

In the Matter of Mark Robert Wakeling

Case Number: SCT/110
Date of Hearing: 25 & 26 August 2003
Appearing Before: Mr G C Fox (Presiding Member/Practitioner Member)
Mr P Short (Practitioner Member)
Ms E Jordan (Lay Member)
In Attendance: Mr J W Broadley (Clerk)
Penalty: Suspended from practice for a period of two years

Charges

1. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that in May/June 2002, in breach of his duty as a solicitor, the practitioner engaged in conduct which mislead, or was likely to mislead the Supreme Court, or a Registrar thereof, in its consideration of an application for probate in the matter of the Will of MW deceased.

Particulars

- (a) In May 2002 the practitioner acted for IP in an application to the Registrar of the Supreme Court of Queensland for a grant of probate of the Will of one MW who died on 23 April 2002, to IP as sole executor.
 - (b) In support of the said application, the practitioner prepared and filed, or caused to be prepared and filed, *inter alia*:
 - (i) an application for probate dated 20 May 2002;
 - (ii) an affidavit supporting probate application of IP sworn 20 May 2002;
 - (iii) an affidavit of publication and service of SH sworn 20 May 2002;
 - (iv) a further affidavit of IP sworn 31 May 2002.
 - (c) The said application was for probate of the Will of MW dated 29 January 1997.
 - (d) The said affidavit supporting probate deposed, *inter alia*, that the last Will of the deceased was the Will dated 29 January 1997.
 - (e) The said affidavit of publication and service exhibited notices describing the application for grant of probate as in respect of the Will dated 29 January 1997.
 - (f) On 6 June 2002 the Supreme Court of Queensland granted probate of the said Will dated 29 January 1997 to the practitioner's said client, IP, as sole executor.
 - (g) As at May 2002, and at the time of filing the application for probate and supporting affidavits, the practitioner knew that:
 - (i) on or about 13 December 2000 MW had executed a new Will;
 - (ii) that the new Will had been prepared by and execution thereof arranged by SWS, on the instructions of MW and/or her daughter-in-law, MMW;
 - (iii) there was an issue as to MW's mental capacity, as at December 2000, to execute a new Will;
 - (iv) upon the death of MW there would be a competition as to the validity of the Wills dated 29 January 1997 and 13 December 2000, and as to MW's capacity to provide instructions for a new Will.
 - (h) In breach of his duty as a solicitor the practitioner failed to inform the Supreme Court of any of the matters particularised in paragraph (g) hereof either prior to the granting of probate of the Will dated 29 January 1997 by the Court on 6 June 2002 or at all.
2. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, on or about 20 May 2002, in breach of his duty as a solicitor, he:
 - (i) prepared or caused to be prepared;
 - (ii) permitted to be sworn;
 - (iii) witnessed the execution of; and
 - (iv) permitted to be filed with the Supreme Court of Queensland;

an affidavit in support of an application for probate in the estate of MW (deceased) which affidavit was, as the practitioner well knew, false or misleading and further in that he has not, since 20 May 2002, taken any steps to put the matter right.

Particulars

- (a) In May 2002 the practitioner acted for IP in an application to the Registrar of the Supreme Court of Queensland for a grant of probate of the Will of one MW who died on 23 April 2002, to IP as sole executor.
- (b) In support of the said application, in accordance with r602 of the *Uniform Civil Procedure Rules*, the practitioner prepared, or caused to be prepared, and permitted to be filed with the Court an affidavit of IP sworn 20 May 2002.

- (c) The said affidavit was sworn by the deponent, IP, in the presence of the practitioner as witness.
 - (d) By the said affidavit, IP swore that the true and original last Will of the deceased was the Will exhibited thereto and dated 29 January 1997.
 - (e) The said affidavit was false or misleading in that the practitioner knew, at the time of preparation, execution and filing of the said affidavit, that on or about 13 December 2000, MW had executed a new Will.
 - (f) The practitioner has not, since 20 May 2002, taken any steps to put the matter right.
3. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that on 2 September 2002, in breach of his duties of candour and frankness as a solicitor, he wrote to the Queensland Law Society Incorporated ("the Society") concerning the matter of the Society's investigation of a complaint against the practitioner by SWS, which letter contained a representation which was false or misleading.

