91PR1270 (6/20/96)

PROBATE COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 91PR1270

IN THE MATTER OF

The Estate of Dan Kubby, Deceased.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

This matter came before the Court for hearing on May 6 through May 17, 1996 on a Petition for Removal of Personal Representative and Trustee and Appointment of Successor Personal Representative and Co-Trustees. The Petition, filed by the decedent's three adult children, Mitchell S. Wagner ("Mitch"), Danielle Shayne Kubby ("Shayne") and Eric K. Kubby ("Eric") (collectively the "Petitioners"), seeks removal of Jack G. Shaffer ("Shaffer") as Personal Representative of the Estate of Dan Kubby and as Trustee of the Dan Kubby Revocable Trust and its sub-trust accounts. Having reviewed the pleadings, considered the evidence, and applied the governing law, the Court makes the following Findings of Fact, Conclusions of Law, and Orders:

FINDINGS OF FACT

Dan Kubby died in Denver, Colorado on June 29, 1991 survived by his wife, Jan Kubby, and by Petitioners.

Prior to and during his final illness Dan Kubby, through an attorney, David Klein, Esq. ("attorney Klein"), prepared and amended an estate plan consisting of three frequently-used estate planning techniques:

An irrevocable life insurance trust ("the life insurance trust") formed between Dan Kubby as Settlor and Theodore Pomeranz, his accountant ("accountant Pomeranz"), as trustee, into which Dan Kubby transferred ownership of six (6) existing life insurance policies. See Exhibit 14. Under applicable tax law, this transfer offered Dan Kubby the opportunity to remove the face amount of these life insurance policies from the array of assets otherwise subject to federal estate tax at his death--if he survived that transfer by three years--while providing a potential source of cash for payment of estate liabilities (including taxes);

A revocable trust set out in the Trust Agreement--Third Amendment (Exhibit 27) between Dan Kubby as Settlor and himself and Shaffer as Trustees ("the Kubby Trust") in which the

majority of Dan Kubby's post-death dispositive plan, including the ultimate division and distribution of his assets after his death, was expressed; and

A will and codicil containing a few instructions relating to estate administration, including the apportionment of estate taxes, describing his feelings and intentions regarding his spouse and children, nominating and providing for the succession of Personal Representatives and directing the Personal Representative to distribute Dan Kubby's residuary probate estate to the trustee of the Kubby Trust to "be administered under its terms". See Exhibits 11 and 23. Shaffer was nominated as Personal Representative.

On July 17, 1991 Shaffer was appointed by the Registrar of this Court to serve as Personal Representative of the estate of Dan Kubby in an informal proceeding. Shaffer continued as sole trustee of the Kubby Trust, which as of Dan Kubby's death became irrevocable. Shaffer registered the trust in this Court, Trust No. 11724, on July 15, 1991. Shaffer hired attorney Klein to provide legal representation for the estate and trust and hired the accounting firm of Pomeranz and Zeplin, where accountant Pomeranz was a partner, as accountants for the estate and trust. Shaffer thereafter selectively sought and followed advice of his counselors.

The life insurance trust agreement provided that, after Dan Kubby's death, his son Mitch and his friend William Beattie would serve with accountant Pomeranz as co-trustees. On July 9, 1991 the three co-trustees designated accountant Pomeranz as their agent, naming him the sole trustee authorized to perform ministerial duties for the trustees of the life insurance trust. See Exhibit 326. Pomeranz registered the life insurance trust with the Denver Probate Court pursuant to C.R.S. 15-16-103. Subsequently, William Beattie resigned and Arthur Seiden became the successor trustee to serve with Mitch and accountant Pomeranz.

The evidence established that accountant Pomeranz, acting on behalf of the trustees, collected the aggregate life insurance policy proceeds of $712,900 on behalf of the life insurance trust. See Exhibit 329. Because Dan Kubby had died within the three-year limitation period, an amount equal to the value of these proceeds was required to be included in the value of Dan Kubby's taxable estate for purposes of calculating his estate tax due; the actual cash proceeds, however, remained in the life insurance trust for disposition.

The provisions of the irrevocable life insurance trust required that the trustees divide the assets of the trust into three equal shares, one each for Mitchell, Eric and Shayne. Each share was to be administered as a "simple trust," that is, all income is payable currently to the child for whose benefit a share is held. One-third of the share held for the benefit of each child is to be distributed to him or her at age 30, one-half of the balance of that share is to be distributed to the child at age 35, and the balance of that share is to be distributed to the child at age 40, thereby terminating the trust.

The life insurance trust also contained the following provision:
Article VI
Estate Administration

On the death of Settlor the Trustee is authorized, in its sole discretion, to purchase at fair-market value, and retain in the form in which received, as an investment for the trust estate, any property forming a part of the probate estate of Settlor or Settlor's spouse and any property owned by any revocable trusts created by Settlor and Settlor's spouse during their lifetimes. The Trustee may, in its sole discretion, make loans, properly and adequately secured and bearing a reasonable rate of interest, to Settlor's spouse or to any revocable trusts created by Settlor and Settlors' spouse during their lifetimes.

The Kubby Trust agreement included language creating and providing for the administration of the Marital Trust, the Vacation Residence Trust, and the Family Trust with Shaffer as trustee. The Marital Trust was not funded with assets from the probate estate or from the Kubby Trust but was to consist of an Individual Retirement Account ("IRA") owned by Dan Kubby during his life and made payable at his death in the amount of $1,000,000 directly to the Marital Trust. In accordance with the provisions of the Trust and the beneficiary designation under the contract establishing the IRA $1,000,000 from the IRA was to be paid out to the Marital Trust over a period of years calculated using Jan Kubby's actuarial life expectancy. Although the distributions from the IRA to the Marital Trust are subject to income tax as paid, the $1,000,000 amount payable to the Marital Trust was exempted from federal estate tax in Dan Kubby's estate by virtue of the marital deduction.

