

1959

## In Re Grant MacFarlane, Sr. : Brief of Petitioner

Utah Supreme Court

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

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IN RE

GRANT MACFARLANE

No. 9051

**BRIEF OF PETITIONER**

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

IN RE

GRANT MACFARLANE

No. 9051

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BRIEF OF PETITIONER  
INTRODUCTORY STATEMENT

Disciplinary proceedings were instituted by the Utah State Bar against petitioner Grant Macfarlane, by issuance of a citation and complaint June 26, 1957 (R. 1, 3), following an *ex parte* investigation of the record compiled in the civil will contest case entitled "*In re Swan's Estate*" (Utah, 1956) 293 P.2d 682.

The Bar charged petitioner with unprofessional conduct in the preparation of a will and codicils for his client, Wilda Gail Swan. All allegations of unprofes-

sional conduct were denied by the petitioner's answer (R. 5).

The Trial Committee of the Bar, composed of three Ogden lawyers, called a pretrial hearing August 20, 1957, in an effort to narrow the issues and to avoid a retrial of the will contest case. It was recognized that this Court, in the *Swan* case, ruled that a presumption of fraud and undue influence arose from the fact that the petitioner was a beneficiary under a will prepared by him for his client.

The Prosecuting Committee stated at pretrial, and reaffirmed later upon oral argument, that it did not have any "evidence of fraud beyond the presumption" and that "these facts, without the presumption, won't sustain a finding of fraud or undue influence. We've got to have the presumption made." (R. 361; pretrial hearing, page 28).

It was thereupon agreed that the Prosecuting Committee would review the three volumes of the record in the will contest case and would select therefrom such portions of that record as were deemed relevant and material to the issues in this proceeding. Petitioner was given an equal opportunity and both sides had the right to produce additional witnesses at the time of the hearing which was ultimately conducted January 9, 1958.

At the hearing, which consumed less than one day, the Prosecuting Committee presented its case, consisting

of condensations of some of the testimony from the will contest case and, in some instances, pertinent testimony in the form of questions and answers, asked and answered upon the civil case. The only testimony given in person was that presented by the petitioner who testified concerning his personal and professional history and who then offered himself for cross-examination, although neither the Trial Committee nor the Prosecuting Committee chose to examine him.

The court reporter in attendance was thereupon asked to compile the record by copying the extracts from the question and answer testimony and by inserting the condensations of testimony into a new and complete record for this hearing. In doing so, the reporter recorded the various objections which had been raised by petitioner to some of the evidence offered by the Prosecuting Committee, which objections had been taken under advisement by the Trial Committee pending the completion of the entire record.

The matter was called for further hearing April 30, 1958, at which time the Trial Committee heard oral argument as is revealed by the record beginning at page 352.

The decision of the Trial Committee was rendered September 25, 1958, and its recommendation for disciplinary action was adopted by a majority of the Board of Commissioners of the Utah State Bar March 25, 1959. The Commissioners recommended to this Court the

entry of an order suspending petitioner from the practice of law for a period of one year and until he be recommended for reinstatement by the Board of Commissioners and, in addition, that he be required to pay the costs of the disciplinary proceedings.

Petitioner filed his petition for review of the recommendation April 29, 1959, and now submits his brief in support thereof.

The foregoing explanation is offered to assist the Court in its examination and review of the somewhat unusual record upon which this prosecution must rest.

### STATEMENT OF FACTS

Wilda Gail Swan died, without issue and unmarried, in 1952, at the age of 62. From 1944 until her death, petitioner was her lawyer and her friend. He represented her in numerous business transactions relating to her various properties in Salt Lake City. (R. 116).

In 1947, at her request, petitioner drafted her Last Will and Testament, in which he was named as one of the beneficiaries. In 1950, at her request, he drafted a codicil and, in 1951, a second codicil. The will, as modified by the second codicil, remained unchanged until her death. (R. 386).

When the first codicil was executed in 1950, it provided no additional bequest to Mr. Macfarlane, except



upon the contingency of the death of Miss Swan's father, who was its principal beneficiary and residual legatee. Mr. Swan's death in 1950 resulted in a substantial increase in the petitioner's share of the testamentary estate. This share, however, was substantially reduced by the second codicil, executed in April, 1951.

