SUPREME COURT OF SOUTH AUSTRALIA

(Full Court)

In The Matter of JOHN FRANCIS MURPHY, AND IN THE MATTER OF THE LEGAL PRACTITIONERS ACT, 1981

THE LAW SOCIETY OF SOUTH AUSTRALIA v MURPHY

Judgment of the Full Court

(The Honourable the Chief Justice, the Honourable Justice Millhouse and the Honourable Justice Prior)

11 March 1999

PROFESSIONS AND TRADES — LAWYERS — REMOVAL OF NAME FROM ROLL

Unprofessional conduct admitted by practitioner - evidence that conduct would be explained in part by depressive illness - whether undertaking offered by the practitioner not to practise profession of law should be accepted in substitution for removal of name from Roll of practitioners.

New South Wales Bar Association v Evatt (1968) 117 CLR 177; *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, applied.

Ziems v Prothonotary of the Supreme Court of New South Wales (1957) 97 CLR 279; *Re B* [1986] VR 695, considered.

Applicant THE LAW SOCIETY OF SOUTH AUSTRALIA: Counsel: MR A MARTIN - Solicitors: THE LAW SOCIETY OF SOUTH AUSTRALIA
Respondent JOHN FRANCIS MURPHY: Counsel: MR W J WELLS QC

Hearing Date/s: 09/02/99.

File No/s: SCGRG-98-1350

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Judgment No. [1999] SASC 83

THE LAW SOCIETY OF SOUTH AUSTRALIA v MURPHY
[1999] SASC 83

Full Court: Doyle CJ, Millhouse and Prior JJ

1 DOYLE CJ. The Law Society of South Australia has filed a Notice of Motion seeking an order that the name of John Francis Murphy be struck off the Roll of Legal Practitioners.

2 Mr Murphy has admitted that he has been guilty of unprofessional conduct. He has admitted the particulars of unprofessional conduct alleged against him by the Legal Practitioners Conduct Board in proceedings before the Legal Practitioners Disciplinary Tribunal.

3 The admission is made on the basis that there is a single charge for unprofessional conduct, supported by particulars identifying a number of different items of conduct. Mr Murphy does not accept that any one of those items considered in isolation constitutes unprofessional conduct.

4 In my opinion the Court does need to consider whether that concession is correctly so limited. I am content to deal with the conduct as a whole, treating individual items as going to the gravity of the conduct as a whole.

5 Mr Murphy accepts that the conduct alleged and admitted is of sufficient gravity to warrant the making of the order sought. But, through his counsel, Mr Murphy has offered to the Tribunal, and offers to this Court, an undertaking not to practise the profession of the law. He submits that the Court should not remove his name from the Roll of Practitioners, but should accept his undertaking.

6 That submission was not accepted by the Tribunal. The matter has been referred by the Tribunal to this Court, and the same issue now must be considered by the Court.

7 The unprofessional conduct occurred in the course of the practitioner acting in thirteen different matters. The affairs of twelve different clients are involved. In each matter there is more than one particular of unprofessional conduct alleged. The original charge specifies the instances of unprofessional conduct in reasonable detail. The charge was supplemented by further written particulars which provide more detail. As well, the Tribunal was provided with an agreed Statement of Facts which provides yet further detail.

8 The report to this Court by the Tribunal sets out the material in full. In view of that, a general summary will suffice.

9 Mr Murphy was admitted to practice in February 1977.

10 The conduct occurred between December 1986 and February 1995, when a Supervisor was appointed to Mr Murphy's practice. Mr Murphy ceased to practise late in 1994, and has not practised or held a Practising Certificate since then. It follows that the conduct occurred over a period of about eight years. However, the first matter of significance (delay in obtaining a medical report), did not occur until after December 1986, and most of the instances of unprofessional conduct occurred between 1992 and late 1994.

11 There is a certain similarity between a number of the matters. For that reason, and to avoid undue length, I will describe the conduct involved in rather general terms, drawing upon the summary that is to be found in the Tribunal's reasons.

