

IN THE SUPREME COURT  
STATE OF MISSOURI

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IN RE: )  
 )  
JOHN C. DAVIS, ) Supreme Court No. SC92110  
 )  
RESPONDENT )

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**RESPONDENT'S BRIEF**

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**STATEMENT OF JURISDICTION**

Respondent, John C. Davis, accepts Informant's statement of jurisdiction.

## STATEMENT OF FACTS

### Background

Respondent supplements Informant's Statement of Facts with significant facts relevant to the appeal.

Respondent and his wife, Jane, were married in 1966. They have two adult children.

Respondent has been active in a number of professional organizations including the Missouri Bar Association (App. 85) (where he has served on the Probate and Trust Committee in various capacities), The Kansas Bar Association (App. 85), The American Bar Association (where he participated on the Real Property, Probate and Trust Committee writing portions of study papers several times), The Estate Planning Society of Kansas City (App. 85) (where he held several offices including President and was a member of the board), the Kansas City Estate Planning Symposium (App. 85) (has served as president and is currently on the board), The American College of Trust and Estate Counsel (ACTEC) (App. 85) (where he participates on several national committees and chaired one committee several times). He is in Who's Who in the World, Who's Who in America, and Who's Who in American Law. He is recognized as a "Super Lawyer" in Ingram's Magazine. He has given numerous professional lectures on estate planning topics and has authored portions of books on estate planning topics and published by West.

He has also been active in a number of civic and charitable organizations including the Village Presbyterian Church (App. 85), a 4,000-member church (elder, deacon, and foundation board), Heart of America Counsel, Boy Scouts of America (board member), UMKC Trustees (App. 85) (board member and officer) (this organization supports the University of Missouri-

Kansas City), Johnson County Community College Foundation (App. 85) (board member and chair of Planned Giving Committee), Nelson-Atkins Museum Planned Giving Council (App. 85), Children's Mercy Hospital Planned Giving Counsel, and Kappa Sigma's Gamma-O Educational Foundation (board member and officer). He has volunteered his time for a number of other organizations, two of which are Pleasant Green Baptist Church and Cross Lines, both in Kansas City, Kansas, which provide hot meals for people who cannot afford their own. He has helped with food preparation, serving and delivery.

Respondent attended the University of Kansas where he received his Bachelor of Arts degree in 1965. App. 85. He attended and graduated with a juris doctorate degree from the University of Michigan Law School in 1968. App. 85. He is admitted to practice in the states of Missouri and Kansas and before the United States Tax Court. App. 85. Upon graduation from law school, Respondent practiced for the entirety of his legal career with the law firm of Stinson, Mag & Fizzell now Stinson Morrison Hecker LLP. App. 21-22.

Respondent's client, in the matter that results in this complaint, was Dorothy Neville. App. 137. She was married twice, and she did not have children. App. 137. Her second husband, Homer Neville, to whom she was married for a significant number of years, had two daughters and seven grandchildren. App. 137-38. She and his family did not communicate with each other, and she provided in her estate planning documents to leave her property to her husband's grandchildren. App. 138-40. She enjoyed music and considered changing her estate plan to benefit charity, but she did not make a decision to do that. She asked Respondent to be her successor trustee and agent under her powers of attorney since she did not have family or close friends whom she wished to name in those capacities. App. 38, 75 & 138.

Ms. Neville after having several strokes became unable to take care of herself. Her financial matters and medical care required extensive time. App. 139-44.

Dr. Peterson, the psychiatrist who examined Respondent, indicated that Respondent had Avoidant Personality Disorder. App. 107. That diagnosis is described in Informant's brief and includes a pervasive pattern of social inhibition, feelings of inadequacy and hypersensitivity to negative evaluation. App. 107.

In 2008 and early 2009, Respondent was representing clients in two matters that had difficult issues with possible malpractice implications which caused him much concern. App. 83, 104. At the same time he was under pressure from his wife about financial matters. App. 101. The combination was very stressful for him. App. 111. He also was drinking alcohol in the evenings and occasionally to excess. App. 108.