After her father's death, Gail's sole heir was her sister, Theo Hendee, of San Francisco, with whom Gail maintained a somewhat hostile, tempestuous and unpredictable relationship. (R. 245, 312, 319). Theo had received downtown business properties from her grandfather and her mother (R. 242) and Gail repeatedly told her tax advisor and friend that Theo was amply provided for and she did not intend to "leave her very much" (R. 312).

She had completely different intentions about Mr. Macfarlane (R. 312). He had suffered a detached retina of the left eye in 1946. Later he lost the center vision in that eye and in 1950, the retina of the right eye became detached. These afflictions required surgery and hospitalization and, of course, prevented petitioner from practicing law (R. 90, 111). Petitioner's troubles greatly disturbed Gail (R. 318) and she stated on several occasions that he might become blind and she wanted to help him. (R. 312, 92).

The will and the codicils were prepared by petitioner in his office, in the usual manner, following consultations with Miss Swan (R. 91 et. seq.) Her testa-

mentary intent was verified only by a medical and psychiatric examination conducted prior to her execution of the second codicil, which modified the will by substantially decreasing the earlier bequest to the petitioner. (R. 386).

Petitioner did not suggest independent legal advice be obtained before each testamentary instrument was signed. Whether Miss Swan had, or would have heeded, such advice at any time between the dates of the original will and the second codicil will probably never be known.

When Miss Swan gave petitioner her instructions about the changes to be made in the will by the second codicil, she asked to be examined by an "independent doctor" in order "to be sure . . . that the will cannot be contested" (R. 109). Her grandfather's will was contested. *In re Swan's Estate* (1918), 51 U. 410, 170 P. 452. Petitioner, therefore, made an appointment for her with Dr. A. M. Nielsen, and after some examination, Dr. Nielsen, upon his own initiative, asked a psychiatrist, Dr. Roy A. Darke, for consultative assistance (R. 294).

After about an hour's examination, during which the doctors questioned Miss Swan about the proposed disposition of her property, it was concluded that "she was mentally sound and certainly in the adult bracket" (R. 295). Dr. Darke concluded that Miss Swan "knew what she wanted to do" with her property and that "she did wish to do what she was saying she wanted to do with her property" (R. 286). The two doctors accordingly signed as witnesses to the codicil.

Fourteen months later, Miss Swan died without having made any additional changes in her testamentary disposition. The will was admitted to probate and, several months later, Theo Hendee instituted the will contest suit which culminated in the decision of this Court in the *Swan* case. In its decision, this Court held that the evidence showed that Miss Swan had testamentary capacity. In this respect, the decision reversed the judgment of the trial court.

Because of the relationship of lawyer-client which had existed between Mr. Macfarlane and Miss Swan, the Court held that his inclusion as a beneficiary in her will raised a presumption of fraud and undue influence and that the presumption thrust upon him the burden of persuasion—the burden of persuading the trier of the fact that he had not fraudulently imposed upon and influenced his client's mind.

In the will contest case, the trial court was not convinced that this burden had been carried and the Supreme Court, therefore, affirmed the decision and declared the bequest to the petitioner to be null and void.

The Trial Committee concluded that the presumption adopted by the Supreme Court in the *Swan* case "applies and is effective against the accused in this disciplinary proceeding." (R. 379).

When the Board of Commissioners of the Utah State Bar adopted this conclusion and recommended that peti-

tioner be disciplined by suspension from practice of the law for a period of one year, this petition for review followed.

## STATEMENT OF POINTS

### POINT I

THE PRESUMPTION OF FRAUD AND UNDUE INFLUENCE, UTILIZED IN THE CIVIL WILL CONTEST LITIGATION, SHOULD NOT BE APPLIED IN A DISCIPLINARY PROCEEDING.

### POINT II

EVEN IF SUCH PRESUMPTION COULD PROPERLY BE APPLIED IN A DISCIPLINARY PROCEEDING, THE RECORD IN THIS CASE DOES NOT SUPPORT THE CONCLUSIONS AND RECOMMENDATIONS OF THE BOARD OF BAR COMMISSIONERS SINCE THE RECORD REVEALS THE PRESUMPTION WAS CLEARLY REBUTTED.

### POINT III

THE MERE ACT OF A LAWYER IN DRAFTING A WILL BY WHICH HE MAY RECEIVE BENEFITS IS NOT UNPROFESSIONAL AND IS NOT PROSCRIBED NOR PROHIBITED BY ANY CANON OF ETHICS, WRITTEN OR UNWRITTEN, NOR BY ANY STATUTE, RULE OR DECISION OF THIS COURT. RULE OF THE UTAH STATE BAR OR THE AMERICAN BAR ASSOCIATION, AND SUCH ACT, STANDING ALONE, CANNOT SUPPORT A CHARGE OF UNPROFESSIONAL CONDUCT.