12 First, in relation to three clients, Mr Murphy appropriated moneys for his fees from his trust account, without first providing to the client an account for those fees. In one further matter, he drew on a litigation loan obtained by the client without first sending an account. As I understand it, it is not suggested that Mr Murphy had not done work for which he was entitled to claim fees of the order of the amount appropriated.

13 Secondly, in relation to most of the thirteen matters, Mr Murphy repeatedly and persistently failed to reply to enquiries and requests for information from clients or other persons. No reasonable excuse for this was provided. In the circumstances, his conduct goes beyond discourtesy and inefficiency, and amounts to unprofessional conduct, at least when viewed as a whole. While this conduct is at the lower end of the scale of professional misconduct, the number of matters in which it occurred, and the frequency with which it occurred, leaves no doubt that it does amount to unprofessional conduct.

14 Thirdly, in about eight or nine matters, Mr Murphy neglected to take action as instructed by his client, or as required in the interests of his client. In each case there was a significant neglect by Mr Murphy of his duty to act in the interests of his client. In several instances it is likely that this resulted in prejudice to the client, and in several cases causes of action fell out of time. The ultimate impact upon the relevant clients is not established. It may be that in the end, as a result of the matters having been attended to by other practitioners, the client ultimately suffered no loss. However, once again, there is a pattern of persistent and significant neglect by Mr Murphy of the interests of his clients.

15 Fourthly, in all thirteen cases there were repeated failures by Mr Murphy over some time to reply to requests by the Legal Practitioners Complaints

Committee for an explanation of his conduct and for information in relation to complaints made to the Committee. There were some responses to the Committee, but they were inadequate.

16 Fifthly, there is a miscellaneous group that includes an instance of significant overcharging, to the extent of about $10,000.00, and an instance of inadequate accounting to a client for funds held by Mr Murphy in his trust account.

17 There emerges from these matters a picture of persistent neglect of the affairs of the clients in question, causing at the least delay and inconvenience, and in some cases prejudice, although perhaps not irretrievable prejudice. There also emerges a picture of the persistent disregard of Mr Murphy's basic professional obligation in dealing with his clients, in responding to their questions and in acting in their interests. Mr Murphy has also failed to meet basic professional obligations in relation to the charging of clients and accounting to clients. Finally, there is a pattern of prolonged and persistent disregard of enquiries from the Legal Practitioners Complaints Committee. There can be no doubt about the obligation of a practitioner to assist that body with its enquiries.

18 Considered as a whole, in my opinion the conduct of the practitioner demonstrates a disregard of his professional obligations, or a failure to meet them, and indicates (subject to any explanation) that he is unfit to remain a practitioner. The disregard of professional obligations is too frequent and too lengthy to permit of any other conclusion, even though any one of these matters in isolation, or even some taken together, might not lead to that conclusion.

19 There is no reason to think that the practitioner was unaware of his obligations. It appears that for some years he conducted a moderately busy practice, and he must have known what was expected of him. There is no reason to think that in the relevant matters the practitioner was deliberately defrauding or cheating his clients. What emerges is that in relation to certain clients the practitioner simply failed to discharge fundamental obligations of which he must have been well aware.

20 Mr Murphy was thirty-five years old when admitted, and was about forty-four years old when the conduct in question began. His conduct cannot be attributed to immaturity in the past. It is the conduct of a mature man.

21 The Tribunal received written and oral evidence from medical practitioners relating to a depressive condition suffered by the practitioner. The Tribunal did not accept an opinion given in oral evidence by a psychiatrist, to the effect that Mr Murphy had suffered a significant and chronic depressive illness for the whole of the period from 1988 to 1994 and that the whole of

Mr Murphy's conduct was attributable to that condition. Nor did the Tribunal accept that over that time that condition inhibited the practitioner from "gaining insight into his condition, and from taking steps to seek help for himself and his clients." In short, the Tribunal did not accept that all of the conduct was attributable to an inability to attend to his work, and a lack of insight, due to chronic depression. I would not lightly differ from the Tribunal, the Court not having heard the evidence that the Tribunal heard. But, in any event, on the material referred to by the Tribunal, I would reach the same conclusion.

