

**PROBATE COURT
CITY AND COUNTY OF DENVER, COLORADO**

City & County Building
1437 Bannock Street, Room 230
Denver, CO 80202

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In the Matter of the Trust Created by

SOPHIA H. SCOTT AND WILLIAM C. SCOTT

Trust Registration #12829

Case Number: 2000PR225

In the Matter of the Estate of

WILLIAM C. SCOTT, Deceased.

Case Number: 2000PR620

**2007 ORDER ON PETITION FOR ACCOUNTING, DAMAGES,
DISGORGEMENT AND REMOVAL OF TRUSTEE**

and

RULING ON TESTAMENTARY CAPACITY

THIS MATTER comes before the Court in regard to the trust created by Sophia H. Scott (hereinafter “Sophia” or “Sophia Scott”) and William C. Scott (hereinafter “W.C.” or “W.C. Scott”) pursuant to an Order of this Court. (This trust is hereinafter referred to as “the Scott Trust” or “the trust”). The 2000PR225 case began on a trust beneficiary’s Verified Petition for Accounting, Damages, Disgorgement, and Removal of Trustee filed February 10, 2000. The final trial on that Petition occurred in January 2007.

To date, the Court has frozen all of the remaining assets of the trust (see Findings of Fact, Conclusions of Law & Orders dated March 11, 2002); the Court has removed the respondent, Samuel “Buck” Scott (hereinafter “the Respondent”) as trustee of a sub-trust known as the Scott Family Trust (see Order dated September 20, 2000); and the Court has ordered an independent successor trustee to provide an accounting and report an explanation of funding (see Order dated September 20, 2000). Further, the Court has

surcharged the Respondent for the costs of the litigation to obtain the accounting and for the independent trustee's work to accomplish the accounting. See Order dated March 11, 2002.

The Court hereby incorporates by reference and affirms the findings and orders contained therein, as if set out in full herein, the following prior orders entered in this case, except as specifically amended or vacated by this Order:

- Order, dated September 20, 2000¹ (hereinafter the "September 2000 Order");
- Findings of Fact, Conclusions of Law, and ORDERS, dated March 11, 2002² (hereinafter the "March 2002 Order");
- AND
- Comprehensive Order, dated February 11, 2003 (hereinafter the "February 2003 Order").

The Court now makes the following additional Findings, Conclusions, and Orders:

I. FINDINGS OF FACT

Sophia Scott and W.C. Scott, now deceased,³ were survived by the Respondent, their only child, and by numerous grandchildren. The central focus of this case arises from the conflict between the Respondent and his son Mark Scott (hereinafter the "Petitioner" or "Mark"). The broader litigation extends to state district court and federal court jurisdiction over certain intellectual property associated with competing companies owned and operated by the Respondent and the Petitioner. The litigation in this Court concerns the events and circumstances surrounding the formation and administration of the Scott Trust.

¹ The mutual hostility between the Respondent and the Petitioner makes wholly inappropriate any fiduciary relationship between the two. United States v. Boucher, 735 F. Supp. 987, 1050 (Colo. 1990). While not a determinative factor in the Court's decision in this Order, their adversarial relationship confirms the soundness of the Court's previous orders removing the Respondent as trustee. See September 2000 Order.

² This Order has been appealed and on August 14, 2003 the Colorado Court of Appeals affirmed the order entering Preliminary Injunction. The mandate issued on October 14, 2003.

³ Sophia Scott died on September 20, 1992; William C. Scott died on January 29, 2000.

In 1991, the Respondent commenced conservatorship proceedings for the benefit and protection of Sophia Scott. In July 15 of that year,⁴ the Respondent presented to the Probate Court Magistrate a detailed and comprehensive financial plan in connection with his request to establish the trust in lieu of the conservatorship. This financial plan provided for a full estate plan (which is permitted under the probate code) for both, Sophia, who was incapacitated and in need of protection, and for W.C. Scott. (The financial/estate plan is hereinafter identified as the “Estate Plan”).

The terms of the Estate Plan established W.C. as co-settlor and co-trustee and established the Respondent, in his capacity as Court-appointed conservator for Sophia, as the other co-settlor and co-trustee. The Respondent represented that all of his mother’s assets had been accounted for and were reported to the Court in the Inventory filed in the conservatorship case; the Respondent represented that, if the Court approved the Estate Plan and the accompanying trust agreement (hereinafter the “W.C. and Sophia Trust Agreement”), all of the assets of Sophia Scott and W.C. Scott would be transferred into the inter vivos trust; he further represented that upon the first death (either Sophia or W.C.), the assets necessary to utilize the then-available federal estate tax exemption equivalent would be transferred into and held as the Scott Family Trust; he further represented that the balance of the assets remaining at the first death would be transferred into the marital share to be further divided into a generation-skipping transfer trust (hereinafter referred to as “the GST Trust”) and a marital trust (hereinafter the “Spousal Trust”). The amount transferred into the GST Trust, when added to the amount

⁴ The Court takes judicial notice of its case 91PR564.

transferred into the Scott Family Trust would not exceed the then-available federal estate tax generation-skipping exemption.⁵

Although presented and approved as a “revocable trust” in name, the trust, by its terms, remained revocable only for so long as Sophia and W.C. were both alive. Upon the death of Sophia, the trust became irrevocable⁶ and unamendable. See W.C. and Sophia Trust Agreement, Article 2.00 “Amendment and Revocation”.