### POINT IV

EVEN IF THE ACTION OF THE BOARD OF COMMISSIONERS WERE OTHERWISE SUPPORTED BY THE RECORD, THE DISCIPLINE RECOMMENDED IS HARSH.

DISPROPORTIONATE AND EXCESSIVE, PARTICULARLY IN VIEW OF THE CENSURE ALREADY VISITED UPON THE PETITIONER DURING THE FIVE YEARS SINCE THE CIVIL WILL CONTEST CASE WAS TRIED AMID WIDE PUBLICITY.

## ARGUMENT

### POINT I

THE PRESUMPTION OF FRAUD AND UNDUE INFLUENCE, UTILIZED IN THE CIVIL WILL CONTEST LITIGATION, SHOULD NOT BE APPLIED IN A DISCIPLINARY PROCEEDING.

This Court, in the *Swan* case, specifically disavowed any implication that its decision should enlarge the presumption to the stature or weight of evidence. Instead, it held that "a presumption is the assumption of a fact required by a rule of law from the establishment of another fact or group of facts. It is not the facts on which it is based nor the inference to be drawn therefrom, but a rule of law fixing the legal consequences thereof . . . This does not mean that the fact finder may consider or weigh the presumption as evidence." *In re Swan's Estate*, 293 P. 2d at page 690.

This careful distinction by the Court cannot be ignored. Particularly is this true where the Court further elaborated by emphasizing that neither the assumed fact nor the rule of law has "any tendency *in reason* to prove the existence of the presumed fact and, therefore, cannot be weighed as evidence thereof. . . ." (Emphasis added).

From the foregoing, it is abundantly clear that the presumption utilized in the *Swan* case cannot be substituted for evidence and cannot be considered as evidence. Its sole function in that case was to shift the burden of persuasion for the purposes of that case. That case is finally and completely adjudicated and public policy, which apparently dictated the use of the rule of law giving rise to the presumption, has been satisfied.

This is a new and substantially different proceeding. Except for the petitioner, the parties are completely different. Even the petitioner is here in a different role. In the former case, he was a legatee whose bequest was attacked by another legatee and nullified by the decision of the Court. In the present proceeding, he and his professional life, training and career are at stake, in a matter in which the parties are the Court and the Utah State Bar. By conducting this review, the Court is inquiring into the conduct of one of its officers. This fact alone distinguishes this proceeding from all that may have gone before.

As stated by the Court in "*In re Evans, et al.*" (Utah, 1913) 42 Utah 282, 130 P. 217, "Who are the parties to the disbarment proceeding? The petitioners on the one side; but who on the other? Certainly not the informant, nor Thomas Nelson. If there were another party, . . . it was the court; for the proceeding involved matters wholly between the court and the petitioners."

Since it is evident that this proceeding has nothing legally in common with the will contest case, and since

it must be recognized, in a disciplinary proceeding, that the power of a court is, practically, without limit, it is significant to note that at no time in the proceedings against the petitioner to date has either side been able to locate, or cite, any decision by any court holding that a presumption of fraud and undue influence is to be utilized in a disciplinary proceeding. Neither has there been found any authority upholding the discipline of an attorney upon a claimed presumption, or upon a record devoid of evidence or fact showing an evil act, a corrupt motive, or dishonest concealment.

It is submitted that the reason for this dearth of authority lies in the inherently different nature of a disciplinary proceeding. The courts have long recognized that the proceeding is unique. They have also recognized that in such a case there is a kind of "presumption of innocence" which inures to the benefit of the accused lawyer. See for example, 7 A.L.R. 93, in which there will be found an annotation entitled "Presumption of Innocence in Disbarment Proceedings." It is there stated that as a general rule the attorney has the benefit of a presumption of innocence when the true burden of proof is recognized.

The Supreme Court of Washington has stated the proposition well. It held, in *In re Little* 244 P. 2d 255, that the disciplinary proceeding "... is a special proceeding peculiar to itself ..." It then went on to say:

"The respondent in such a matter is, upon his admission to the Bar, certified by the Court to have attained high moral and professional standards. It is to be presumed that he has maintained them and has performed his duty as an officer of the Court in accordance with his oath. Every doubt should be resolved in his favor, and only upon a clear preponderance of the evidence that the acts charged have been done and were prompted by improper motives, should disciplinary action be taken. The privilege — and it is a privilege, not a right — to practice his profession cannot be lost to the practitioner upon slight evidence."