The Marital Trust was described as a Q(ualified) T(erminable) I(nterest) P(roperty) trust. A QTIP trust allows the surviving spouse to receive the income from the trust property throughout her lifetime while providing that the accumulated principal at her subsequent death would be distributed to remaindermen designated by the decedent. In this case, Dan Kubby provided that the principal of the Marital Trust could be distributed to Jan Kubby during her lifetime if the trustee (Shaffer) determined that (a) the income was inadequate and (b) the distribution of principal was necessary or advisable "to adequately provide for [her] health, support, maintenance and education." At the death of Jan Kubby, the remainder of the Marital Trust is to be distributed: 60% to the Family Trust and 40% to Jan Kubby's children by a prior marriage, Loy Ann Searle and Scott W. Searle. Although Shaffer made several substantial advances of principal to Jan Kubby from the estate and the Marital Trust; the evidence establishes that he failed to apply the standards of distribution set out in the trust.

The Vacation Residence Trust was to consist of the interest owned by Dan Kubby in a condominium in Vail, Colorado and a sum of cash sufficient to permit the Petitioners and their respective families and Jan Kubby and her children to use the residence without cost to them on a rotating basis taking into account the rental income the trustee could generate from the condominium during the ski season. A majority of the living members of a class consisting of Jan Kubby and Petitioners can consent to a sale of the condominium and premature termination of the Vacation Residence Trust. All proceeds from such a sale are payable to the Family Trust. In any event, the Vacation Residence Trust terminates at the later of Jan Kubby's death or Shayne's attaining age 40 when title to the trust property vests absolutely in Petitioners. As of the date of the hearing in May, 1996 the evidence established that the Vail condominium continued to be an asset of the estate; the Vacation Residence Trust had not been funded with the property or the maintenance fund. At the time of the hearing Shaffer had engaged a professional property manager to manage the property although he had previously paid Jan Kubby for this service.

The Family Trust was divided into Shares A, B and C, with Shaffer as trustee for all three shares. Share A, consisting of a lump sum of $75,000 cash, was for the benefit of Scott W. Searle, Cherie Searle (former spouse of Scott), and Loy Ann Searle (the "Searles"). The residuary assets of the Family Trust were to be distributed one-third to Share B for the benefit of Eric and the balance to Share C for the benefit of Mitch and Shayne, in equal sub-shares.

Share A of the Family Trust provided that each of the Searles was entitled to a single lump sum distribution of $25,000 to be used solely for the purchase of a residence, provided that the closing of such purchase occurred no later than five (5) years after the date of death of

Dan Kubby. None of the Searles had any interests or benefits in the estate except those provided in the remainder of the Marital Trust and as beneficiaries of the Vacation Residence Trust and they had no interests or benefits in the Family Trust.

Each of the Searles purchased a residence prior to the date the hearing commenced and each requested and received the distribution of $25,000. Although Share A was not funded at the time of any such request, Shaffer made the distributions to each of the Searles directly from the assets of the estate. Shaffer, attorney Klein, and accountant Pomeranz testified that the transfers were made because the specific event (i.e., the closing on a residence purchase) had occurred within the prescribed time and failure to satisfy the distributions could have resulted in claims by the Searles against Shaffer or the estate for the loss of the opportunity to purchase a specific residence.

Because Share A had not been funded at the time of the distributions to the Searles, attorney Klein advised Shaffer to secure an agreement from each of the Searles that the respective distributions were each subject to refund if there were unsatisfied liabilities of the estate after the distributions were made. Attorney Klein further recommended that the "refunding agreement" in each case be secured by a deed of trust on the residence to be purchased or by a guaranty from a parent or responsible party. See Exhibit 605. Shaffer made the distributions from the estate without the recommended conditions or documentation.

Shares B and C of the Family Trust are to be funded from the remaining IRA owned by Dan Kubby and by all of the property from the estate and the Kubby trust not otherwise disposed of. It is from these shares that all costs of administration, taxes, and other estate and trust liabilities will be deducted, thereby imposing the ultimate burden of the estate's liabilities and the costs of estate and trust administration on Petitioners. Although the trust instrument required that the various sub-trusts, including Shares B and C, be created "on the death of Settlor," see Article VI, Section 1, at the time of the hearing Share B and Share C were not funded or were not funded sufficiently to have made distributions to Petitioners in amounts approximating those made to Jan Kubby or to the Searles.

Share B of the Family Trust is exclusively for the benefit of Eric Kubby and is to hold one-third of the residuary portion of the Family Trust. Eric is to receive $500 per month during the term of the trust, plus additional amounts for his medical and psychiatric expenses. The trustee is also authorized to distribute additional amounts to Eric for health, support, maintenance and education. Although distributions to Eric are subject to satisfactory results on drug tests, the evidence established that Shaffer did not consistently require such tests. One third of the balance in Share B will be distributed to Eric at age forty.

The Trustee of Share C has discretion to distribute income and principal to Shayne and to Mitch from their respective shares; one third of the balance in the trust is to be distributed at age 30 to the one for whom the share was held; one half of the balance is to be distributed at age 35 and the remaining trust property is to be distributed at age 40. As of the time of the hearing Mitch was 39 years of age and entitled to two-thirds of his share; the evidence established that Shaffer had not distributed two-thirds of Mitch’s share to him.

