements to the State Attorney's Office were not transcribed and argues that as a consequence, an evidentiary hearing should not have been granted. However, Florida case law does not require the moving party to establish the misrepresentations through transcribed or recorded testimony in his/her Rule 1.540(b)(3) motion as a prerequisite to an evidentiary hearing. Rather, the moving party is only required to make the allegations of misrepresentations to be entitled to an evidentiary hearing. See Rosenthal v. Ford, 443 So. 2d 1077, 1078 (Fla. 2d DCA 1984)(even though the moving party's motion for relief based upon fraud or misrepresentations contained only "bare allegations," trial court was required to hold an evidentiary hearing to determine the credibility of the allegations.); Accord Stella v. Stella, 418 So. 2d 1029 (Fla. 4th DCA 1982)(holding "[a]llthough we find the motion of the wife to be

discovered evidence" could have been discovered through the exercise of due diligence. See, Complainant's Motion to Reopen the Evidence and Order dated February 22, 2000 attached as Appendix I to this brief.

less than artfully drawn and the statement of her position to the trial court and now on appeal to be less than clear-cut, we conclude that she is entitled to an evidentiary hearing on her allegations of fraudulent conduct by the husband.") Since Respondent made the allegation that Ms. Goldstone misrepresented Mr. Vossiek's competency during the relevant time periods, Respondent was entitled to an evidentiary hearing.

Moreover, Respondent's allegations were made in a timely manner. Allegations concerning fraud or misrepresentation must be made "as soon as it is reasonably possible." Stella v. Stella, 418 So. 2d 1029 (Fla. 4th DCA 1982).⁴ In this case, Respondent's attorney made a public records request when it was learned that the State Attorney's Office had closed its investigation and its records were public. The day after receiving the State Attorney's files, Ms. Goldstone's conflicting statements were brought to the attention of this Court in an Emergency Motion.

The allegations contained in Respondent's Emergency Motion filed in this Court and in Respondent's Brief Requesting Relief filed with the Referee were sufficient to warrant an evidentiary hearing pursuant to Florida Rule of

⁴. See also supra at footnote 2.

Civil Procedure 1.540(b)(2) or (3). While The Florida Bar has strenuously attempted to thwart inquiry into Ms. Goldstone's sworn representations, Complainant has no valid basis supporting its contention that no procedure exists to examine "misrepresentations" or "newly discovered evidence" in disciplinary proceedings. In fact, Complainant has asked for similar relief in other proceedings when the "misrepresentations" or "newly discovered evidence" might strengthen The Florida Bar's case. The Referee properly granted an evidentiary hearing to consider Ms. Goldstone's subsequent sworn statements to the State Attorney's Office.

II. THE REFEREE'S AMENDED FINDING THAT THERE WAS NO COMPETENT EVIDENCE THAT RESPONDENT KNEW OR SHOULD HAVE KNOWN THAT MR. VOSSIEK LACKED TESTAMENTARY CAPACITY AT THE TIME THE SECOND AMENDMENT TO THE TRUST WAS EXECUTED IS SUPPORTED BY THE RECORD.
(*Restated by Respondent*).

The Referee determined that "subsequent to the entry of the Referee's original report, Ms. Goldstone, in essence, retracted her testimony regarding Mr. Vossiek's lack of testamentary capacity when providing testimony to the Pinellas County State Attorney's Office regarding a criminal investigation into Respondent's dealings with Mr. Vossiek." (Amended R.R. 11). Specifically, Ms. Goldstone had "related to them that Mr. Vossiek had more lucid days than non-lucid days" and that "Ms. Goldstone told them she regretted filing the complaint against Respondent because Mr. Vossiek was competent more times than not." (Amended R.R. 12). The Referee further found that the testimony of Robert Lewis, Pinellas County assistant state attorney and Scott Hopkins, an investigator for his office, was "highly credible and trustworthy" and they had "no motivation to color their testimony one way, or the other." (Amended R.R. 12). Regarding Respondent's knowledge of his client's competency throughout the course of the representation, the Referee "recede[d] from [his] original findings as to Respondent's scientor with regard to Mr.