A somewhat similar thought has been expressed by this Court in "*In re Oliver*" 97 Utah 1, 89 P. 2d 229. In that case, the Court was considering the effect of one of the sections of the "Revised Rules of the Utah State Bar Governing Professional Conduct and Discipline." After recognizing that, as to a member of the Bar who has allowed his dues to lapse, the Bar may question his legal qualifications to resume membership, the Court pointed out that the lapse of time does not effect his standing as a morally qualified, but suspended, member of the Bar. The Court then went on to say:

"Naturally there is the disadvantage to this that the Bar must assume the burden of proving his lack of moral qualification: but this is in line with our accepted theory of trials. It far better, after a member has established his moral qualifications, as he does upon admission to the Bar, to presume that those qualifications remain with him until such time as they are taken away by



proper procedure, than to presume ill of him and to require him to overcome the last presumption."

A careful review of the decisions of this Court in disciplinary proceedings fails to reveal a single instance where a presumption was either urged or utilized as a basis for disciplinary action. Instead, the clear import of the decisions is that evidence is required, it must be substantial and convincing in its nature, and nothing less than evidence will suffice.

For example, in "*In re McCullough*" 97 Utah 533, 95 P.2d 13, the Court was asked to draw inferences from a series of facts which, as contended by the prosecution, showed that solicitation of business by one Spencer was at the direction of or with the knowledge of the accused. After examining the record, the Court found that there were "rumors" and a suspicion of "ambulance chasing." The Court concluded, however, that there had been no instance of solicitation shown "by clear and convincing evidence." In a further discussion of the evidence, the Court remarked, on this phase of that case, "our attention has been called to no instance in which an attorney was suspended or disbarred on such meager evidence of solicitation through a runner."

For centuries, it has been universally recognized that the court has had power to exercise rigid control over the professional conduct of members of the legal profession. As pointed out by Judge Cardozo in *People v. Calkin*, 248 N.Y. 465, 162 N.E. 487, in very early days

in England the court regulated the conduct of barristers "with minute particularity, even in matters so personal as the growth of their beards or the cut of their dress."

The courts of this country are not shown by the decisions to have wielded their power of control to this extent. It was recognized early that the power to disbar ". . . is not an arbitrary and despotic one . . . but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion . . ." *Ex parte Seacombe*, 60 U. S. 9, 15 L. Ed. 565.

As stated by the Supreme Court of Illinois, in the case of *In re Donaghy*, 402 Ill. 120, 83 N.E. 2d 560,

"The disbarment of an attorney is the destruction of his professional life, his character, and his livelihood. (citing cases) The court should, therefore, disbar in moderation. Likewise, the same considerations obtain in the application of a suspension rule. A removal of an attorney from practice . . . entails the complete loss of a clientele with its consequent uphill road of patient waiting to again re-establish himself in the eyes of the public, in the good graces of the courts and his fellow lawyers."

This Court, in harmony with the great weight of authority, has long recognized that a disciplinary action is of such serious nature and consequence to the accused that its power should be exercised only upon the basis of "convincing proof." *In re Hanson* (Utah, 1916) 158 P. 778, 48 Utah 167.

In that case, after discussing other elements in a disciplinary proceeding (in which discussion there is no mention of a "presumption") the Court said:

"The foregoing statements really contain the whole gist of the law, which is sustained by both reason and common sense. To disbar an attorney is a very serious matter indeed. It not only may deprive him of gaining a livelihood for himself and a dependent family, but it may, and usually does, result in preventing him from making available all antecedent preparation, although that may cover practically the period of a lifetime. In no other calling are such far-reaching consequences visited upon a delinquent who has not been found guilty of some felonious act. The rule, therefore, that the evidence should be clear and convincing is based upon a most solid foundation."

No such "solid foundation" supports the abortive use of the presumption of fraud in the present inquiry. It has no basis in social or legal history. It cannot be supported upon the basis of reason or logic because, as stated by the Court in the *Swan* case, neither the facts nor the rule of law involved in the presumption "have any tendency in reason to prove the existence of the presumed fact and, therefore, cannot be weighed as evidence thereof . . ."