The Court approved the Estate Plan and terminated the Conservatorship. Thus, the Respondent used the Denver Probate Court to gain control of his mother’s estate, and facilitate his appointment as co-trustee of his father’s estate. Eventually, the Estate Plan positioned the Respondent to act as the sole fiduciary for his parents’ combined estates.

Upon the termination of the Conservatorship, the Estate Plan operated without Court supervision or control. Ordinarily, the Court would not relinquish its oversight and supervisory role without assurances. In support of his petition for appointment as conservator and for approval of the Estate Plan, the Respondent represented [1] that he had no need for the assets of his parents; [2] that the assets of his parents would flow through to the grandchildren (his own children) without benefit to him; and [3] that no conflicts of interest would impede his appointment as a conservator for his mother, as a co-settlor of the trust, or as a co-trustee of the trust.

⁵ By virtue of the then-applicable federal estate tax law, it is not disputed that this amount would be \$400,000 upon creation of the GST Trust.

⁶ The Court has already ruled that two efforts to amend the trust after Sophia’s death were a nullity. See the March 2002 Order. One appropriate exception exists on record. The original trust agreement, signed and dated on June 14, 1991 provided that the Respondent would be a remainderman on May 31, 2015 when the Scott Trust (then consisting of the spousal and GST sub-trusts) ultimately terminated. On September 9, 1992, after this Court approved the financial/estate plan for Sophia and directed Respondent to implement the same, the Respondent and his father, W.C., as co-settlors and co-trustees (then permissible because Sophia was still alive) amended the Trust to change the ultimate distribution of The Scott Family Trust to eliminate Respondent as a remainderman on May 30, 2015. Because Respondent’s interest was thereby reduced and because this change mirrored the representations made to and approved by this Court on September 2, 1992, in the conservatorship case.

The W.C. and Sofia Trust Agreement, which presented to the Court for approval, contained the necessary language to create the sub-trusts described by the Respondent.

[the] Trustee shall divide the trust property allocable to the deceased Settlor (including any property allocated directly to the Settlor's separate property or one half of the joint property and any property given or transferred to the Trustee by the Settlor and any proceeds of insurance on the Settlor's life received by the Trustee) into two separate shares to be known as the "Marital Share" and the "Family Share."

The Trustee is directed to divide the Marital Share into two separate trusts—one called the GST Trust and the other named the Spousal Trust.

See Article 4.08 of The Revocable Trust Agreement of William C. Scott and Sophia H. Scott (the written agreement is hereinafter referred to as the "W.C. and Sophia Trust Agreement"). Without these representations and the accompanying language in the W.C. and Sophia Trust Agreement, the Respondent's appointment as conservator would have been doubtful. The Denver Probate Court would not permit a family member or other party with an economic interest to terminate a conservatorship in favor of an unsupervised trust absent the disclaimers and representations made by Respondent in 91PR564.

Throughout the course of this litigation, it has become obvious that the Respondent's representations were totally unreliable and that the Respondent failed to carry out his fiduciary obligations, both as conservator and as co-trustee. First, he failed to give a complete accounting of his mother's assets, namely her interest in Scott Partners, and he failed to fully transfer his mother's assets to the trust. Second, he failed to carry out the provisions of the trust that required funding of the GST sub-trust, and he failed to render a complete accounting to trust and sub-trust beneficiaries. Rather, he

obfuscated or concealed information from beneficiaries who did not enjoy a fiduciary position. Third, he used his fiduciary position and undue influence over W.C., the co-trustee, to unjustifiably and wrongfully transfer trust assets to himself or for his use at the expense of the other beneficiaries. The Court shall discuss each in turn.

a. Inventory of Sophia Scott's Conservatorship Estate and related trust –
Scott Partners and 2519 Walnut

The Court fully addressed the relevant background information concerning Scott Partners in the September 2000 Order. Scott Partners was a family limited partnership created by Sophia and W.C. (general partners) for the purpose of making gifts of limited partnership interests to their grandchildren. At various points during his tenure as conservator and co-trustee, the Respondent informed the grandchildren that Sophia and the grandchildren held interests in Scott Partners. By 2000, the Respondent claimed that he alone owned the property.

Thus, in the September 2000 Order, the Court found self dealing between Scott Partners and the Respondent with respect to Sophia's interest in the partnership. Problematically, the Court found that the Respondent failed in his duty as trustee to maintain accounts. The Court thereby ordered the appointment of a successor trustee charged with the task of, among other things, conducting an accounting of all transactions involving the Scott Trust, including the apparent transfer of Sophia's interest in Scott Partners to the Respondent. The Court required, in no uncertain terms, that the Respondent cooperate with the successor trustee in creating this accounting. See September 2000 Order pp. 2-3.