The assets owned by Dan Kubby at the time of his death and subject to the provisions of his will (the "estate") consisted primarily of stocks and bonds, bank accounts, the life insurance and IRA(s) referred to above, and sizable real estate holdings, as follows:

Four properties owned outright, in fee, by Dan Kubby:

Bridge Street, Brighton

8014 East Iliff (under contract for sale executed prior to Dan Kubby's death)

Grand Junction filling station (also under contract for sale)

the Vail condominium (see ¶ 7 above)

In addition to the properties 100% owned by Dan Kubby, he "co-owned" eleven (11) properties:

Havana Shopette

Jefferson Arms Apartments

Fox Street Warehouse

Ogden Nines Apartments

Park Humboldt Apartments

Lamplighter Village

The Mine Shopping Center

Ralston Road retail

Monument Village land

Dry Creek Center

Dozens Restaurant property

Dan Kubby had no direct ownership interest in three additional properties (Wadsworth, Globeville, and 48 Steele) which were 100% owned by an entity created by Dan Kubby known as the Kubby Family Limited Partnership ("KFLP"). Dan Kubby, and then his estate at his death, owned a 10% interest in KFLP as a general partner and approximately a 60% interest as a limited partner. KFLP had been established by Dan Kubby during his lifetime as a vehicle through which he had made gifts of limited partnership interests to Petitioners and to his daughter-in-law, Renee Wagner.

When the estate of Dan Kubby was opened in July 1991, the relations between Shaffer and Petitioners were cordial and cooperative. Petitioners supported Shaffer's appointment as fiduciary to manage the estate and the Kubby trust. Petitioners expressed support and appreciation for the role and work of the Personal Representative. There was no evidence that Petitioners imposed any resistance or impediment to a proper, efficient administration of the estate and the trusts. Shaffer met with Petitioners in Vail, Colorado in August 1991,

when the children came to Colorado a few weeks after Dan Kubby's death to scatter the decedent's ashes.

In early 1992 Petitioners began requesting specific information about the estate and the trusts. Mitch wrote to Shaffer in 1992 and in 1993 requesting information. See Exhibits 611 and 715. Some information was sent to Petitioners, but no fiduciary accountings or inventories in Court-approved formats were prepared or presented to any of the Petitioners. The Petitioners testified that Shaffer did not answer their questions satisfactorily and that they did not understand the documents they were sent by Shaffer, by his secretary Heidi Foster, or by attorney Klein or accountant Pomeranz and their staffs. The evidence supports their testimony. Shaffer cannot recall what, if any, information he personally gave to Petitioners. He testified that it took him until 1993 to "get organized."

In December 1994, three and one-half years after Dan Kubby’s death, Shaffer filed an Inventory with the Court and in January 1995 Shaffer filed Interim Accountings for the estate covering the period from date of death until 1994. Evidence at the hearing established that these accountings were incomplete and hence failed to satisfy the requirement of full disclosure. Petitioners continued to advise Shaffer that they were not sufficiently informed. The Court finds that they acted reasonably.

A veritable blizzard of documents was available during the hearing. Some, perhaps all, of these documents were sent to Mitch or to all three Petitioners. The Court finds that even if every document received into evidence at trial had been given to Petitioners, Petitioners lacked the necessary financial and legal sophistication to decode these reports and accounting records which reflected incomplete reports, interrelated transfers, reports within reports, various fiscal year ends versus calendar year ends, cash versus accrual accountings, and a vast quantity of bare information, disorganized, unintelligible and meaningless. The Court rejects Shaffer’s analysis that Petitioners could have garnered all of the information they wanted or needed by scrutinizing and assembling, into an integrated whole, the fragments of data they were provided.

In early- to mid-1993 Mitch retained a Denver attorney to advise him as to his rights and the rights of his siblings concerning their father’s estate and the trust assets. In August 1993 Petitioners scheduled a meeting with Shaffer. At the meeting Petitioners requested that Shaffer provide the requested information and change his methods of operation to include better reporting to Petitioners about the estate, the trusts, and the limited partnership. When Shaffer declined to change his procedures, Petitioners suggested that he resign his fiduciary positions. Shaffer refused. Subsequently Shaffer hired separate counsel to "defend [his] position."

In September 1993 Petitioners’ counsel met with Shaffer and renewed the request for information about the estate and related entities. Correspondence was exchanged and some additional information was provided. See Exhibits 842 and 844. Petitioners found the information insufficient and in the course of the investigation preparing for the September meeting and in their follow up, specific concerns came to the attention of Petitioners and their counsel which are included in the Petition as grounds for removal. Petitioners learned, for example, that Shaffer had made "gifts" to non-estate, non-trust beneficiaries, including his secretary, and that substantial sums were being spent by Shaffer on "meal meetings."

In June 1994 the present Petition to remove Shaffer was filed with the Court. Petitioners allege that Shaffer has failed to settle and distribute the estate in accordance with the terms of the will and the Colorado Probate Code in a manner as expeditiously and efficiently as is

consistent with the best interests of the estate. They allege that Shaffer has failed to perform acts required by the Code, specifically the filing of an inventory and service of the inventory on Petitioners after they requested it in accordance with C.R.S. § 15-12-706, and has failed to provide full and complete accountings to them. According to the Petition, Shaffer has mismanaged the estate in violation of C.R.S. §15-12-709 by a) improperly hiring unqualified property managers, including Jan Kubby, whose interests are in conflict with Petitioners; b) improperly using estate funds to pay taxes and expenses of a restaurant tenant; c) failing to develop a plan for payment of estate taxes in a timely, cost-efficient manner, and d) demonstrating favoritism to certain beneficiaries. Petitioners assert that Shaffer's removal would be in the best interests of the estate. As to the trusts, Petitioners allege that Shaffer has failed to administer the trusts expeditiously for the benefit of the beneficiaries as required by C.R.S. §15-16-301 and has failed to observe the prudent person standard as required by C.R.S. §15-16-302. They cite Shaffer's failure to render accountings within 90 days of the request of any beneficiary as required by the trust agreement, Article XI, Section 4. Petitioners question the propriety of the timing and amounts of Shaffer's compensation of himself as personal representative and as trustee and conclude that Shaffer's acts have created hostility and ill will between him and Petitioners to such an extent that future cooperation between them is improbable. After receiving notice of the Petition, Shaffer continued to pay fees to himself, to his personal counsel, to attorney Klein, and to accountant Pomeranz without notice to or consent of Petitioners and without further order of Court without regard to the provisions of C.R.S. §15-12-611(2).