In accord with this principle is the decision of the New York court in "*In re Spencer*," 201 N.Y. Supp. 315, 206 App. Div. 806. Spencer was accused, in a total of nine charges, of violating the code of ethics. In one count

he was charged with having procured by misconduct, fraud and dishonesty, two real estate mortgages from his client and thereafter, procuring the assignment thereof to his wife, at a time when his client was incompetent to transact business. The assignments were drawn by him in his client's bedroom, when he and she were alone.

As to this count, the court said:

"There may be, and probably is, a presumption against the validity of this transaction, and if it were brought in question by persons interested in . . . the estate, and who were prejudiced by it, very likely the burden would be cast upon respondent to show that the transaction was free from fraud and undue influence on his part. It does not appear that the transaction has been questioned by those persons. If respondent's testimony in this proceeding is accepted, the transaction was honest and straightforward. There was an opportunity and motive for respondent to take advantage of Miss Sharp's enfeebled condition; whether he did or not, no one living knows. *In a proceeding of this character, I do not think it can be found as a fact that he did.* (Emphasis added)

This is but another way of stating that a presumption of fraud, which arbitrarily arises from the nature of the confidential relationship, will not be accepted as a substitute for proof, or as satisfactory proof upon which to predicate the discipline of an attorney.

To our knowledge, no court has ever indulged in such a presumption or assumption during a disciplinary

proceeding involving circumstances such as are present here. Instead, the courts have recognized the punitive nature of the proceeding and have drawn inferences in favor of, and not against, the accused.

For example, more than sixty years ago the Supreme Court of California in a disciplinary proceeding entitled "*In re Haymond*" 53 P. 899, ruled that "... all intendments are in favor of the accused." The same rule, expressed in different language, is found in later California cases. In *Browne v. State Bar of California* (1955) 287 P.2d 745, the court held "... Any reasonable doubts must be resolved in favor of the accused". To the same effect is the earlier California case of *Hildebrand v. State Bar of California*, 117 P.2d 860.

In view of the nature of this proceeding, and in the light of the legal principles and authorities already mentioned, petitioner earnestly contends that the Board of Commissioners of the Utah State Bar committed manifest error in adopting the conclusion of its Trial Committee that "the presumption mentioned by the Supreme Court" in the *Swan* case "applies and is effective against the accused in this disciplinary proceeding." The Board then compounded the error by recommending discipline against the petitioner upon the basis of this mere presumption, which arose from a rule of law, utilized in private civil litigation, at a time when, and under circumstances in which, none of the considerations which are now before this Court were present.

## POINT II

EVEN IF SUCH PRESUMPTION COULD PROPERLY BE APPLIED IN A DISCIPLINARY PROCEEDING, THE RECORD IN THIS CASE DOES NOT SUPPORT THE CONCLUSIONS AND RECOMMENDATIONS OF THE BOARD OF BAR COMMISSIONERS SINCE THE RECORD REVEALS THE PRESUMPTION WAS CLEARLY REBUTTED.

The Prosecuting Committee has repeatedly conceded that it must fail in this prosecution, if the presumption of fraud is not utilized, because it has no extrinsic evidence of fraud or undue influence upon which to rely.

A careful examination of the record reveals the necessity for this concession. No fact was ever brought before the Trial Committee, or the Board of Commissioners, which tended to show any act of fraud or influence upon the part of the petitioner.

Not for a moment do we concede that the presumption of fraud and undue influence, utilized in the *Swan* case, should be applied here. We confess our inability to understand how it is even possible of application in a disciplinary proceeding where the evidence presented against an attorney must be "clear and convincing" and his guilt must be "clearly established." *In re McCullough*, 97 Utah 533, 95 P.2d 13.

To apply the presumption here is to relieve the prosecution of this recognized burden of proof and, in-

stead, to place it upon the accused, under circumstances where neither he, nor the Bar, can know from judicial precedent the extent of the proof required to overcome it.

However, for the purposes of argument, we shall assume that the prosecution is entitled to the benefit of the presumption. It seems to concede, because it could not properly do otherwise, that it has nothing else upon which to base its claim. As the Supreme Court said, in the *Swan* case, except for the presumption “. . . the trial court’s finding of fraud and undue influence probably is not supported by the evidence.” (pp. 687 and 688 of 293 P.2d). The prosecution can properly find no comfort in the *Swan* decision, because nothing in that decision compels any finding of fraud. Instead, the court held that the burden of persuasion was upon the petitioner in the will contest case, and that the Supreme Court could not say, as a matter of law, that he had sustained it. The Court held, on this point, in speaking of Mr. Macfarlane and a co-defendant:

“. . . although they clearly made a prima facie showing, the finding against them on that issue must be approved because it indicates that the trial court was not convinced that the facts are in their favor.”