Vossiek's testamentary capacity." (Amended R.R. 12).

Complainant contends that the Referee's amended findings were the result of a flawed evidentiary hearing. Incredibly, Complainant first blames the amended finding discounting Ms. Goldstone's disciplinary hearing testimony on the order in which the witnesses were presented at the evidentiary hearing. However, Complainant did not object to the order in which the witnesses were called during the evidentiary hearing. (T. pp. 24-25). Complainant also seems to assert that Respondent improperly "bolstered" the credibility of the witnesses from the State Attorney's Office.

However, the only instance in which Complainant mentioned "bolstering" was with regard to Respondent's counsel's question to Mr. Hopkins whether he was aware of Assistant State Attorney Lewis' reputation for handling tough cases. (T. p. 30). Complainant had previously "opened the door" to this inquiry by alleging in his Brief to the Referee that Mr. Lewis was intimidated by the prospect of handling a tough prosecution case.⁵ Complainant further explored this line of

⁵ See Complainant's Memorandum of Law in Opposition to Respondent's Brief Requesting Relief Pursuant to Fla. R. Civ. P. 1.540(b)(2) and (3), pp. 8-9 (arguing "...[I]t is Mr. Lewis' motives that are at issue here on remand, not necessarily Ms. Goldstone's. The proffered 'evidence' is a memorandum that reads like it was written by an attorney who did not want to prosecute this difficult case from a criminal

inquiry in his cross examination of Mr. Hopkins and Mr. Lewis. (T. pp. 50-51; 160-161). Rather than objecting to the procedure at the time of the evidentiary hearing, Complainant unsuccessfully attempted to attack the character and motivations of Mr. Lewis and Mr. Hopkins. To the contrary, as the testimony of Mr. Lewis and Mr. Hopkins demonstrates, they thoroughly and competently investigated Respondent's criminal case and, as noted by the Referee, had no motive to lie about Ms. Goldstone's sworn statement to the State Attorney's Office.

Although Complainant repeatedly attempts to undermine the impact of Ms. Goldstone's statements to the State Attorney's Office because they were not stenographically recorded or audio-taped, Complainant overlooks the inherent reliability of the meeting at which the statements were witnessed. Prior to meeting with Ms. Goldstone, Assistant State Attorney Robert M. Lewis had conducted an extensive investigation of the allegations against Respondent and was able to recognize the significance of Ms. Goldstone's unexpected sworn statements.

Mr. Lewis testified at length about the details of his investigation and application of the facts to the criminal

aspect, and so went about finding ways to justify not prosecuting it.")

statutes. (T. pp. 75-86, 89-103). There was no indication that the Pinellas County State Attorney's Office was considering allowing Respondent to enter a diversionary program or receive a light sentence. Rather, Mr. Lewis testified that his office had intended an aggressive and vigorous prosecution and the State Attorney had indicated that it was appropriate to file a first degree felony charge against Respondent if probable cause existed. (T. p. 84). Most importantly to the analysis of this case, Mr. Lewis testified that the critical focal point of his investigation was the date of the execution of the testamentary instrument in which Mr. Vossiek left his estate to Respondent. Consequently, Mr. Lewis appropriately paid particular attention to Mr. Vossiek's capacity at the time the Second Amendment to the Trust was executed on May 20, 1993. (T. p. 111).

When Mr. Lewis interviewed Ms. Goldstone, Mr. Lewis told her that he really wanted to focus on the first couple of years. (T. p. 111). Ms. Goldstone responded that he was "more down to earth the first couple of years and then less so as time went on." (T. p. 111). Mr. Hopkins then asked Ms. Goldstone whether she meant that Mr. Vossiek was more lucid during the first couple of years and she replied, "yes." (T.

p. 112). Mr. Lewis testified that both he and Mr. Hopkins were surprised at her responses and repeatedly asked her whether or not Mr. Vossiek was lucid more often than not during the first couple years and she repeatedly said yes. (T. p. 113). Mr. Lewis testified that he was not mistaken about what she said. (T. p. 113). Mr. Lewis explained that he and Mr. Hopkins kept abandoning the subject of lucidity and coming back to the questions and then asking her again. Mr. Lewis testified, in pertinent part, as follows:

But during the first couple of years – we kept coming back to this – were there more days that he was lucid, that he knew what was going on – I tried to be as simple as I could – that he knew what was going on during the first couple of years than he had days that he didn't know what was going on? The answer was repeatedly yes.

