

1959

In Re Grant MacFarlane, Sr. : Respondent's Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH FILED

MAY 3 - 1960

Clerk, Supreme Court, Utah

IN RE

GRANT MACFARLANE, SR.

} Case
No. 9051

RESPONDENT'S PETITION FOR
REHEARING AND BRIEF IN SUPPORT THEREOF

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RESPONDENT'S PETITION FOR
REHEARING AND BRIEF IN SUPPORT THEREOF

PETITION FOR REHEARING

The respondent, Grant Macfarlane, Sr., petitions the Court for a rehearing and reargument of this case upon the following grounds:

POINT I.

THE COURT HAS MISINTERPRETED THE RECORD AND THE CONTENTIONS OF RESPONDENT, AND HAS APPROVED FINDINGS WITHOUT SUPPORTING EVIDENCE, SO THAT ITS DECISION SHOULD BE RECALLED AND THE CASE REHEARD.

POINT II.

THE PUNISHMENT RECOMMENDED BY THE BAR, AND DECREED BY THE COURT, IS UNJUST AND OPPRESSIVE IN VIEW OF THE RECORD AND THE CIRCUMSTANCES OF THIS CASE AND IN COMPARISON WITH WHAT HAS BEEN DECREED IN EARLIER DISCIPLINARY PROCEEDINGS.

WHEREFORE, respondent prays that the judgment and opinion of the Court be recalled and a reargument be ordered of the entire case.

A brief in support of this petition is filed herewith.

JOHN H. SNOW and
HAROLD G. CHRISTENSEN
Attorneys for Petitioner.

BRIEF IN SUPPORT OF
PETITION FOR REHEARING

POINT I.

THE COURT HAS MISINTERPRETED THE RECORD AND THE CONTENTIONS OF RESPONDENT, AND HAS APPROVED FINDINGS WITHOUT SUPPORTING EVIDENCE, SO THAT ITS DECISION SHOULD BE RECALLED AND THE CASE REHEARD.

The Bar, throughout this case, has never receded from its concession at the pretrial hearing that it had

"no evidence of fraud beyond the presumption" announced by this court in the will contest case of *In Re Swan's Estate*, 4 Utah 2d, 277, 293 P. 2d 682.

The controversy was litigated, by all participants, on the issue of whether the presumption should be applied in a disciplinary proceeding to the same extent as it had been applied in the civil will contest case.

The entire presentation of the prosecution in this case consisted of selections from the transcript of testimony given on trial of *In Re Swan's Estate*.

Upon argument to the Trial Committee, the chief counsel for the Bar told the Trial Committee that he and his associates, as a prosecuting committee, had concluded that the "matter must turn on the question of whether there is or isn't a presumption of fraud in a disbarment proceeding." (R. 356)

The Trial Committee, in its decision, found as a fact that the Court had utilized the presumption in the will contest case, had held the presumption shifted the burden of persuasion in that case to the respondent, and that he failed to sustain that burden.

The Trial Committee then concluded the presumption applied in this disciplinary proceeding and that the burden of exoneration was thrust again upon respondent.

The Board of Bar Commissioners approved the Findings and Conclusions of the Trial Committee, without elaboration or comment.

Thus, all members of the Bar concerned with the conduct of this proceeding concluded that the issue being presented to this Court was the effect, if any, in a disciplinary proceeding, of the presumption of fraud and undue influence announced in *In Re Swan's Estate*.

Because of this background, it is difficult for us to understand and to accept the remarkable statement in the decision that the Court is "not concerned with the niceties of the term 'presumption' . . ."

It is recognized that the theory of the case and the issue argued by opposing counsel may not be considered important by the Court in a matter of discipline. However, as seems clear from the decision of the Court, more than ordinary reliance has been placed by the Court upon members of the Bar and their elected representatives. It is said that the Court deems it proper "to indulge considerable latitude" to the actions of the Bar Commission whose members it is said are "peculiarly suited to be the arbiters" of standards of conduct of members of the Bar.

The decision purports to reaffirm the rule of proof in these kinds of cases that misconduct must be proved

by "clear and convincing evidence." The Bar, however, has repeatedly conceded that it has no evidence and that its entire case rests upon the presumption from the will contest case.

In that case, the Court expressly and deliberately held that the presumption there announced is but "a rule of law" and the fact finder cannot "consider or weigh the presumption as evidence." *In Re Swan's Estate*, 293 P. 2d at Page 690.

In the present decision, despite the unequivocal language just quoted, the Court has raised the presumption to the status of evidence and has held that when the presumption is recognized, mere inferences from the "foundational facts" are magically transformed into clear and convincing evidence.

If the inferences to be drawn from the foundational facts in this case have the strength and the power of clear and convincing evidence, then the holding of *In Re Swan's Estate* cannot be supported or justified. Obviously, such inferences were not so regarded by the Court in that case, because the Court there held that the inferences could be overcome by a mere preponderance of the evidence, which would not have been the holding if the Court had concluded that such inferences had the force as is now attributed to them.