This is nothing more than is said by the Court repeatedly in affirming jury verdicts. In such cases, the Court affirms because the jury was not convinced in favor of the appellant but, this is not the same as saying

that the weight of evidence was against such an appellant, because if he had had the burden of proof upon the issue, he would fail, and the verdict would be against him, if the evidence were equally balanced.

Expressed in percentages, if the total weight of evidence in a civil suit is viewed as 100 per cent, he upon whom the burden of persuasion falls must convince the trier of the facts by the greater weight of that evidence or by more than 50 percent of the evidence. If, after the proof is in, the evidence is viewed as equally balanced, the burden of persuasion has not been carried by him and, upon appeal, the decision will be affirmed by the Supreme Court.

Therefore, in the *Swan* case, while the accused may have placed 50 percent of the weight of evidence upon the scales, he did not convince the lower court that he had done more. The decision does not attempt to evaluate the evidence, since a will contest case is an action at law.

To draw any additional inferences from the *Swan* decision, to claim that petitioner produced less than 50 percent of the evidence and that the contestants produced more, is to strain the decision beyond its meaning.

Yet, this is precisely what the Board of Commissioners has done in this proceeding. It has concluded, in paragraph 3 of the conclusions of its Trial Committee "that the accused used fraud and undue influence toward



Miss Swan and that said actions were a breach of his fiducial relationship, and is (sic) unprofessional conduct as a member of the Bar of the State of Utah."

This conclusion cannot be supported by any extension of the Court's decision in the *Swan* case, and certainly is not supported by the evidence in this record.

The only evidence in the record, on the prosecution's side of the ledger, is the evidence that petitioner was the attorney for Miss Swan, that he drew a will in 1947, a codicil in 1950 and a second codicil in 1951 and that in each of these testamentary documents, he was named as a beneficiary of a valuable portion of Miss Swan's estate. Additionally, there is evidence that the only disinterested and independent consultation experienced by the testatrix resulted from a medical and psychiatric examination conducted immediately prior to the execution of the second codicil.

Opposed to this evidence, and opposed to the presumption the prosecution seeks to draw from it, is the unequivocal denial of the petitioner that he exercised or utilized any fraud or undue influence at any time in his dealings with the testatrix, the testimony of disinterested witnesses that the testatrix desired to make such disposition of her property and had expressed a repeated concern for the welfare of the petitioner, and finally and perhaps most important, the professional, civic and personal standing and reputation of the petitioner which looms upon the record unassailed, uncontradicted and unimpeached.

The record reveals petitioner has practiced at the Bar of this Court for thirty-two years, following his education in the public schools and the University of Utah. He is now age sixty, the father of five children and grandfather of six.

He has twice been elected by his district as a member of the House of Representatives in the Legislature and twice elected a member of the State Senate. During his service in the latter chamber, he was elected President of the State Senate in 1941 and again in 1943.

He has served as President of the Exchange Club in Salt Lake City and has received the unique honor of selection as National President of that organization. At the time of the hearing of this matter he was serving as National President of his college fraternal organization. In addition, he has been active in the local council of the Boy Scouts of America and in other community and civic affairs.

His professional practice has been general in its nature and he has always practiced alone. In addition to his professional interests, in years past he engaged in business activities in the ranching, mining and construction businesses (R. 343, et seq.).

This discussion of the evidence shows convincingly that the record preponderates in favor of the petitioner. As will now be demonstrated, the inferences from the evidence and from the unusual manner in which this

disciplinary proceeding has been conducted, lend further effective support to the petitioner's cause.

At the hearing on January 9, 1958, when the evidentiary portions of this record, including the complete and verbatim testimony of the petitioner, were introduced, counsel for petitioner, in his opening statement (R 304) and later, at the conclusion of the defense, assured the Trial Committee that petitioner "would answer any questions you might have or anyone might have concerning this matter." (R. 347)

None of the lawyers of either the Trial Committee or the Prosecuting Committee accepted this opportunity to determine for themselves whether petitioner, in explaining his conduct, possessed that degree of candor and honesty which would enable them to view his testimony with confidence.