(T. p. 117). Mr. Lewis' testimony demonstrated that Ms. Goldstone's sworn statements to the State Attorney's Office contradicted her testimony at the final hearing.

The Florida Bar also ignores the testimony of Mr. Scott Hopkins, who was present and asked questions during Ms. Goldstone's statement to Mr. Lewis. While Mr. Hopkins did not have a detailed understanding of all of the facts of Mr. Lewis' investigation, Mr. Hopkins knew that Ms. Goldstone was a "pivotal witness" concerning the competency of Mr. Vossiek. Mr. Hopkins testified that during the Goldstone interview,

when Mr. Lewis stated that he understood Mr. Vossiek was incompetent the entire time that Respondent dealt with him, Ms. Goldstone corrected him by stating, "The first couple of years, he was all right, seemed to know what was going on . . . [a]nd then as time progressed, he got worse." (T. p. 40). Mr. Hopkins explained that he verified that Ms. Goldstone understood the meaning of "lucid" and that the "first couple of years" meant from 1992 to 1994. (T. p. 41).

In its misguided zeal to win at any cost, The Florida Bar created a sinister motive for Mr. Lewis and Mr. Hopkins to conspire with each other to deceive their superiors at the State Attorney's Office about the merits of the criminal case against Respondent and to lie at the evidentiary hearing about Ms. Goldstone's statements. The Florida Bar suggested that Mr. Lewis and Mr. Hopkins lied because they did not want to prosecute a difficult case and because they were concerned that the public perception of their office would be negatively impacted by a loss in another high profile case. (T. pp. 50-51; pp. 160-161). Such accusations were not supported by fact or logic.

The Florida Bar stridently maintains that Ms. Goldstone's disavowal of the statements attributed to her by Mr. Lewis and Mr. Hopkins sufficiently rebuts any claim of

misrepresentation. While The Florida Bar created fantastical motivations to explain why two Pinellas State Attorney officials would lie, The Florida Bar continues to disregard Ms. Goldstone's numerous inconsistencies and exaggerations. First, Ms. Goldstone's attempts to embellish Mr. Vossiek's isolated problems were demonstrated in her disciplinary hearing testimony. While Ms. Goldstone's own time records showed that she had contact with Mr. Vossiek over 300 times, she authored few memoranda. (See Record of final hearing; hereinafter "R" pp. 194-95). In some of the memoranda in which she described Mr. Vossiek's problems, she also explained that Mr. Vossiek had been acting normally earlier that day. For example, in TFB Exhibit 11-f, Ms. Goldstone wrote "earlier in the morning, Walter had been his usual self." Another example is found in Respondent's Exhibit 59 in which Ms. Goldstone stated, "mentally [Walter Vossiek] seemed to be himself today." However, in explaining away these memoranda, Ms. Goldstone attempted to create a distorted picture of Mr. Vossiek's mental capacities by testifying at the final hearing that by "usual self," she meant he had not been talkative and by "mentally he seemed to be himself," she meant that he did not understand how much money he had and did not know who employed her. (R. pp. 162, 202-203).

Second, the manner in which Ms. Goldstone responded to questions at the evidentiary hearing continued to demonstrate her unwillingness to truthfully acknowledge any fact that might support Respondent's position. For instance, at the evidentiary hearing on remand Ms. Goldstone testified that Mr. Vossiek was not lucid for a majority of the time during the first few years. (T. p. 183). However, when the Referee asked her if that also meant that there were times when he was lucid, Ms. Goldstone attempted to obfuscate the inquiry and finally grudgingly agreed that it might have been possible. (T. pp. 183-185).