Particulars

- (a) By letter dated 26 August 2002 the Society wrote to the practitioner concerning the matter of a complaint that the practitioner had assisted his client, IP, to obtain probate of an earlier Will of MW in circumstances where the practitioner knew that MW had made a subsequent Will, the existence of which later Will was not revealed to the Court, and requested that the practitioner provide an explanation of the matters referred to in the complaint.
 - (b) By letter to the Society dated 2 September 2002, the practitioner represented, *inter alia*:

"...We advise that it was not a question of revealing the Will of 13 December 2000. We believe that the Will of the 13th December, 2000, is invalid...We note that SWS have provided us with a diary note that acknowledges that Mr & Mrs W do not have mental capacity to make a Will..."
 - (c) By letters to the practitioner dated 16 September 2002 and 14 October 2002 the Society requested that the practitioner provide a copy of the diary note provided by SWS acknowledging that Mr & Mrs W did not have mental capacity to make a Will.
 - (d) Under cover of a letter to the Society dated 14 October 2002 the practitioner provided the Society with a copy of the diary note which, contrary to the practitioner's representation to the Society of 2 September 2002, did not acknowledge that Mr & Mrs W did not have the mental capacity to make a Will.
 - (e) The practitioner's said representation to the Society of 2 September 2002 was knowingly false or misleading, or alternatively was made recklessly, not caring whether it was true or false, the practitioner having no reasonable grounds for the representation at the time it was made.
4. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, during the period 14 November 2001 to 18 February 2002, he fraudulently misappropriated trust moneys in the sum of \$14,280.99, or part thereof, the property of the estate of DML deceased, by paying the said sum from his trust account to general account and applying the same to his own use and benefit, in circumstances where the practitioner had no lawful entitlement to the said sum.

Particulars

- (a) At all material times the practitioner acted for the executors of the estate of DML deceased.
- (b) Between 14 November 2001 and 18 February 2002, the practitioner transferred estate funds totalling \$14,280.99, as particularised hereunder, from his trust account to his general account for costs and outlays ("the said payments");

(i)	14 November 2001	\$5,940.00
(ii)	19 November 2001	5,500.00
(iii)	18 February 2002	2,840.99
		\$14,280.99
- (c) At the time of each of the said payments:
 - (i) the executors had not authorised the payment, the practitioner had not rendered an account to the executors in respect of the payment and the practitioner had no other lawful entitlement to the payment; and
 - (ii) the payment (and the accumulative payments) grossly exceeded a reasonable charge to the estate, as at the time of such payment, for professional services then rendered by the practitioner on behalf of the estate.
- (d) By the said payments, the practitioner fraudulently misappropriated trust moneys up to the sum of \$14,280.99, mixed the same with his own moneys, and applied same to his own use and benefit.
- (e) On 18 September 2002 the trust deficiency of \$14,280.99 was restored by the practitioner:
 - (i) rendering a bill of costs to the executors of the estate in the sum of \$10,039.02 for professional services rendered on behalf of the estate; and
 - (ii) refunding the sum of \$4,242.08 from the general account to the credit of the estate trust ledger.

5. In the alternative to charge 4 that the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that he, being a solicitor and trustee of property, namely trust moneys, dealt with that property in breach of the terms of the trust and in breach of s8 of the *Trust Accounts Act* by, without authority, or any other lawful entitlement, intermingling the property with his own property and thereby applied the same to his own use and benefit.

Particulars

- (a) On the dates appearing in the Schedule hereunder, the practitioner withdrew the sum of \$14,280.99, the property of the estate of DML, from the trust account to the general account for costs and outlays, in breach of s8 of the *Trust Accounts Act*, and without having any lawful entitlement thereto.