The failure of the Trial Committee to make inquiry at that time is, in fairness, understandable since it had not then had the opportunity to read the record and it could not then know whether inquiry would be useful.

No such explanation is available, however, to justify the Committee's silence on April 30, 1958, when the hearing was reconvened for oral argument. Although petitioner again was present and available, neither the Trial Committee nor the Prosecuting Committee bothered to ask a single question.

We view this silence as particularly significant and as indicative of the fact that this Committee, in passing judgment in 1958 on the professional conduct of the petitioner, was content to rely upon what he said in testimony given more than five years earlier, in a bitterly contested trial involving different parties, different counsel, different issues of fact and law and vastly different stakes.

In addition, at the hearing of April 30, 1958, it had become apparent, and it still is, that there was a glaring inconsistency in the prosecution's case, revealing a substantial variance between the charge and the proof. The Committee did not seek an explanation. The Prosecuting Committee did not volunteer one. The inferences which may be drawn from this inconsistency will be apparent from the following:

The complaint charged the petitioner with professional misconduct in that, after he prepared the will in 1947, thereafter he "prepared various codicils to said will, *in each of which his interest as a beneficiary became increasingly more advantageous to him.*" (Emphasis added)

This is patently untrue, as revealed by the documents themselves (R. 386). They show that by the will of May 2, 1947, petitioner would have received one piece of property. Under the terms of the first codicil in February, 1950, his position was unchanged unless and until a contingency occurred. On the date of the codicil, in view of the uncertainties of health of those involved, no

one could have predicted whether the contingency would happen before the death of the testatrix.

The contingency did occur, however, and as matters then stood, petitioner's bequest had increased because the contingency resulted in the addition of four other properties, together with that already mentioned in the will itself.

In April, 1951, the second codicil was executed and, by its terms, two of the five properties were devised to someone else thus *decreasing*, not increasing, petitioner's stated bequest, all of which is contrary to the charges asserted against him.

If, as is contended, petitioner had intended to perpetrate fraud upon his client in the testamentary disposition of her estate, why would he have taken measures to insure the validity of the second codicil when, by so doing, he received less than he would have received if he had done nothing?

This inconsistency in the theory of the prosecution has never been explained. The Trial Committee and the prosecution have ignored it, which only serves to emphasize that the inferences to be drawn from it support, and are consistent with, the innocence of the petitioner. When these inferences are coupled with the uncontradicted testimony of the petitioner, the unimpeached testimony of disinterested witnesses concerning the intent of the testatrix and with the outstanding personal, civic and

professional record of the petitioner, the conclusion is inescapable that the record does not support the conclusions and recommendations of the Board of Bar Commissioners.

### POINT III

THE MERE ACT OF A LAWYER IN DRAFTING A WILL BY WHICH HE MAY RECEIVE BENEFITS IS NOT UNPROFESSIONAL AND IS NOT PROSCRIBED NOR PROHIBITED BY ANY CANON OF ETHICS, WRITTEN OR UNWRITTEN, NOR BY ANY STATUTE, RULE OR DECISION OF THIS COURT, RULE OF THE UTAH STATE BAR OR THE AMERICAN BAR ASSOCIATION, AND SUCH ACT, STANDING ALONE, CANNOT SUPPORT A CHARGE OF UNPROFESSIONAL CONDUCT.

After the ruling of the trial court in the will contest case and again after this Court handed down its decision upon appeal, there arose in some legal circles a cry for petitioner's professional scalp because, it was said, he had "breached the ethics" of the profession.

Upon the hearing in this matter, the Trial Committee was informed by counsel that the matters involved did not appear to be proscribed by, and petitioner was not charged with a violation of, "any canon, any opinion of the committee construing canons, any violation of a Utah rule of bar procedure, any violation of a statute, informal order, opinion, statement or anything else, except the opinion of a great many lawyers who now, after the *Swan* decision has been rendered, *ex post facto* realize that they knew it was wrong all along" (R. 368).

The Prosecuting Committee did not dispute this contention which was again asserted in the informal hearing before the Board of Bar Commissioners. It was there contended, as it is now, that a charge of unprofessional conduct cannot be supported by proof that a lawyer drafted a will by which he might receive benefits unless there are additional factors proved as evidence of a fraudulent or corrupt intent.