Shaffer's stated priority after the death of Dan Kubby was to hold the various properties owned by the estate until their value increased. Initially he met with several representatives of Fuller & Company, a local real estate company, to determine whether real estate was likely to increase or decrease in value and if so, when these increases or decreases, in the opinion of the Fuller representatives, were likely to occur. Shaffer calculated that any market appreciation the real property enjoyed would offset the expenses incurred by the delay in estate administration. The evidence established that he took the following additional steps:

As to the properties solely owned by Dan Kubby at death, Shaffer liquidated the two properties (Iliff and Grand Junction) which were already under contract at Dan Kubby's death. He continued to hold the Vail condominium as an asset of the estate; he did not fund the Vacation Residence Trust. He did not liquidate the Brighton property nor did he use it to fund the Family Trust; it remains where Dan Kubby left it -- in the probate estate.

As to the co-owned properties, Shaffer essentially continued the relationship with the co-owners that had been utilized by Dan Kubby. One of Dan Kubby's co-owners, Robert Howsam, testified that Howsam, Dan Kubby, and the other co-owners involved did not have written agreements reflecting their partnership or joint-venture relationships and instead relied on ownership of the property as tenants in common and informal, oral agreements as to sharing of rights and responsibilities. Among the properties the identification of the co-owners varied; not all of the same co-owners shared interests in all of the properties and the interests were not always the same for any one co-owner as to all of the co-owned properties. Shaffer continued to operate similarly to Dan Kubby in two important ways:

first, none of the relationships were reduced to written form, it being the preference of the co-owners to conduct their business informally through co-tenancy and

second, Shaffer continued to manage the properties for 2% of the net rentals. This commission, which never exceeded $20,000 in any one year between 1991 and 1996, was

deposited to the estate's account. Contrary to the relationship enjoyed by Dan Kubby, there were no additional commissions or other compensation received by Shaffer for his services to the co-owners regardless of his time devoted to management tasks. Shaffer billed some of the time he spent on these efforts to the estate. On some of the co-owned properties, the estate, therefore, paid a disproportionate share of the co-owners' expenses. In one instance (Fox Street) Shaffer negotiated an overriding commission to offset the disproportionate contribution being made by the estate, but the ultimate sale price was not sufficient to support the commission.

Shaffer's interests were aligned with the co-owners rather than with the estate individually. Robert Howsam testified that he and other co-owners "hired" Shaffer to "act for the investors." According to Howsam, Shaffer was working for "all the co-owners." Shaffer actively managed the co-owned properties, working at less compensation than Dan Kubby, much to the pleasure and satisfaction of the other co-owners. Shaffer reported regularly to the co-owners, met with them annually in Vail, and hired property managers to service the properties. From this position of irreconcilable conflict Shaffer's vision of his fiduciary obligations to the estate, the trust, and Petitioners was hopelessly obscured.

Shaffer hired Jan Kubby to serve as property manager for some of the estate properties. Shaffer concluded that she was familiar with the properties and overall performed a beneficial service to the estate. He admitted that she was not held to the same standard of performance as the professional property managers. Both she and Shaffer failed to follow up on the insurance on the Lamplighter property which resulted in potential harm to the estate. Shaffer set Jan Kubby's compensation at approximately $14,000.00 per year. In December 1992 Petitioners objected to Shaffer's use of Jan Kubby as property manager citing her lack of expertise and potential conflict, but Shaffer continued to use and compensate her. Jan Kubby was not managing any estate properties as of the date of the hearing.

Shaffer had expressed a desire to take his compensation from the estate/trust in the form of ownership positions in Dan Kubby's real estate. Although he was advised that this was inappropriate and would conflict with his duties as a fiduciary, the evidence supports a finding that Shaffer continued to see himself as an active "partner" in various of the Kubby real estate holdings rather than as a fiduciary whose obligations to the estate and to Petitioners put him inherently in conflict with the co-owners.

As to KFLP, the four limited partners were presented with an analysis of their alternatives as a result of the death of the general partner. Subsequently, the KFLP agreement was redrafted with the estate of Dan Kubby, represented by Shaffer as Personal Representative, holding the 10% general partnership interest and the management authority over the three properties owned by KFLP.

Prior to his death Dan Kubby had formed an S-Corporation known as Seven-Three Ventures, Inc., d/b/a/ Lakewood Omelette Parlor, to operate a restaurant business in the Wadsworth property owned by KFLP. The principals in Seven-Three Ventures included Dan Kubby, Jan Kubby, Eric Kubby, and Jan Kubby's son Scott Searle. One month prior to Dan Kubby's death KFLP and Seven-Three Ventures entered into a lease agreement. At the time of his death Dan Kubby and Jan Kubby owned 100% of the stock in Seven-Three Ventures as joint tenants. Eric Kubby's interest in Seven-Three Ventures was abandoned by Eric before Dan Kubby's death. Neither the estate, the Kubby trust, nor Petitioners here had any interest in Seven-Three Ventures after the death of Dan Kubby. After Dan Kubby's death and before the trial, Jan Kubby transferred all of her interest in the company to her son Scott Searle.

The lease document reflects that the first month's rent was paid in advance. Subsequent rent is part of the conflict which gives rise to this removal action. The evidence is uncontroverted that the Petitioners and Shaffer discussed some waiver of the rent due from Seven-Three Ventures to KFLP at the August 1991 meeting in Vail as a technique to secure a tenant for the Wadsworth property, an occupied property being more marketable, according to Shaffer, than a vacant one. Petitioners agreed in writing to permit Shaffer to waive the rent otherwise due from Seven-Three immediately after their father's death. See Exhibit 434. Petitioners discussed but did not impose a time limit on the waiver in their written agreement.