It is significant to recall that the Court, on a record substantially identical as that now before it, did not choose on its own motion to discipline respondent following the rendition of the will contest decision.

Four years have elapsed since *In Re Swan's Estate*. Nothing has occurred in the meantime to strengthen or to enlarge the impact and effect of the inferences which can be drawn from the foundational facts.

The Bar has never urged any greater effect from the inferences than the Court attributed to them in its will contest decision, and both the Bar and the Court, it would appear, have made a fundamental error in the prosecution and consideration of this case.

That error consists in drawing the conclusion that only one inference can be drawn from these facts — an inference of evil. The Bar and the Court have ignored any fact or any inference to the credit of respondent, and have brushed aside as inconsequential any suggestion that at least some favorable inferences ought to be drawn to the credit of respondent whose denial of misconduct, whose lifetime civic, professional and service standing and reputation, were apparently considered to be of more force and effect in the will contest case than in a case where his professional life is at stake.

In its one paragraph summary of the "facts" purportedly found by the Trial Committee, there is ample

indication that only unfavorable inferences have been drawn by the Court from this record. For example, the Court states that respondent "used his superior position and talents to ingratiate himself with her and to overreach and use undue influence in his dealing with her . . ." There is no evidence to support this statement, and even the Trial Committee made no findings to this effect.

The Court then states that there was "a maintenance of joint bank accounts and careful protection of funds available to respondent therein." Such a statement completely overlooks the fact that respondent, immediately after the death of the testatrix, delivered a pass book evidencing the joint account with his client, to her executor who, as found by the Trial Committee, was not theretofore aware of its existence. If, as stated by the Court, respondent had "carefully protected" the funds available to him in such an account, he would have withdrawn the funds prior to the death of the testatrix and while she was in her terminal illness, and it is unlikely that the existence of this fund would have ever come to light.

Equally untenable is the statement of the Court that "these matters were deliberately kept secret from anyone else including relatives, who, it might reasonably be supposed, would have advised and protected her interests

with respect thereto." No such finding was made by the Trial Committee. Mis Swan had but one heir. As is amply borne out by later events, any advice which might have been received from that heir would certainly not have been for the protection of any interest other than that of the heir. This was recognized by Miss Swan, who repeatedly told her business advisor, the Vice-President of Walker Bank & Trust Company, of the reasons why she intended to dispose of her property without substantial recognition of her heir.

Respondent has never asked this Court to afford him a "review of the mental process" of those whose Findings and Conclusions were under attack. Neither has respondent assumed that this proceeding follows the "usual pattern of a trial and appellate review." All that respondent has ever asked, and all he asks now, is that if he is to be disciplined at the request of the Bar, he should be afforded the "right to a review of the charges found against him" and that upon such review this Court should be governed by the same rules that have governed those who have been charged in the past — that is, that the "charges should be clearly sustained by convincing proof," that the evidence "should be clear and convincing," that "more than a preponderance of the evidence" be found against him and that his "guilt must be clearly established." *In Re Hanson*, 48 Utah

167, 158 P. 778; *In Re Evans & Rogers*, 22 Utah 366, 62 P. 913; *In Re McCullough*, 97 Utah 533, 95 P. 2d 13.

Although the Court, in its decision in this case, recognizes "the established rule" that clear and convincing evidence is required, it has not followed that rule. Instead, it has affirmed conviction by the use of inferences which, four years ago, were regarded by it as not being substantial evidence of fraud and undue influence. Four years ago, the Court rejected the rule that a presumption of this kind could only be overcome by clear and convincing evidence, and instead held that the presumption could be overcome by a mere preponderance of the evidence. *In Re Swan's Estate*, at Page 693.

The present decision states that the concern of the Court is "whether reasonable minds" might infer from the facts sufficient force to meet "the required standard of proof." It is interesting to note that in this decision, as in the decision in the will contest case, there has been a dissent each time reaching a directly opposite result from that reached by the majority opinion concerning the inferences to be drawn from the facts concerning respondent's conduct.

This might be of no importance if, in the present case, the Court was indulging in "considerable latitude" to the members of the Bar and the Bar Commission upon

the familiar ground that they, as the fact finders, had a superior opportunity to observe the witnesses and to determine credibility.

Such is not the case here, however, because this entire proceeding has been based and conducted upon a written record made in 1954 under completely different circumstances with completely different issues and involving completely different parties. Although respondent has made himself available for unlimited cross-examination, no member of the Bar has ever asked him a single question from the time these proceedings began.

The first hearing, by an investigating committee of the Bar, was *ex parte* and without notice of any kind to respondent, although the Revised Rules of Discipline of the Utah State Bar, and the regulations promulgated under Section 24 of such Revised Rules, clearly contemplate notice, and the opportunity to explain informally the questioned conduct.