This is not to say that a lawyer acts wisely if he draws such a will. As stated by the Court of Appeals of New York in the well-known case entitled "*Re Putnam*," 257 N.Y. 140, 177 N.E. 399,

"Attorneys for clients who intend to leave them or their families a bequest would do well to have the will drawn by some other lawyer. Any suspicion which may arise of improper influence used under the cover of the confidential relationship may thus be avoided."

But petitioner is here not charged with being unwise. He is charged with unprofessional conduct because of the use of fraud and undue influence.

We believe it significant that there have been many decisions by many courts involving wills prepared by lawyers who also were beneficiaries thereof but in no instance have we found a decision, and none was cited to us by the prosecution, where the court condemned the attorney's actions as professional misconduct, in the absence of additional facts. See for example, "*Re Put-*

nam," supra; *Matter of Kindberg's Will*, N.Y., 100 N.E. 789; *Marx v. McGlynn*, 88 N.Y. 357.

The comment of the Supreme Court of Idaho in 1946 is pertinent here. In *Swaringen v. Swanstrom*, 175 P.2d 692, the Idaho Court observed:

"If the relation of attorney and client or principal and agent existing between the parties is sufficient to constitute undue influence by the attorney or agent over the principal, it would throw open many wills to contest; and, on the contrary, an existence of such a relationship often furnishes potent reasons for the execution of a will in favor of such an attorney or agent (Citing cases)."

Those who have been trained under Anglo-American jurisprudence and who have been honored by admission to the Bar of this State have, since our earliest exposure to the law, cherished the concept that the law permits no punishment without proof of violation of a rule which, while perhaps not known or widely understood, is at least subject to ascertainment. Such rules are for the guidance of the bench and Bar. No such rule can here be found.

This situation is not unlike that which confronted the Supreme Court of California in 1950 when it decided *Hildebrand v. State Bar of California*, 225 P. 2d 508. That was a proceeding to review a recommendation of the Board of Governors of the State Bar of California that petitioners should be disciplined because they had



participated in a plan under which a labor union established a legal aid department to assist injured members of the union in procuring legal counsel.

The decision of the Court was in favor of petitioners and was expressed in the following language:

“... in the absence of any prior decision in this State holding that it was improper for petitioners to participate in such a plan in the manner above described, it is our conclusion that the ends of justice will be served by dismissing the present proceeding without disciplinary action, thereby permitting this opinion, as the first expression of the views of this Court upon the subject, to serve prospectively as a guide to the members of the profession generally, rather than to serve retrospectively to the detriment of petitioners.”

#### POINT IV

EVEN IF THE ACTION OF THE BOARD OF COMMISSIONERS WERE OTHERWISE SUPPORTED BY THE RECORD, THE DISCIPLINE RECOMMENDED IS HARSH, DISPROPORTIONATE AND EXCESSIVE, PARTICULARLY IN VIEW OF THE CENSURE ALREADY VISITED UPON THE PETITIONER DURING THE FIVE YEARS SINCE THE CIVIL WILL CONTEST CASE WAS TRIED AMID WIDE PUBLICITY.

Should this Court disregard our contentions and determine the issues against the petitioner, it will then be confronted with the problem of what, if any, discipline should be imposed.

We do not intend to presume or to encroach upon the power of the Court when we suggest that the recommended discipline is harsh and improper. In fairness, however, it should be stated that petitioner has already undergone, as a result of the publicity attendant upon the prior litigation and attendant upon this proceeding, five years of public opprobrium, manifested by the loss of the esteem of many of his fellow practitioners and fellow citizens. As may be readily imagined, his practice has sharply dwindled.

Regardless of what occurs in this case, petitioner has a long and uphill road to travel in his efforts to re-establish himself.

### CONCLUSION

There is more here at stake than Mr. Macfarlane's personal and professional career. There is a principle — the principle that no lawyer should stand convicted in his profession except upon proof which "clearly establishes his guilt." If lawyers in this State are to be convicted upon presumptions — presumptions which may vary in effect with the case, or the court, or the decision in which they are applied, and if lawyers are to be convicted of violating an unwritten rule of conduct, without proof of improper motive, design or act — then the practice of this profession may have become so unpredictable and so uncertain that only those with clairvoyant foresight and perception will presume to undertake the management of the confidential affairs of their clients.

It is respectfully submitted that the proceedings should be dismissed and the petitioner be exonerated completely of the charges and implications asserted against him.

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