The Omelette Parlour was not a viable business. KFLP did not collect rent from Seven-Three Ventures during the second half of 1991, during 1992, or during part of 1994. Some of the rental amounts collected in 1993 and 1994 were less than the amount recited as due in the lease agreement. Some of the other financial obligations of the Omelette Parlour and Seven-Three Ventures under the lease were paid gratuitously by personal representative/trustee Shaffer as general partner of KFLP (real estate taxes, utilities, etc.) without Petitioners' knowledge.

KFLP had insufficient cash assets to meet its financial obligations without the receipt of the full rental income from the Omelette Parlour operation. Shaffer, as the Personal Representative of the estate, made cash advances from estate funds to himself as general partner of KFLP to sustain KFLP. No evidence was offered that Shaffer made efforts to market the Wadsworth property while it was occupied by the Omelette Parlour business. The Court concludes that Shaffer made no other reasonable effort to create liquidity for KFLP by sale of its assets. The Court finds that Shaffer actually rejected or avoided opportunities to sell 48 Steele Street, one of the KFLP properties, and concealed information Petitioners were entitled to review regarding prospects for its sale.

The Omelette Parlour operation and hence Seven-Three Ventures was subsidized from the portion of the estate in which neither Jan Kubby nor Scott Searle had an interest until the business entirely failed, when Scott Searle sold the restaurant furnishings and fixtures on his own account leaving unsatisfied obligations flowing to KFLP.

The evidence establishes that the Petitioners, clearly, and Shaffer, probably, did not fully understand or appreciate the complexity of the flow of moneys between KFLP and Seven-Three Ventures and among the shareholders of Seven-Three Ventures, the partners of KFLP, and the estate. According to the testimony of Shaffer and his advisors, the rationale for the flow of money from the undistributed portion of the estate to Jan Kubby and Scott Searle was that an occupied building was more marketable than a vacant one. There is insufficient evidence from which the Court can make a finding that Shaffer marketed the property during the period the estate was subsidizing the Omelette Parlour business.

Shaffer was oblivious or indifferent to the conflict between his duties as personal representative to the estate, the demands of KFLP on the estate's assets, and the economic benefits flowing from the estate to Scott Searle through Seven-Three Ventures. Shaffer's intentional deferral of liquidation of the real estate owned by KFLP contributed substantially to the losses suffered by the estate and by Petitioners and constitutes mismanagement.

In early 1992 Shaffer requested from the Internal Revenue Service an extension of time to file the Federal Estate Tax Return, Form 706, which was due 9 months after the date of Dan Kubby's death. Along with the request for an extension to file, the Personal Representative is required to pay the estimated estate tax due in full. Shaffer had insufficient funds on

hand in the estate to make the required payment. No evidence was offered during the hearing to support a finding that Shaffer made any genuine effort to create the necessary tax dollars by sale of assets. The will of Dan Kubby and the trust refer to the payment of tax and to the apportionment of tax but neither document directs or provides for tax deferral. There was no evidence that the estate was managed by Shaffer in a way to make possible a timely and efficient payment of the tax liability. Instead, Shaffer held the properties, hoping for market appreciation and in some cases, at considerable expense to Petitioners' share of the estate, while the deadline for paying the estate tax approached. Ultimately, Shaffer resorted to two alternatives to satisfy the tax obligation:
first, he borrowed $710,000 from the Life Insurance Trust (see paragraphs 2a and 4c above); and

second, he asked the Internal Revenue Service to extend the time for payment of the estate tax. Attorney Klein testified that, although he has extensive experience in advising personal representatives and counts numerous substantial estates among his clients, he had never previously requested an extension to pay estate tax, and in this estate, his effort to do so failed.

On March 18, 1992 attorney Klein on behalf of Shaffer wrote Mitch Wagner and William Beattie as co-trustees of the life insurance trust, proposing a loan from the trust to the estate to help pay the estate taxes which were due on March 21, 1992. The letter (Exhibit 338) proposed a $710,000 loan at 4.8% interest for 30 months and concluded:
"I anticipate that the principal would be paid by means of transfer to the trust of estate property once accurate values have been determined."

Klein wrote a confirming letter to Shaffer the following day. See Exhibit 776. The two trustees agreed to the loan and it was documented on March 26, 1994.

A promissory note was executed to reflect the loan from the life insurance trust to the estate. Although the trust agreement required it (see ¶ 4c above), the note did not reflect security and the testimony supports a finding that no security was offered or given by Shaffer to support the note. The interest rate of 4.8% was suggested by the accountants as the lowest allowable rate between related parties under the applicable tax provisions.

The appraisals of the property required for the Form 706 were completed in June 1992.The note was not paid at that time by transfer of property. The note matured on September 1994; except for a small repayment of the principal, the note was not paid at that time by cash of by transfer of property. Under the terms of the note the stated interest rate increases to 8% on default. In spite of demand for re-payment, as of the time of the hearing the note remained unpaid. See Exhibit 365. A suit for enforcement of the note against the estate is pending in Denver District Court case no 96CV321.
Shaffer cites several reasons for refusing to pay the note:

the payment would require either transfer or sale of appreciated property, both of which would trigger taxable capital gains;

uncertainty as to the proper rate of interest; and

the collection lawsuit.

In addition to failing fully to pay the principal of the note, Shaffer failed to keep the interest payments current. After the interest went into arrears a plan was devised to "account for" the interest as though it were being paid. Each time Shaffer made a distribution from the estate to one of the Petitioners it was treated for estate/trust purposes as though it had come from Share A, Share B, or Share C of the Family Trust and the distribution standards set forth there were applied in the communications between Shaffer and Petitioners. For accounting and tax purposes, however, each such distribution was treated as though the estate had made an interest payment on the note to the life insurance trust and this trust had distributed its income through to Petitioners.