Date	Amount
14 November 2001	5,940.00
19 November 2001	5,500.00
18 February 2002	2,840.99
	\$14,280.99

- (b) The said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use and benefit until 18 September 2002, when the practitioner caused the trust deficiency to be restored in the manner particularised in paragraph (e) of charge 4 above.
6. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, on 7 October 2002, in breach of his duty as a solicitor, the practitioner produced a trust account statement to his client executors in the matter of the estate of DML which statement contained representations which were, as the practitioner well knew, false and misleading.

Particulars

- (a) At all material times the practitioner acted for NL and MdN as executors of the estate of DML deceased.
- (b) On 19 November 2001 the practitioner paid the sum of \$5,500 of estate funds from his trust account to his general account for costs and outlays.
- (c) On 18 February 2002 the practitioner paid the further sum of \$2,840.99 of estate funds from his trust account to his general account for costs and outlays.
- (d) At the time of the payments referred to in particulars (b) and (c) above, the practitioner had no lawful entitlement to the said trust moneys.
- (e) Under cover of a letter dated 7 October 2002, to each of his executor clients, the practitioner provided a "*Trust Account Statement which shows the incoming and outgoing moneys in this matter*", which trust account statement provided, *inter alia*:

Trust Account Statement

Re: Estate of DML

Date	Particulars	Debits	Credits	Balance
...				
19/11/01	Paid WL professional costs and outlays	1,257.92		6,270.15
...				
18/02/02	Paid WL professional costs and outlays	1,674.99		5,408.08

- (f) The said trust account statement was false and misleading, in that, as the practitioner well knew at the time of its production:
- (i) on 19 November 2001, the sum of \$5,500 and not the sum of \$1,257.92 had been paid to WL for costs and outlays;
- (ii) on 19 November 2001, the trust balance was \$2,028.07 and not \$6,270.15;
- (iii) on 18 February 2002, the sum of \$2,840.99 and not the sum of \$1,674.99 had been paid to WL for costs and outlays;
- (iv) on 18 February 2002, the trust balance was \$116.60 and not \$5,408.08.
7. In the alternative to charge 6 that the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, on 7 October 2002, in breach of his duty as a solicitor, the practitioner produced a trust account statement to his client executors in the matter of the estate of DML, which statement was given recklessly, not caring whether its contents were true or false.

Particulars

- (a) The Society repeats and relies upon the matters particularised in paragraphs 6(a) to 6(f) of charge 6.
- (b) The practitioner had no reasonable grounds for producing the trust account statement on or about 7 October 2002 which contained the entries for 19 November 2001 and 18 February 2002 respectively.

8. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, in July 2001, in breach of his duties of candour and frankness as a solicitor, the practitioner engaged in conduct which misled, or was likely to mislead the Queensland Law Society Incorporated ("the Society") in its consideration, during the course of a s31 examination of the practitioner's accounts, of the transaction file of K.