Third, Ms. Goldstone's testimony at the evidentiary hearing on remand contradicted her testimony at the final hearing. At the final hearing, Ms. Goldstone was questioned about an incident that she reported in a memorandum as occurring on January 8, 1993. In this memorandum, Ms. Goldstone indicated that Mr. Vossiek "didn't seem to know who I was and acted as if he were conversing with someone he had never met before." (TFB Exhibit 11-f; R. p. 161). In response to The Florida Bar's inquiry of whether she recalled that incident, Ms. Goldstone replied, "No, because he acted that way more times than not." (R. p. 161). However, at the evidentiary hearing on remand, in an attempt to explain her

statement to the State Attorney's Office, Ms. Goldstone testified that her statement that "he was more down to earth" meant that he "knew where his room was, he knew that I'd take him to the doctor. . . [h]e recognized my face when I would come to visit." (T. pp. 181-182). When cross examined about these two inconsistent statements, Ms. Goldstone admitted that she could not reconcile her contradictory testimony. (T. pp. 204-205).

It is appropriate to compare Mr. Lewis' and Mr. Hopkins' testimony and demeanor with the manner in which Ms. Goldstone answered questions. While Mr. Lewis' and Mr. Hopkins' answers were direct and thoroughly responsive to all questions, Ms. Goldstone's responses were evasive and contradictory. The Referee was in the best position to consider the demeanor of the witnesses during the evidentiary hearing. The record fully and completely supports the Referee's finding as to the credibility of Ms. Goldstone.

The Florida Bar's Cross Appeal Brief suggests that the evidentiary hearing was limited to assessing Ms. Goldstone's credibility through consideration of her disciplinary testimony and her sworn statements to the State Attorney's Office. (Cross Appeal Brief After Remand, p. 3). While her contradictory sworn statements were sufficient reason for the

Referee to reconsider his findings based upon her inconsistent statements and her diminished credibility, her statements to the State Attorney's Office have further significance when compared to the other evidence presented during the final disciplinary hearing in this case. Ms. Goldstone's sworn statement to the State Attorney's Office was consistent with her previously introduced memoranda concerning Walter Vossiek and consistent with the testimony of all other witnesses who testified during the disciplinary hearing concerning Mr. Vossiek's mental status.

Ms. Goldstone was the only eye witness whose testimony at the final hearing suggested that Mr. Vossiek lacked testamentary capacity when the Second Amendment to the Trust was executed on May 20, 1993. The remaining witnesses who had contact with Mr. Vossiek during this time period testified that Mr. Vossiek was lucid and/or possessed testamentary capacity.

Only two witnesses observed Mr. Vossiek on May 20, 1993 and their testimony before the Referee clearly showed that Mr. Vossiek demonstrated all three elements of testamentary capacity.⁶ Those witnesses to Mr. Vossiek's testamentary

⁶ In Florida, in order to execute a valid will a testator need only have testamentary capacity, (i.e. be of "sound mind"). Raimi v. Furlong, 702 So. 2d 1273 (Fla. 3d DCA 1997).

capacity were William Griffin, Esquire, the drafter of the second amended trust and the other witness to Mr. Vossiek's signature, Carol Martico.

Mr. Griffin had been an attorney for twenty-five years and he specialized in estate and trust work. (R. 299). Mr. Griffin testified that he met with Mr. Vossiek for an hour discussing his assets and what Mr. Vossiek wished to do with them. (R. 308). Mr. Griffin took notes of this conversation wherein Mr. Vossiek advised he had no relatives and had not been married. (R. 323, 326, 327). Mr. Vossiek further advised Mr. Griffin of his mother and father's names, where he had been employed, where he was from and the fact that he had seven hundred thousand to a million dollars in assets. (R. 306, 324; Resp. Exh. 68, 69). Mr. Griffin observed Mr. Vossiek to understand all of Mr. Griffin's questions without confusion. (R. 326). Mr. Vossiek expressed a desire to make

The test for testamentary capacity is three-pronged. The testator must be able to understand in a general way the following three factors:

- (1) the nature and extent of the property to be disposed of,
- (2) the testator's relationship to those who would naturally benefit from the will or were the proper objects of the testator's bounty, and
- (3) a general understanding of the practical effect of the will as executed.