This accounting jumble was noted with alarm by Judge Benton in his February 24, 1995 "Advisory Opinion." Petitioners testified credibly that they did not fully comprehend the scheme until they heard all of the trial testimony. The Court cannot conclude when Shaffer understood the flow of money from the estate to the Family Trust to the life insurance trust to Petitioners but he clearly did not on October 6, 1993 when he wrote to tell Shayne she would no longer receive distributions to fund her health insurance. See Exhibit 845. The letter reveals substantial confusion on Shaffer's part about the source and characterization of the distributions.

This intricate accounting system, necessitated by Shaffer's failure to service the debt obligation as he had contracted to do and his failure to fund the shares of the Family Trust in a timely manner, impacted particularly negatively on Eric who was entitled to mandatory distributions from both the Family Trust and the life insurance trust. While Mitch and Shayne could receive their mandatory income distributions from the life insurance trust by Shaffer's apparent exercise of trustee discretion under the Family Trust, Eric was basically denied his $500 per month mandatory income from the Family Trust each time a payment was accounted for as a mandatory life insurance trust payment.

From an accounting perspective these "set off" or "pass around" distributions can undoubtedly be reconciled and some had already been prior to the hearing; however, the Court finds that the need for and the perpetuation of this tax and accounting quagmire resulted from Shaffer's mismanagement of and inexcusable delay in settling the estate, including his obligation to pay the estate's taxes and debts. What began, at the time of Dan Kubby's death, as a relatively simple, common estate had become, by the date of the trial, a complex maze of disagreeable alternatives.

There is insufficient evidence from which the Court could conclude that any of the beneficiaries knowingly consented to the acts of Shaffer. Eric and Shayne were minimally knowledgeable before or at the time of their father's death about his assets. Neither was given sufficient information or instruction from which he or she could be expected to understand the complex tax and accounting methods being applied. Mitch was, at the time of his father's death, a practicing attorney and was more knowledgeable and financially sophisticated. There was no evidence that he had any special knowledge or expertise in estates, trusts, taxes, or fiduciary accounting principles. Mitch's efforts to alert Shaffer to the extent of Petitioner's confusion or lack of information were not addressed. The evidence clearly establishes that Petitioners moved from satisfaction to dissatisfaction with Shaffer's performance as their level of confusion and frustration increased. When Mitch and his siblings hired counsel to advise them, Shaffer met them with hostility and denied distributions from the estate to pay their attorney's fees.

Shaffer advised the Petitioners that he intended to forego compensation as personal representative of the estate for six months, followed by compensation at the rate of

$12,000 per year. He assured Petitioners he was performing services "as a friend of the family." Shaffer wanted to defer the compensation he would receive because he was obliged to divulge his income to his own creditors under a consent arrangement in his personal bankruptcy. The evidence establishes that Shaffer reported to the IRS total compensation to himself of $36,000.00 collected from the estate. See Exhibits 133 and 35. In his 1994 deposition (page 121, lines 19-21) he testified that he had been paid in full through the end of 1993.

CONCLUSIONS OF LAW

C.R.S. § 15-12-611 provides the Court may remove a personal representative only for cause. Cause exists if (a) removal would be in the best interests of the estate or (b) "it is shown that [the] personal representative . . . intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office." C.R.S. § 15-12-611(2) (1987).

C.R.S. § 15-16-201 empowers this Court to remove a trustee. In reviewing this petition the Court has considered the common law standards along with the duties and liabilities of trustees imposed by C.R.S. § 15-16-301 et seq.

Neither C.R.S. § 15-12-611 nor C.R.S. § 15-16-301 et seq. assign the burden of proof. The Court assumes, arguendo, that Petitioners have this burden. Petitioners have carried their burden.

In considering the acts and failures to act about which Petitioners complain in urging Shaffer's removal, the Court is struck, not by the egregiousness of any one act or omission, but by the general confusion and mismanagement of the estate which has been their cumulative result. In re Estate of Jefferson, 344 P.2d 179, 180 (1959).

The acts and omissions of Shaffer constitute cause for his removal pursuant to C.R.S. § 15-12-611(2), because he has mismanaged the estate and has failed to perform duties pertaining to his office. See also, e.g., in re Estate of Senz, 417 So. 2d 325, 327 (Fla. App. 1982) (reversing trial court's refusal to remove personal representative where the petitioners had shown several instances of mismanagement, that the lines of communication between the parties had collapsed, and that the beneficiaries had lost confidence in the personal representative); Matter of Estate of Stone, 727 P.2d 508, 511 (Mont. 1986) (affirming removal where over four and one-half years had elapsed and the estate had not been closed, and the personal representative failed to provide timely accountings, file timely estate tax returns, and keep the beneficiaries reasonably informed).

Shaffer's basic strategy, which was to continue to operate Dan Kubby's "business" while deferring payment of taxes, debts, and distributions is inconsistent with the most fundamental premise of the Colorado Probate Code, which is:

to promote a speedy and efficient system for settling the estate of the decedent and making distribution to his successors . . . .

C.R.S. § 15-12-102(2)(c) (1987).

Shaffer failed to tend to the basic duties of a personal representative to wrap up the affairs of the decedent, promptly and efficiently discharging the obligations of the decedent and the estate including taxes, and providing all of the estate's beneficiaries with the assets or interests to which they were entitled. Instead, by Shaffer's own admission, he deliberately deferred the administration of the estate while he continued to operate the real estate business. While a personal representative's business judgment is not to be supplanted by the Court's when the efficient and proper administration of the estate is being carried out, here Shaffer's pattern of indifference to his fiduciary obligations and the consequences this indifference visited on Petitioners provides cause for removal pursuant to C.R.S. §15-12-611(2).