22 As the Tribunal pointed out, the psychiatrist did not see Mr Murphy until June 1997. His opinion was based upon the same material as the material before the Tribunal. The psychiatrist also relied upon a history provided by Mr Murphy and his wife, which history was unsupported by evidence before the Tribunal. The psychiatrist told the Tribunal that the recall of events by Mr and Mrs Murphy was patchy. There was other evidence suggesting that for significant periods Mr Murphy appeared to be coping with his work. I realise that that is equivocal under the circumstances, because the depressive condition is not inconsistent with Mr Murphy appearing to cope, but not in fact coping. However, the lengthy inactivity by Mr Murphy in dealing with his clients' affairs, which is said to be indicative of depression, is equally equivocal because it is consistent with simple inattention to Mr Murphy's professional duties.

23 Mr Wells QC, for Mr Murphy, submitted that the Tribunal's negative conclusion that everything was not attributable to the depression does not establish how much of the conduct was in fact attributable to the depression. He advanced a submission that the Tribunal must have concluded that all but two matters were attributable to the depression. It is true that the finding of the Tribunal is not precise, however, I think that this is a matter in which precision is impossible.

24 As I have said, I am not inclined to depart from the Tribunal's conclusions, but in any event, on my reading of the material, would reach the same conclusion. I propose to proceed on the basis that from late 1994 Mr Murphy's depression explains his conduct, and that being of gradual onset the depression may have played a part in the earlier conduct, but I also proceed on the basis that there is no medical excuse for events in 1992 and 1993. I also accept that there was an episode of depression in late 1987, and that in April 1993 Mr Murphy was found to be suffering from diabetes. This may have played some part in his conduct.

25 Like the Tribunal, I consider that the evidence as a whole leads to the conclusion that by and large Mr Murphy was capable of managing his practice properly until 1994, and that any depressive condition or anxiety state or other ill health from which he suffered before then was not such that his conduct was

simply the result of a medical condition and that, provided the condition is properly treated, there is no reason to expect a recurrence of the unprofessional conduct.

26 In my opinion Mr Murphy's mental state provides an explanation for some of the conduct that occurred, but does not prevent the conclusion that he is unfit to remain a practitioner.

27 Like the Tribunal I also accept that difficulties that Mr Murphy experienced in securing proper secretarial support, and financial difficulties that he experienced, put him under considerable pressure, and contributed to the events that occurred. However, that cannot alter the proper characterisation of his conduct, nor does it mitigate the seriousness of the conduct. A practitioner who is under business or other forms of pressure cannot use the existence of such pressure as an excuse for a failure to observe proper professional standards. The Court and, no doubt, the Tribunal, will readily accept that business and other pressures on practitioners may result in occasional minor departures from the required standard of conduct, and when the departure is not great and is an isolated instance, an understanding of the circumstances that led to the departure from the required standard may enable the Court to conclude that the practitioner remains fit to be a legal practitioner, notwithstanding the relevant conduct. But, in my opinion, in the present case the departure from the required standard is too serious and too persistent, and the explanation offered of insufficient weight, to avoid the conclusion that the practitioner is unfit to remain a practitioner.

28 The evidence before the Tribunal also establishes that at present Mr Murphy is suffering from severe depression, and that for that reason alone he is presently unfit to resume legal practice.

29 For those reasons, in my opinion this Court should make an order removing Mr Murphy's name from the Roll of Practitioners, unless it considers it appropriate to accept the undertaking offered. The undertaking not to practise the profession of the law is unqualified as to time and as to place. There is no reason to think that Mr Murphy has any present intention of resuming practise.