Particulars

- (a) On or about 19 June 2001, during the course of an examination of the practitioner's accounts pursuant to s31 of the Queensland Law Society Act, Mr Hourigan, an accountant in the employ of the Society, called for and examined the practitioner's transaction file of K sale to DEQPL, in which the practitioner acted for the seller, K.
- (b) During the course of the said transaction, Mr Hourigan identified and brought to the practitioner's attention a shortfall of \$1,100 in trust funds held on behalf of the client K as a consequence of:
- (i) the transfer on 4 October 2000 of trust funds of \$1,100 to the practitioner's general account for costs and outlays;
 - (ii) an underpayment of \$1,100 by the purchaser upon settlement of the transaction on 31 October 2000.
- (c) On or about 19 June 2001 the practitioner advised Mr Hourigan that he would remedy the said trust shortfall by the immediate deposit of \$1,100 from his general account to the trust account, and that he would attempt to recover the sum of \$1,100 from the purchaser.
- (d) By letter to Mr Hourigan of 4 July 2001 the practitioner further advised Mr Hourigan, *inter alia*:
- "We refer to the above matter and confirm that [the practitioner] deposited \$1,100 into the trust in favour of K as the settlement figures and the contract amount was incorrect.*
- We have written to the purchaser's solicitors and they have now confirmed that they will be paying us the amount of \$1,100 which will then be refunded to K on or about 1st August 2001."*
- (e) In consequence of the practitioner's advices of 19 June 2001 and 4 July 2001, the Society, by Mr Hourigan, believed that the practitioner had rectified the trust shortfall of \$1,100 identified by Mr Hourigan at the time of his examination of the practitioner's accounts, and that the practitioner would, in due course, account to his client, K for the said trust balance.
- (f) The practitioner's said advices were misleading, as, in November 2002, Mr Hourigan undertook a further s31 examination of the practitioner's accounts, during the course of which he again called for and examined the transaction file of K, which examination revealed that:
- (i) on 21 June 2001 the practitioner had, in accordance with his advices to Mr Hourigan, transferred the sum of \$1,100 from his general account to his trust account resulting in a balance of \$1,100 in the trust ledger; and
 - (ii) on 4 July 2001 the practitioner had, however, re-transferred the sum of \$1,100 from his trust account to his general account, resulting in the trust ledger again having a nil balance.
- (g) In breach of his duties of candour and frankness, the practitioner failed, at or about the time of his letter to the Society of 4 July 2001, or at any time thereafter, to inform the Society that he had, on 4 July 2001, re-transferred from his trust account to his general account the sum of \$1,100 which he had informed the Society had been paid into his trust account in rectification of the said trust shortfall.
9. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that, in breach of r86 of the *Rules of the Queensland Law Society Incorporated*, and, in breach of his duty as a solicitor, he did, on or about 13 August 2002, borrow for his own personal use the sum of \$10,000 from his client, IP.

Particulars

- (a) The practitioner acted for IP, HW and KW as sellers pursuant to a contract for the sale of land dated 6 June 2002.
- (b) On 18 June 2002 the practitioner, as the deposit holder named in the contract, received the sum of \$10,000 into his trust account being deposit moneys payable by the buyers pursuant to the contract.
- (c) By written authority dated 9 August 2002 the said IP authorised the practitioner to pay the sum of \$10,000 held by the practitioner to his general account for his "*general use*", such sum to be repaid by the practitioner "*at a future date to be determined*".
- (d) On 13 August 2002, the practitioner paid the said sum of \$10,000 from his trust account to his general account (the "said borrowing") and applied same to his own use.
- (e) Rule 86 of the *Rules of the Queensland Law Society Incorporated* provides that a practitioner shall not borrow money from a client except in certain excepted circumstances provided for therein. The said borrowing by the practitioner from his client IP was not a borrowing within the excepted circumstances provided for by r86.
- (f) In breach of his duty to his client IP, the practitioner:
- (i) thereby mixed the affairs of his client with his own affairs;
 - (ii) thereby preferred his own interests to those of his client;
 - (iii) thereby acted in circumstances of conflict between the interests of his client and himself;
 - (iv) failed to explain to his client the existence and nature of the conflict of interest referred to in paragraph (iii) above;

- (v) failed to advise his client to obtain independent legal advice with respect to the loan or alternatively, to insist that his client obtain independent and informed advice;
 - (vi) failed to ensure that his client was aware of every circumstance that was or might be relevant to the decision to lend; and
 - (vii) failed to take any step or steps to secure the repayment of the said loan to him by his client whether by mortgage, caveat or otherwise howsoever.
10. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice in that he, being a solicitor and trustee of property, namely trust moneys, dealt with that property in breach of the terms of the trust and in breach of s8 of the *Trust Accounts Act* by, without authority, or any other lawful entitlement, intermingling the property with his own property, and thereby applied the same to his own use and benefit.