Thereafter, the Prosecuting Committee and the Trial Committee had the opportunity to question respondent in order better to judge his credibility, to determine his motives or to learn whether it would be just as reasonable to draw good inferences, instead of evil inferences, from the factual relationship existing between him and his client.

The respondent had told of his training and background, in response to questions from his counsel. He had already repeatedly denied, by oral testimony and by written pleading, the accusations first made against him by the complaint in the will contest case.

We suggest that each member of the Bar who has been concerned with this case chose to remain silent and to ask no questions of respondent because all shared the view of the chief counsel for the Prosecuting Committee that the entire issue in this case was a legal issue — namely, the effect of the presumption announced by the Court in the Swan case.

Thus, at every step of this proceeding, there has been an avoidance of an evidentiary finding of fraud and undue influence and a substitution of the statement that the presumption of fraud and undue influence applies. For the Court now to approve the recommendation of the Board of Bar Commissioners, without either evidence or finding of fraud and undue influence, is to announce a new rule in disciplinary proceedings.

Under such a rule, lawyers who enter into business ventures with their clients will be subjecting themselves to future discipline unless they can prove a negative — that is, prove that they did not take advantage of the client with whom they enjoyed a confidential relationship.

Under the rule of this case, the burden will henceforth be placed upon the attorney to exonerate himself, rather than upon the Bar to prove his guilt.

It is respectfully suggested that the Court did not intend, by its decision, to change the long-standing rule concerning disciplinary proceedings in this state.

POINT II.

THE PUNISHMENT RECOMMENDED BY THE BAR, AND DECREED BY THE COURT, IS UNJUST AND OPPRESSIVE IN VIEW OF THE RECORD AND THE CIRCUMSTANCES OF THIS CASE AND IN COMPARISON WITH WHAT HAS BEEN DECREED IN EARLIER DISCIPLINARY PROCEEDINGS.

Disciplinary proceedings are traditionally not designed to punish the accused, but, as stated by this Court in *In Re Hanson*, they "are intended more in the nature of an admonition to the accused and to protect the public against future transgressions upon the part of the attorney . . ."

For more than six years, respondent has lived, and attempted to practice law, under the cloud of the accusations embodied in this proceeding.

In April, 1954, the trial court in the *Swan* case filed a lengthy condemnatory opinion, accusing respondent of the commission of fraud. This opinion received wide-

spread newspaper and radio publicity. Each recordation of a document in that proceeding or in the disciplinary proceeding that followed has received equal attention from the press.

It is difficult to see how the respondent could be more thoroughly "admonished" or how he could receive more pointed and thorough admonition than that which has already been visited upon him.

Respondent is 61 years of age and his health is impaired. A suspension for one year, at his age, is far more severe, harsh and oppressive than would be a similar term imposed upon a younger lawyer with the greater part of his professional life before him.

While it is recognized that each case must be decided on its own facts, an examination of the decisions of this Court in disciplinary proceedings in the past 25 years does not reveal a penalty as relatively severe as that imposed in this case. The earlier cases are further worthy of note because in each of them there was involved a transgression of written rules of conduct, or a statutory violation, with evidentiary proof.

Precedent may be of little assistance, but it is impressive to note the difference in the method of review and penalty imposed in *In Re McCullough*, 97 Utah 533,

95 P. 2d 13, as compared with the review and penalty in the present case.

The McCullough case involved a series of charges relating to solicitation of personal injury litigation personally and through a paid solicitor and giving false testimony under oath in a contempt proceeding. The court made a meticulous review of the evidence and concluded that there was clear proof of solicitation on one charge, but in considering another charge the court, while recognizing the evidence pointed toward guilt, stated:

“However, the evidence adduced is consistent . . . with lack of knowledge upon the part of plaintiff . . .” of the conduct of the alleged solicitor.

The court was, therefore, giving the accused in that case the benefit of such favorable inference as might be drawn from the evidence but no such benefit has been afforded the respondent in this case.

Although the record showed clearly the charge of solicitation upon McCullough, and further showed conduct deserving of the censure of the Court concerning the use of a paid solicitor, and although the Court found him guilty of unprofessional conduct by withholding information from a lower court, he nevertheless received a suspension of but nine months from the practice of law.

If the Court in this case concludes that the finding of guilt should be reaffirmed, it is respectfully suggested that the true purpose of this proceeding will be properly served without the imposition of the penalty of a one year suspension.

Such a penalty, in this case, is not far removed, in its ultimate effect, from disbarment. Even if respondent should later be recommended for reinstatement after suspension, there would be but little of his professional life remaining within which to attempt to rebuild his practice, in view of his age and his health.

No good reason appears why the Court could not decide for itself, apart from the recommendation of the Bar, what would constitute justice under these circumstances, to the end that the public would receive its protection and the respondent, his admonition.

Respectfully submitted,

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