One of the legal matters involved drafting errors by an associate at the law firm (App. 104), which involved the rule against perpetuities. This matter eventually was resolved by a reformation action in an appropriate state court in Texas, and his firm paid the expenses of the case of about \$5,000. App. 104. The other case involved a sophisticated issue involving whether assets in a decedent's trust that should be exempt from estate tax would instead be subject to that tax. App. 104. The matter was eventually resolved without any tax. App. 104. Respondent reported these to the firm's general counsel as required by firm policy, but the firm did not provide assistance in resolving the matters. App. 104. The stress from these issues and of Jane's pressure over money wore on Respondent. App. 83, 101, 111. At the same time his son was being divorced in Texas where he lived with the Davis' only grandchildren. App. 83.

**POINT RELIED UPON**

**THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR THREE YEARS BECAUSE, WHILE DISBARMENT IS MOST OFTEN THE APPROPRIATE SANCTION IN A MISAPPROPRIATION CASE, RESPONDENT PRODUCED EVIDENCE IN MITIGATION SUFFICIENT TO WARRANT LENGTHY SUSPENSION IN THAT AN INDEPENDENT MENTAL HEALTH PROFESSIONAL DIAGNOSED RESPONDENT AS SUFFERING FROM A MENTAL DISORDER AND ALCOHOL DEPENDENCE AT THE TIME OF THE MISCONDUCT AND OTHER SUBSTANTIAL MITIGATING FACTORS ARE PRESENT.**

*In re Belz*, 258 S.W. 3d 38 (Mo. banc 2008).

*In re Ehler*, 319 S.W. 3d 442 (Mo. banc 2010).

**ARGUMENT**

**THE COURT SHOULD SUSPEND RESPONDENT'S LICENSE WITH NO LEAVE TO APPLY FOR REINSTATEMENT FOR THREE YEARS BECAUSE WHILE DISBARMENT IS MOST OFTEN THE APPROPRIATE SANCTION IN A MISAPPROPRIATION CASE, RESPONDENT PRODUCED EVIDENCE IN MITIGATION SUFFICIENT TO WARRANT LENGTHY SUSPENSION IN THAT AN INDEPENDENT MENTAL HEALTH PROFESSIONAL DIAGNOSED RESPONDENT AS SUFFERING FROM A MENTAL DISORDER AND ALCOHOL DEPENDENCE AT THE TIME OF THE MISCONDUCT AND OTHER SUBSTANTIAL MITIGATING FACTORS ARE PRESENT.**

There are compelling mitigating factors in this matter. Respondent was under pressure resulting from two matters he was handling and those had issues of possible malpractice by the firm. He was under pressure from his wife about financial matters. They had more than sufficient assets to make their tax payments, but he wanted the payments to be out of sight of his wife. The amount was repaid with interest.

An independent physician diagnosed Respondent with disorders mentioned above in the facts and alcohol dependence. Respondent has been involved in regular personal counseling, marital counseling, and alcohol counseling with MOLAP.

He will be 69 years of age on March 4 of this year. He has had an excellent career, and has no previous disciplinary matters. He has given his time to the profession through work on various bar committees and organizations of professionals in the estates and trust practice area. He has given his time to the community and those less fortunate.

Supreme Court Rule 5.285(c) provides that the physician who examines the attorney must be an “independent, licensed mental health professional.” Dr. Peterson is that. Respondent had not seen Dr. Peterson for any purpose prior to the examination made by Dr. Peterson, a psychiatrist licensed to practice medicine in Missouri. Informant did not ask to have another evaluation prepared by a different physician.

Dr. Peterson prepared a twenty-one-page evaluation that is dated March 7, 2011. In that evaluation Dr. Peterson stated that Respondent has a mild to moderate Avoidant Personality Disorder and alcohol dependence.

*In re Belz*, 258 W.3d 38 (Mo. banc 2008) involved similar circumstances, and in that case the Court concluded that mitigating circumstances were such that an appropriated discipline was suspension of Mr. Belz’s license to practice for three years. The court concluded that the mitigating circumstances were such that disbarment was not appropriate or required. Respondent’s facts are even more compelling.