Raimi v. Furlong, 702 So. 2d 1273 (Fla. 3d DCA 1997) (citing In re Wilmott's Estate, 66 So. 2d 465, 467 (Fla. 1953)).

Respondent his sole beneficiary and Mr. Griffin believed he was "very, very capable of making that decision." (R. 308). Mr. Vossiek also understood the trust document was revocable and could be changed. (R. 327-328).

Carol Martico testified that she had previously been employed by attorney William Griffin between 1990 and 1993. (R. 340). Ms. Martico prepared the second amended trust of Mr. Vossiek, witnessed Mr. Griffin read the document to Mr. Vossiek and observed Mr. Vossiek indicate he understood the document. (R. 341).

Much of the testimony presented by The Florida Bar concerned events that occurred prior to Respondent meeting Mr. Vossiek. (See Report of Referee, pp. 2-4, 5). Further, The Florida Bar did not attempt to prove that Respondent had knowledge of events occurring prior to 1992. It appears that these "historical facts" were elicited in order for The Florida Bar to argue, through its expert witness, that a change in Mr. Vossiek's personality and demeanor occurred suggesting he suffered from dementia.⁷ Nonetheless, the testimony of Ms. Minnie Smith and the Delvescos established

⁷. As a related issue, this argument is extremely unfair to Respondent because it charges him with knowing that Mr. Vossiek was demented and yet it simultaneously attempts to prove the dementia through behavior and conduct of which it admits that Respondent had no knowledge.

that there was no abrupt change in Mr. Vossiek's personality and demeanor nor was there any concern on their part that Mr. Vossiek was mentally incompetent. Ms. Goldstone's sworn statement to the State Attorney reinforces their testimony that Mr. Vossiek was in control of his mental faculties.

The Delvescos testified that Mr. Vossiek agreed to move to Orlando in 1991 to be with their grandmother, Ms. Mary Forsey, if Ms. Forsey's family paid for half of his expenses. In 1991, when Mr. Vossiek was living in Orlando, Mr. Delvesco testified that Mr. Vossiek, consistent with his past behavior, continued to try and get others to pay for his expenses. (R. 68). Mr. Delvesco explained that when he refused to pay for Mr. Vossiek's bills, Mr. Vossiek understood that his plan was not going to work but that he had "given it his best shot." (R. 68).

Following Ms. Forsey's death, the Delvescos did not believe that Mr. Vossiek was confused or was unable to handle his bookkeeping. They did not contemplate placing Mr. Vossiek in a nursing home or assisted living facility and were not concerned that Mr. Vossiek had any mental problems that would cause him to have trouble living independently; rather, they searched for apartments in St. Petersburg that would meet Mr. Vossiek's requirements. (R. 65). In 1992, when Mr. Vossiek

found a place cheap enough to live, they helped him move there and never contacted him again. (R. 50).⁸ Their actions did not reveal a concern that Mr. Vossiek lacked the mental faculties to care for himself. On the contrary, the Delvescos' treatment of Mr. Vossiek indicated that he was an independent man, who required some assistance with his transportation, but who was mentally and physically able to take care of himself.

Ms. Minnie Smith knew Mr. Vossiek prior to his move to Orlando and became reacquainted with him after his relocation to St. Petersburg. Throughout the time that she knew Mr. Vossiek and Ms. Forsey, she did not know that Mr. Vossiek had a lot of money. (R. 102). When Mr. Vossiek moved back to St. Petersburg in 1992, she testified she had tried to find him places to live but Mr. Vossiek searched for the very cheapest apartment that existed and then instructed the management to remove the air-conditioning to save \$15.00 a month. (R. 113-114). She described his apartment as "miserable," "just terrible" and not "kept up," but she explained that it was

⁸ The Delvescos never again initiated personal or telephonic contact with Mr. Vossiek. Two years after dropping him off, Respondent requested that the Delvescos come to St. Petersburg to meet him. At that time, the Delvescos went to lunch with Mr. Vossiek and brought him a bottle of his favorite liquor. (R. 49, 74, 81).

exactly what he wanted and that was his choice. (R. 113).