Shaffer failed to liquidate sufficient properties to meet the estate's financial obligations in a timely manner. The record is devoid of evidence that reasonable efforts would not have yielded, in liquid assets, the amounts reported by Shaffer to the IRS as the fair market value of Dan Kubby's interests in some or all of these properties. If there were buyout agreements among the co-owners, Shaffer failed to explore them. Instead, Shaffer carried on Dan Kubby's business, and showed little or no inclination to wrap up the estate.

No evidence was presented that Shaffer failed, or that he tried, to find a private or public market for sufficient properties to pay KFLP's obligations without taking cash from the estate; to pay off the note to the life insurance trust in time and in full; to service the interest obligations he undertook; or to pay the taxes in a timely fashion. These failures created the problems around which this Petition centers. This creation of confusion, litigation, and conflict supports the conclusion of this Court that Shaffer should be removed pursuant to C.R.S. §15-12-611(2). Jefferson, 344 P.2d at 180.

Shaffer's responsibility was to pay the taxes when due and his failure to promptly pay the taxes renders him personally liable for the consequences. Vredenburgh v. Jones, 349 A.2d 22, 43 (Del. Ch. 1975); Harper v. Harper, 491 So. 2d 189, 201 (Miss. 1986); Estate of Gerber, 140 Cal. Rptr. 577, 582 (Cal. App. 1977); In re Estate of Chrisman, 761 S.W.2d 285, 287-88 (Mo. App. 1988); Matter of Estate of Bartlett, 680 P.2d 369 (Okla. 1984). Whether Shaffer's efforts were earning the estate a return greater than the amount of interest accruing in favor of the taxing authorities does not mitigate since a personal representative is not permitted to speculate with tax monies due. Vredenburgh, 349 A.2d at 22.

Shaffer failed in several important ways in managing information about the estate and the trusts. First, Shaffer breached his duty to ascertain key information necessary in the proper performance of his duties. Brent v. Smathers, 547 So. 2d 683, 686 (Fla. App. 1989). Shaffer appears not to have understood the consequences of the exchange of real property between the life insurance trust and the estate; he failed to understand his basic responsibility to act with efficiency and dispatch in wrapping up the estate administration and he did not sufficiently educate himself as to the duties and obligations of a fiduciary.

Although Shaffer had authority to employ attorneys and other advisors both in his capacity as personal representative and as trustee, he may not assert reliance on the advice of the advisors as a defense to claims of mismanagement of the estate or trusts. C.R.S. § 15-12-715 (1987); C.R.S. § 15-1-804(2)(x) (1987 & 1992 Supp.) (fiduciary may "employ attorneys or other advisors to advise or assist the fiduciary in the performance of his duties or, instead of acting personally, employ one or more agents to do any ministerial act required to be done by the fiduciary in the performance of his duties"). Moreover,

employment of an attorney or accountant does not relieve Shaffer of his personal responsibility for diligent administration of the estate and trusts. Brent, 547 So. 2d at 686. Nor does his passive acceptance of the advice of the attorney or accountant for the estate and Trusts relieve him of liability for damages caused by mismanagement of the estate. Gudschinsky v. Hartill, 815 P.2d 851, 855 (Alaska 1991).

Shaffer failed to provide material information to the Petitioners in a comprehensible, usable form with respect to such matters as the advisability of the sale of 48 Steele Street, the scope of the waiver of rent from the Omelette Parlor, and the offset of income distributions from the estate and the life insurance trust. The beneficiaries cannot be deemed to have given their consent to or approval of Shaffer's actions, such consent or approval requiring full knowledge of the facts. Cf. Heller v. First Nat'l Bank of Denver, N.A., 657 P.2d 992, 998 (Colo. App. 1982); Beyer v. First Nat'l Bank of Colorado Springs, 843 P.2d 53, 58 (Colo. App. 1992).

Shaffer also failed to manage information properly by failing to properly account. Shaffer failed to prepare an estate inventory as required under the Code. C.R.S. § 15-12-706 (1987). Shaffer's testimony that it took him two years to "get organized" so as to provide Petitioners with an inventory reveals his profound lack of appreciation for the primary responsibility of a fiduciary.

Shaffer has failed, pursuant to C.R.S. §15-16-303, to keep the beneficiaries reasonably informed of the estate administration and of the trusts and their administration and, upon reasonable request, to provide accountings to the beneficiaries. Such conduct is a proper ground for removal. In re Estate of Jefferson, 344 P.2d 179 (Colo. 1959). See also, e.g., Ferguson v. Mueller, 169 P.2d 610, 612 (Colo. 1946); Matter of Estate of Lehner, 714 P.2d 130, 132 (Mont. 1986); Restatement (Second) of Trusts § 107, cmt. b (1959).

Prior to December 1994, Shaffer failed to provide any proper trust accountings in the form exemplified by the requirements of C.R.P.P. 31.1 or by the National Fiduciary Accounting Standards. Shaffer failed to state in clear and understandable terms the nature and value of trust corpus when received; any realized increases or decreases on principal; any income received; any disbursements and distributions to beneficiaries; any commissions paid; and the amount and location of any balance on hand. The administration of the Marital Trust requires precise attention to income and principal accounting because Jan is the income beneficiary and Petitioners and Jan's children are the remaindermen. Kelly v. Sassower, 382 N.Y.S.2d 88, 89 (Sup. 1976). See also Berlage v. Boyd, 112 A.2d 461, 466 (Md. App. 1955) (trustee's accounting must be precise, complete, and accurate).

Shaffer as trustee abused his discretion to invade the Marital Trust principal "as necessary" for the support of Jan Kubby in failing to consider her income and other resources. NCNB Nat'l Bank of Florida v. Shanaberger, 616 So. 2d 96, 98 (Fla. App. 1993). See also Provident Nat'l Bank v. U.S., 353 F. Supp. 1025, 1031 (E.D. Pa. 1973).