Particulars

- (a)
 - (i) On 14 September 2000, the practitioner received the sum of \$1,100 into his trust account from BS, being deposit moneys payable by BS's client, DEQPL, pursuant to a contract for the sale of land dated 14 September 2000 between DEQPL as buyer, and the practitioner's client, K, as seller.
 - (ii) The practitioner was named in the said contract as deposit holder. Settlement of the contract was effected on 31 October 2000.
 - (iii) Prior to settlement, on 4 October 2000, the practitioner withdrew the said deposit moneys of \$1,100 from the trust account and paid same to his general account for costs and outlays, in breach of the terms of the trust and in breach of s8 of the *Trust Accounts Act* and without having any other lawful entitlement thereto.
 - (iv) The said moneys were mixed with the practitioner's own moneys and applied to the practitioner's own use and benefit until 21 June 2001 when, following a Queensland Law Society audit, the practitioner caused the trust deficiency to be restored by repaying the said sum to the trust account.
 - (v) On 4 July 2001, the practitioner again withdrew the said sum of \$1,100, then the property of his client K, from the trust account to the general account as a "refund" in breach of s8 of the *Trust Accounts Act* and without having any lawful entitlement thereto.
 - (vi) The said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use and benefit until on or about 20 December 2002 when, following a further Queensland Law Society audit, the practitioner caused the trust deficiency to be restored by refunding the sum of \$1,100 to his client K from his general account.
- (b)
 - (i) On 18 June 2002, the practitioner received the sum of \$10,000 into his trust account, being deposit moneys payable by MV & LV pursuant to a contract for the sale of land dated 6 June 2002 between them as buyers and the practitioner's clients, IP, HW and KW as sellers.
 - (ii) The practitioner was named in the said contract as deposit holder. Settlement of the contract was effected on 30 August 2002.
 - (iii) Prior to settlement, on 13 August 2002, the practitioner withdrew the said deposit moneys of \$10,000 from the trust account and paid same to his general account for his own use, as a loan from the said IP, in breach of the terms of the trust and in breach of s8 of the *Trust Accounts Act* and without having any other lawful entitlement thereto.
- (c)
 - (i) On 18 July 2001 the practitioner withdrew the sum of \$3,030, the property of his client Anderson from the trust account to the general account for costs and outlays, in breach of s8 of the *Trust Accounts Act* and without having any lawful entitlement thereto.
 - (ii) The said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use and benefit. The said trust deficiency has not been rectified or restored.
- (d)
 - (i) On 20 May 2002 the practitioner withdrew the sum of \$353.22, the property of his client G, from the trust account to the general account for costs and outlays, in breach of s8 of the *Trust Accounts Act* and without having any lawful entitlement thereto.
 - (ii) The said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use and benefit until on or about 20 December 2002 when, following a Queensland Law Society audit, the practitioner caused the trust deficiency to be restored by refunding the sum of \$353.22 to his client G from his general account.
- (e)
 - (i) On 17 July 2002 the practitioner withdrew the sum of \$1,939.05, the property of his clients McG and N from the trust account to the general account for costs and outlays, in breach of s8 of the *Trust Accounts Act* and without having any lawful entitlement thereto.
 - (ii) The said moneys were thereby mixed with the practitioner's own moneys and applied to the practitioner's own use and benefit until the trust deficiency was restored:
 - as to the sum of \$700, on 24 July 2002 by the rendering by the practitioner to the clients of a bill of costs; and
 - as to the sum of \$139.05, on 21 October 2002 by the practitioner refunding the same to his clients; and
 - as to the sum of \$1,100 on 11 November 2002 by the practitioner refunding the same to his trust account as unexpended stamp duty.

11. That the practitioner is guilty of professional misconduct or unprofessional conduct or practice, in that he, being a solicitor and trustee of property, failed to keep, operate and conduct his trust account in a proper and professional manner, and engaged in the respects particularised hereunder, in breaches of the *Trust Accounts Act 1973* and the *Trust Accounts Regulation 1999*.

Particulars

- (a) (i) On 18 September 2002, in breach of s8(1) of the *Trust Accounts Act* and s10(1) of the *Trust Accounts Regulation 1999*, the practitioner caused a payment to be made from the trust account in the matter of the estate of DML in the sum of \$79,698.00, in circumstances where the amount of the payment was \$1,166.00 more than the amount of cleared funds held in the account for the said matter;
- (ii) the said trust deficiency was restored on 30 September 2002 by the deposit of general account funds of \$1,166.00 to the trust account.
- (b) In breach of Division 4 (ss8 and 9) of the *Trust Accounts Regulation 1999*, the practitioner has failed, from February 1999, to maintain a trust account deposit book and failed to retain any records of the deposit of moneys into his trust account.