Mr. Vossiek had very specific goals of saving every penny and he acted in accordance with his desires. Ms. Smith believed that Mr. Vossiek was mentally competent and lucid in 1992.

Similarly, Ms. Goldstone's sworn statement to the State Attorney's Office expressed her belief that Mr. Vossiek was lucid between the summer of 1992 and the summer of 1994. Ms. Goldstone's conflicting testimony at the final hearing was the only eye witness account that claimed Mr. Vossiek was not mentally competent. Therefore, the Referee properly investigated the misrepresentations made by Ms. Goldstone and receded from his original findings.

The opinion of The Florida Bar's expert, Dr. Cosma, that Mr. Vossiek did not have testamentary capacity is seriously flawed because he did not recognize the legal concept of "lucid interval"⁹ and did not properly understand the elements

⁹Public policy supporting an individual's right to dispose of one's property in the manner one sees fit has influenced the creation of a presumption of testamentary capacity. A testator is presumed to be sane and to have sufficient mental capacity to make a will. Chapman v. Campbell, 119 So. 2d 61 (Fla. 2d DCA 1960). This "presumption of testamentary capacity is so strong that it allows for a demented or insane person to execute a valid will during a 'lucid interval.'" Raimi v. Furlong, 702 So. 2d 1273, 1286 (Fla. 3d DCA 1997). Even a lunatic may make a will during a lucid interval. Murrey v. Barnett National Bank of Jacksonville, 74 So. 2d 647 (Fla. 1954). If a testator has such a lucid interval his past or future condition is immaterial. Miller v. Flowers, 27 So.

of testamentary capacity. (R. 567-568, 578-579). However, assuming *arguendo* that Mr. Vossiek was mentally compromised, even Dr. Cosma's testimony emphasized that Respondent could not have been expected to recognize Mr. Vossiek's mental incapacities. Dr. Cosma testified that Mr. Vossiek had dementia even though he may have appeared to be perfectly normal and even though this illness may not have been detected by those who were not trained. (R. 388, 399-400, 568-569, 572). According to Dr. Cosma, even Mr. Vossiek's medical providers, who were supposedly trained to recognize the symptoms of dementia, failed to render that diagnosis. (R. 396). Dr. Cosma explained that dementia is very difficult to detect because those afflicted with dementia tend to "compensate" to avoid any appearance that their mental faculties are failing. (R. 582-583). Therefore, Respondent could not have been expected to recognize mental conditions that Mr. Vossiek's doctors did not even diagnose.

The proceedings before the Referee on remand were not procedurally flawed and Complainant failed to make any objection to the procedure at the time of the hearing. The

2d 667 (Fla. 1946); Chapman v. Campbell, 119 So. 2d 61, 64 (Fla. 2d DCA 1960). Accordingly, it is necessary to examine whether Mr. Vossiek possessed the requisite factors on May 20, 1993, the date he executed the Second Amendment to the Trust which named Mr. Dann as the beneficiary.

Record contains abundant support for the Referee's amended finding receding from the original finding that Respondent knew or should have known that Mr. Vossiek lacked testamentary capacity. Accordingly, the Referee's finding in this regard should not be disturbed.

CONCLUSION

Based upon the findings that are sustainable by clear and convincing evidence, this Court should reject the recommendation of a ninety-one (91) day suspension and instead impose an admonishment for minor misconduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Respondent's Reply/Answer to Cross Appeal Brief After Remand has been furnished by UPS overnight delivery to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399 and true and correct copies have been furnished by regular U. S. Mail to Brett A. Geer, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607 and John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, all this 13th day of November, 2001.

SCOTT K. TOZIAN, ESQUIRE
Attorney for Respondent

CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief is submitted in 12 point not proportionally spaced Courier New font.

SCOTT K. TOZIAN, ESQUIRE
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