Shaffer's delay in properly administering the estate and the trusts of which they were the beneficiaries impacted disproportionately on the Petitioners. It was their share of the estate which paid Shaffer's fees as personal representative, paid interest due on unpaid taxes, paid attorneys' and accountants' fees and carried the Seven-Three Ventures. Shaffer distributed funds to Jan Kubby and the Searles, while the Petitioners waited. Shaffer's improper exercise of favoritism against Petitioners is further grounds for removal. Restatement (Second) of Trusts § 183 and § 107 cmt b (1959); Estate of Baldwin, 442 A.2d 529, 532 (Me. 1982).

The Court rejects Shaffer’s analysis that his errors of administration have been de minimus ("gifts" of estate moneys to non-beneficiaries) or have resulted in no aggregate harm (some assets have appreciated during the delay) and commends his attention to the sentiment of Mr. Chief Justice Cardozo, speaking for the New York Court of Appeals:
Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a higher level than that trodden by the crowd . . . .

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (citations omitted).

The Court concludes that the acts and omissions of Shaffer constitute cause for his removal as personal representative pursuant to C.R.S. §15-12-611(2), which supports removal when it would be in the best interests of the estate. See, e.g., Matter of Estate of Townsend, 793 P.2d 818, 821 (Mont. 1990) (inadequate inventory of the estate); Matter of Estate of Lehner, 714 P.2d 130, 132 (Mont. 1986) (failure to provide timely accounting and to notify beneficiaries of pending lawsuit); Matter of Estate of Stone, 727 P.2d 508, 511 (Mont. 1986) (failure to close estate after four and one-half years had elapsed and to timely file estate tax return); In re Estate of Senz, 417 So. 2d 325, 327 (Fla. App. 1982) (line of communication between personal representative and beneficiaries had collapsed and personal representative had committed several instances of mismanagement).

The Court further concludes that Shaffer should be removed as personal representative and trustee because the hostility and ill-feeling between Shaffer and the beneficiaries has reached such a level that future cooperation and proper administration of the estate and trusts are improbable. Matter of Estate of Malone, 597 P.2d 1049, 1050-51 (Colo. App. 1979).

Order

The Court hereby Orders:

Jack Shaffer is hereby removed as Personal Representative of the estate of Dan Kubby effective on the date of this Order. A successor personal representative will be appointed by this Court pursuant to C.R.S. § 15-12-613. The Court notes that the primary interests remaining in this estate belong to the Petitioners and, while they alone do not have priority for appointment or nomination of a successor personal representative, the Court will accord substantial weight to their views.

The Court reserves any claims by Petitioners for surcharge of Shaffer for future additional hearing. Any fee to Shaffer for administration of the estate in excess of $36,000 shall only be by agreement of Petitioners or by application to the Court, upon notice, and hearing.

Jack Shaffer is hereby removed as Trustee of the Kubby Trust effective immediately. A successor trustee will be appointed by this Court pursuant to C.R.S. § 15-16-201(a). The Court notes that the primary responsibilities of this trustee will be to wrap up the affairs of the trust, fund the Vacation Residence Trust and the Family Trust. The trust agreement

provides a mechanism for filling this vacancy which will be followed by the Court. Again, although the Petitioners do not have the only interest in this trust, the Court will accord substantial weight to their views on selection of a successor trustee if the procedure set out in the governing instrument is not followed. See this Court's opinion In the Matter of the Malkin Family Trust, Case No. 96PR317, dated June 10, 1996.

The Court reserves for ruling at a future time, after notice and hearing, any remaining issues as to fees to and surcharge of Shaffer as trustee of the Kubby Trust.

Jack Shaffer is hereby removed as Trustee of the Marital Trust. A successor trustee will be appointed by this Court pursuant to C.R.S. § 15-16-201(a). This trust has been funded as required by the governing instruments. During the hearing Petitioners and Jan Kubby agreed that a corporate fiduciary is to serve as successor trustee of this trust. Colorado National Bank or another mutually agreeable independent corporate fiduciary shall become successor trustee on the date such fiduciary files its Acceptance of Appointment with this Court.

The Court orders the successor trustee of the Marital Trust to prepare or commission the preparation of a proper, complete interim accounting of the Marital Trust, in accordance with applicable federal tax law and fiduciary accounting principles. Copies of the interim accounting shall be served on Jan Kubby and the adult remaindermen, including Petitioners. If not resolved by the successor trustee in its interim accounting, the Court reserves ruling on the proper allocation of income and principal of the Marital Trust, the reasonableness and proper allocation as between income and principal of Shaffer's trustee fees, the propriety of the principal distributions made by Shaffer to Jan Kubby from the Marital Trust, and the proper allocation of the costs of the preparation of this interim accounting.

Shaffer is hereby removed as Trustee of the Vacation Residence Trust. The Court will appoint a mutually agreed-upon successor upon receipt of an Acceptance of Trusteeship by a qualified successor trustee. If Jan Kubby, her children, and Petitioners cannot agree on a successor trustee, the selection of a successor trustee shall be as set forth in the governing instrument.

Shaffer is hereby removed as Trustee of the Family Trust (Shares B and C only). The Court will appoint a successor trustee upon receipt of an Acceptance of Trusteeship. In the case of both the Vacation Trust and the Family Trust the Court authorizes a variation from the terms of the governing instrument based upon a change of circumstances which the Court is satisfied could not have been anticipated.

Any assets of the estate or any trust titled to or under the control of Shaffer shall be assigned, transferred or conveyed to the duly appointed successor personal representative or successor trustee without hinderance or delay.

DATED June 20, 1996.

BY THE COURT

C. Jean Stewart
Judge, Probate Court