Appearances

- (a) For the Council of the Queensland Law Society Incorporated:
Mr R G Perrett, Solicitor of Messrs Clayton Utz Solicitors
- (b) For the Practitioner:
Mr A J Macsporrán of Counsel instructed by Messrs Dearden Lawyers
- (c) For the Complainant:
There was no appearance on behalf of the complainant, RSW

Findings and Orders

- The Tribunal grants leave to the Queensland Law Society Incorporated to amend the Notice of Charge as follows:
 - In charge 2 in the second last line of the first paragraph by inserting the words "or ought to have known" after the words "well knew";
 - In the first paragraph of charge 10 in the third line after the words "terms of the trust" by inserting the words "....., the dealing in the case of particular (c) having occurred dishonestly"
 - In paragraph 10(c)(i) in the first line by inserting "dishonestly" after the word "practitioner".
 - In charge 10(d)(i) and (ii) by deleting where it appears "\$353.22" and substituting "\$41.89".
- The Tribunal orders that all evidence contained in Dr C's report and adduced orally in these proceedings relating to the child of the practitioner not be published.
- The Tribunal finds proved the charges which are set out in the reasons below and that those charges amount to professional misconduct. The Tribunal finds the practitioner guilty of professional misconduct.
- The Tribunal suspends the practitioner from practice for a period of two years.
- The Tribunal further orders that the practitioner shall not apply for a certificate as a legal practitioner until he has provided the Queensland Law Society Incorporated with a certificate from a psychiatrist approved by the Queensland Law Society Incorporated certifying as to his fitness to practice.
- The Tribunal further orders that the practitioner shall satisfactorily complete a Practice Management Course approved by the Queensland Law Society Incorporated before applying for a principal's level certificate.
- The Tribunal further orders that for a period of five years after recommencing practice, the practitioner shall practise only as an employee or in a partnership.
- The Tribunal further orders that the practitioner pay the costs of and incidental to these proceedings including the costs of the Clerk and the recorders, such costs to be agreed, or failing agreement to be assessed by Monsour Legal Costs Pty Ltd.
- The Tribunal further orders that the suspension be stayed for a period of one month.

Reasons

The charges

Charge 1 relates to engaging in conduct misleading or likely to mislead the Supreme Court in its consideration of an application for probate. That charge is admitted.

Charge 2 relates to causing to be prepared and sworn, and witnessing the execution of and filing of an affidavit in support of, an application for probate, that the practitioner knew or ought to have known was false and misleading.

On the practitioner's own evidence, he was aware of the existence of the later Will and the correspondence regarding that Will. We find that the practitioner knew that the affidavit was misleading. We find that the practitioner well knew that the affidavit in support of probate was false or misleading.

Charge 3(a), (b), (c) and (d) are admitted.

Charge 3(e) relates to the practitioner's representation to the Society regarding a file note by SWS. It must have been obvious to the practitioner that his response to the Society must have been given to SWS for comment. Accordingly, we find that the representation was made recklessly, not caring whether it was true or false. We do not find that it was made knowingly.

Charge 4 relates to an allegation of fraudulently misappropriating trust money in the sum of \$14,280.99. The accountant, T, gave evidence. We find T to be a witness of credit. He deposes to the existence of the duplicate accounts at the time of his involvement in the practice. We cannot say when these duplicates came into existence. The practitioner says they were in existence at the time they are dated and that he believed that those accounts had been sent out.

There is no clear evidence that the accounts were not in existence at that time. The fact that the practitioner thought they had been sent and in fact were not is not inherently incredible, given the state of his office practices at the time.

The Tribunal cannot find on the *Brigginshaw* Test that the practitioner fraudulently misappropriated those trust funds.

The practitioner admits charge 5 relating to dealing with trust monies in breach of s8 of the *Trust Accounts Act*.