30 In dealing with a charge of unprofessional conduct, the Court acts in the public interest, and not with a view to punishment: *New South Wales Bar Association v Evatt* (1968) 117 CLR 177 at 183-184; *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 250-251. The Court is concerned to protect the public, not to punish a practitioner who has done wrong, although of course the removal of the practitioner's name from the Roll will operate as a punishment. The Court acts to protect the public and the administration of justice by preventing a person from acting as a legal practitioner, and by

demonstrating that the person is, by reason of his or her conduct, not fit to remain a member of a profession that plays an important part in the administration of justice and in which the public is entitled to place great trust. In considering whether to accept the undertaking the Court does not consider whether Mr Murphy's wrongdoing is adequately acknowledged by accepting an undertaking from him that will almost certainly ensure that, unless the Court releases him from the undertaking, he causes the public no harm. Nor does the Court consider whether the acceptance of the undertaking will be a sufficient punishment for Mr Murphy. Nor is there much scope for considering extenuating circumstances, or the showing of mercy, as the court might if the power of the court was exercised by way of punishment.

31 The issue for the Court is whether, in view of the admitted conduct, Mr Murphy is fit to remain a member of the legal profession. If his conduct demonstrates that he is not, in my opinion the ordinary course must be an order that his name be removed from the Roll, even if something less would be an adequate punishment for him or even if something less is likely to ensure that he would not be able to practise as a practitioner.

32 In saying this, I do not say that considerations of the practitioner's personal circumstances, and consideration of extenuating circumstances, are to be put to one side entirely. I merely emphasise the point that the court acts in the public interest and not with a view to punishment of the practitioner.

33 The Court also has to consider the maintenance of public confidence in the profession, and must ensure that only those who have observed the required standards are permitted to remain members of the legal profession.

34 By allowing a practitioner to remain on the Roll of Practitioners, the Court holds the practitioner out as a fit and proper person to practise. There is a certain incongruity in allowing a practitioner to remain on the Roll even though it has been demonstrated that the practitioner is not a fit and proper person to remain a practitioner. However, there are decisions indicating that in some circumstances an order suspending a practitioner's right to practise will be adequate, even though for the time being the practitioner cannot be held out as a fit and proper person to remain a practitioner: see *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 and *Re B* [1986] VR 695 at 705. On the same basis it can be argued, as was argued by Mr Wells QC, that the public is sufficiently protected by the undertaking offered, and that the incongruity referred to is not decisive.

35 In reaching a conclusion as to the order that should be made, I take account of my conclusion, expressed earlier, that the practitioner has been guilty of unprofessional conduct over a substantial period of time. Although no one item of conduct may amount to unprofessional conduct, the sustained

neglect of the clients' affairs is significant. I cannot say that the conduct that is not attributable to the depression would itself, if it stood alone, warrant removing the name of the practitioner from the Roll. But the depression to which some of the conduct is attributable itself indicates that the practitioner is not presently fit to practise, and that there is no reason to think that that condition will be of short duration.

36 In combination, the lack of any excuse for part of the conduct, and the fact that the explanation for the balance is a condition that makes the practitioner medically unfit to practise, and likely to remain so for some time, in my opinion lead to the conclusion that the practitioner's name should be removed from the Roll.

37 In my opinion, acceptance of the undertaking would not adequately reflect the significance of the conduct of the practitioner and the significance of his present condition.

38 As well, acceptance of the undertaking would mean that should Mr Murphy seek at some later time to obtain a Practising Certificate, he would not face the hurdle of establishing that he is fit to be a practitioner, but the lesser hurdle of satisfying the Court that he should be released from his undertaking.

39 Finally, although this is of lesser weight, if the undertaking were broken, it would be necessary to allege and prove the breach, and then to move for the removal of Mr Murphy's name from the Roll on the basis of that further breach.

40 I accept that there may be cases in which it would be appropriate for this Court to accept an undertaking of the type proffered. But this is not such a case.

41 In summary, in my opinion the gravity of the conduct requires that the practitioner's name be removed from the Roll of Practitioners. Acceptance of the undertaking that is offered would not fit with my firm conclusion that Mr Murphy has demonstrated that he is not fit to remain a legal practitioner.

42 For those reasons I would order that the name of John Francis Murphy be removed from the Roll of Legal Practitioners.

43 MILLHOUSE J. I agree.

44 PRIOR J. I agree with the order proposed by the Chief Justice and with his reasons.