Respondent accepts Informant’s invitation to discuss Dr. Steven E. Peterson’s report dated March 7, 2011, which was made a part of the stipulation between Informant and Respondent submitted to the Disciplinary Hearing Panel on August 30, 2011. Following the hearing, the panel recommended that Respondent be subject to an indefinite suspension without leave to apply for reinstatement for three years from the date of the final order.

Informant offered no evidence to contradict the factual recitations and expert opinions offered by Dr. Peterson. Dr. Peterson is a medical doctor and a diplomat of the American Board of Psychiatry and Neurology since 1992. He holds a sub-specialty in Forensic Psychiatry since 1994, recertified in March of 2003. He qualifies as an independent licensed mental health professional under Supreme Court Rule 5.285. The uncontradicted evidence presented by his

report presents compelling mitigating evidence of the Respondent's mental disability envisioned by the ABA Standards for Imposing Lawyer's Sanctions, (1992) which this Court has looked to for guidance in imposing discipline in *Belz* and subsequently *In re Ehler*, 319 S.W. 3d 442 (Mo. banc 2010).

Dr. Peterson recounts Respondent's history of treatment with psychoanalyst, Dr. Lubbers Ph.D. over almost 10 years and his sessions with clinical social worker Peg Donley up to and through the time of the occurrence which gives rise to the charge at issue.

Dr. Peterson recounts Respondent's social history, work history and on the job tensions and travails, all of which he considers in his report as he reaches a diagnosis that the Respondent suffers from mild to moderate Avoidant Personality Disorder recognized by DSM IV-TR along with alcohol dependence likewise recognized in the axis system of DSM-IV-TR.

In addition to diagnosing Respondent's mental disorders, Dr. Peterson relates them to Respondent's professional misconduct establishing their substantial relationship to the conduct which is described in the evidence.

The doctor also opines that if the Respondent follows his recommendations as delineated in his report the recurrence of the kind of behavior that led to the charge which has been dealt with by the OCDC and Respondent is not likely to reoccur. The record establishes that the Respondent has accepted the recommendations of Dr. Peterson and is engaged in cooperating with the Missouri Lawyers Assistance Program with respect with his alcohol abuse situation (App. 86) and is being seen regularly by Dr. Bearce Psy.D. for marital therapy recommended by Dr. Peterson (App. 118-19) and is being seen by Dr. Bonnie Buchele, Ph.D. for individual therapy. App. 27.

Dr. Peterson's report, fully accepted by the Office of the Chief Disciplinary Counsel and endorsed by the hearing panel by its stipulation, qualifies the Respondent for mitigation as outlined in Supreme Court Rule 5.285 and the ABA Standards Regarding Mental Disability as a mitigating factor.

Respondent has been diagnosed with disorders that impaired his ability to make good decisions at the time of his borrowing of client funds. Respondent also has shown that he had a mental evaluation to explain the out-of-character behavior. He has followed the recommendations of the examining physician with good results, and continues to be involved in treatment. He has been active with volunteer activities in support of the practice such as committee service, leadership of professional organizations, lecturing on professional topics, contributing to writing scholarly articles; and has been active in civic and charitable activities. He has practiced in excess of forty years. He has made restitution. Respondent is apologetic for his actions and regrets very much that this occurred.

#### CONCLUSION

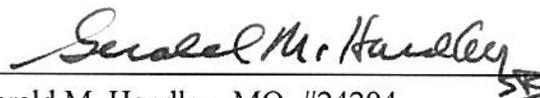
While disbarment might be appropriate in some circumstances, Respondent has shown mitigating factors described above that should be considered. In a prior case substantially similar to this one, *In re Belz*, the Court concluded that suspension was appropriate. In Respondent's situation suspension of his license for three years is likewise appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing has been sent by e-filing on this 21st day of February, 2012 to:

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CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 2,303 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. Symantec Endpoint Protection software was used to scan the disk for viruses and that it is virus free.



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