The practitioner admits charge 7 relating to the production of a Trust Account Statement to his client executors, which statement was given recklessly, not caring whether its contents were true or false.

The practitioner admits charge 8, alleging that he engaged in conduct which misled or was likely to mislead the Queensland Law Society.

The practitioner admits charge 9 relating to the borrowing of funds from his client in the sum of \$10,000.

The practitioner admits charge 10(a), (b), (d) as amended, and (e), which relate to various breaches of s8 of the *Trust Accounts Act*.

In relation to charge 10(c), we have heard a great deal of evidence surrounding the coming into existence of the account which relates to the sum of \$3,030 withdrawn from the Trust Account. The account can only have come into existence some time after the event; a sufficient time after the event for the practitioner to have forgotten that he had already billed the conveyance and to have forgotten when the hearing of the Magistrates Court application actually took place. The practitioner cannot have believed when he took the money that he had a present entitlement to it.

Accordingly, we find charge 10(c) proved in that the practitioner dishonestly withdrew the sum of \$3,030 from his Trust Account without having any lawful entitlement.

Charge 11 is admitted.

We find the charges proved or admitted amount to professional misconduct. We find the practitioner guilty of professional misconduct.

Penalty

In the normal course one might regard a striking off as the appropriate consequence of the findings we have made. We are reminded however by the NSW Court of Appeal in *Jauncey v Law Society of NSW* (NSW Court of Appeal, 654 of 1988) that suspension is an avenue we must explore and further, that the jurisdiction exercised by this tribunal is protective in nature, not punitive.

When we look at the practitioner's actions in misleading the court, we find the misconduct could only ever have had temporary effect. His acquiescence in the demands of his client in drawing and witnessing the misleading affidavit (and then filing the affidavit and failing to advise the court of the existence of the later will) could only ever have given the client temporary advantage. The practitioner knew of the involvement of the other solicitors and knew that his application for probate must come to their notice. The practitioner must have known, had he ever stopped to consider the consequences of his behaviour, that those solicitors would inevitably complain, the court would be appraised of the true position, and the complaint would result in the prosecution now before us. We cannot say that the practitioner's conduct was part of a considered plan to permanently hide from the court the true state of affairs.

Although we do not in any way minimise the seriousness of his behaviour, the practitioner's misconduct in relation to his trust account reflects a similar lack of awareness of the consequences of his actions. These offences occurred in the context of an accounting system that had broken down, compounded by clumsy attempts to reconstruct documentation that should have been, but was not, in existence when it ought to have been, coupled with denials to the Law Society as to the true state of affairs. There is nothing he has done of any substance that he could not have achieved lawfully, had he applied himself properly.

The borrowing from his client reflects a basic lack of awareness of the Rules of the Society. There was no suggestion that the client was a person whose will was easily overborne, or that he exercised any inappropriate influence over her. It is a matter that would normally warrant a significant fine.

The practitioner's misconduct took place over a two-year period. Prior to this he had been in practice on his own account for seven years and there is no suggestion of any failing in his professional responsibilities during this period. He was able to establish and grow a successful practice.

In the period immediately prior to his misconduct he suffered a number of events in his personal life which can only be described as highly traumatic. His situation was exacerbated by major practice difficulties and an underlying medical condition.

Dr C gave evidence of significant mental illness relevant to the practitioner's conduct during the period to which the offences relate. Indeed the practitioner's behaviour is not explicable otherwise. We accept Dr C's evidence.

However much sympathy one might feel for the practitioner's personal circumstances we find that the nature of the offences warrants a substantial period of suspension. In reaching this view we have considered the effect of the suspension of a sole practitioner, and the consequences to his family. We need to be satisfied as to the practitioner's fitness to practice at the conclusion of the period of the suspension (*QLS v Carberry; A-G v Carberry* [2000] QCA 450).

On the evidence before us, and the practitioner's demeanour while giving evidence, we are satisfied that compliance with the following orders will achieve this result.

The Society is appealing the Tribunal's findings and orders.