With unwavering zeal, the Respondent has consistently and belligerently refused⁷ to obey the September 2000 Order and subsequent orders requiring him to answer this seemingly simple inquiry – how he came to own Scott Partners entirely.

He did not answer the question until, during trial in January 2007, he testified at long last, “I do not know.” See Testimony of Samuel C. Scott dated Thursday, January 25.

The Respondent provided no evidence that Sophia Scott did not continue to own an interest in Scott partners on the date the Court approved creation and funding of the trust. The Respondent did, however, testify that he had “killed” Scott partners *prior* to Sophia’s death. Like the Court’s suspicion over the Respondent’s description of “treated as owned,” (see September 2000 Order) the Court is not familiar with the nature of the transaction “killed” in corporate law, tax law, trust law, partnership law, or fiduciary law. Contrary to the Respondent’s sworn testimony, evidence adduced during the January 2007 trial confirmed that after Sophia’s death, Scott Partners continued to collect income and to make distributions. See Exhibits 47, 48, 49 & 50.

There is evidence in the record that would support a conclusion that consideration passed between the Respondent and his parents in connection with the change of ownership of Scott Partners (especially as to a building located at 2519 Walnut St.). As an inducement to get the Petitioner to sign over his interest in Scott Partners to the Respondent, the Respondent represented that:

“Since we assumed this [the 2519 Walnut building was considered to be mine] to be the case, it was left to me **as a trade off for the**

⁷ This obfuscation, delay, and disobedience to the Court’s Orders reinforces the proposition that this Court justifiably removed Respondent as fiduciary for the Family Trust in 2000. September 2000 Order. The Court was further justified in pursuing an independent investigation of the circumstances of this asset. The appointment of the successor trustee served that purpose. Id.

bulk of the estate dollars being left in the trust. This is known as generation-skipping and is great for saving estate taxes, etc.” Exhibit 47 in the gray binder –the so-called “Hey Guys” letter.

While the Court is not confronted here with a decision as to whether consideration was exchanged between the Respondent and W.C. or between the Petitioner and the Respondent for the transfer to the Respondent of W.C.’s or the Petitioner’s interests in Scott Partners in exchange for the creation and funding of the GST Trust, the “Hey Guys” letter lends significant credibility to the Petitioner’s argument that, as late as 1995, the Respondent agreed that the Scott Partners’ assets remained in the partnership shares, including Sophia’s share held as part of the trust.

Under the common law, after the Respondent assumed a fiduciary relationship with his mother,⁸ and, by statute, after he was appointed by this Court as her conservator, the Respondent could not transfer Sophia’s interest in Scott Partners to himself without a Court Order. C.R.S. §15-14-422 & -423. In re Guardianship of Gaube, 14 Neb.App. 259, 707 N.W.2d 16, Neb.App., November 22, 2005 (No. A-04-1374). (Self-dealing by a conservator is permissible, but only *after* judicial finding that there is adequate reason for the transaction).

Generally, the prohibition against self-dealing does not depend upon proof of bad faith, but is absolute so as to avoid the possibility of fraud and the temptation of self-interest. It is generally immaterial to the liability of the trustee or the voidability of the transaction that the trustee acted in good faith, and paid a valuable consideration; neither is a causal connection between the trustee's self-dealing and the loss or depreciation incurred always necessary.

76 Am. Jur. 2d Trusts § 468.

⁸ Respondent testified that he had assumed the care of his mother as early as 1986 and hence would have had a confidential relationship with her that would have prohibited self-dealing.

Instead of seeking permission to make such a transfer, Respondent initially concealed Sophia Scott's ownership from the Court and then, in this litigation, first claimed he was the sole owner of Scott Partners, and then ultimately confessed that he "did not know" how he allegedly came to own his mother's interest.

The "Hey Guys" letter sheds some light on the possibility that Sophia and W.C., when both had capacity, could have structured their estate plan to shift the Scott Partners/2519 Walnut properties to their son in exchange for his agreement to implement the ultimate gift to their grandchildren as presented to and approved by the Court in the Estate Plan. However, Respondent has neither pled nor proved this bargain (except by implication in the Hey Guys letter). Therefore, the Court cannot employ mere conjecture to conclude that the Respondent now owns Sophia Scott's interest in Scott Partners. Rather, the preponderance of the evidence suggests that Sophia's interest remains in the Scott Trust to this day.

Respondent, relying on a memo written by attorney Ezer, argues that the statute of limitations bars the Petitioner's request for an accounting regarding Sophia's ownership of the interest in Scott Partners, as the two-year period according to C.R.S. § 13-80-102(1)(ii) began to run at Sophia's death on September 20, 1992. Contrariwise, the Respondent, as conservator for Sophia Scott, represented to this Court (Exhibit 12⁹) that he, as her guardian and conservator, had placed all of her assets in the trust prior to her death. Therefore, Sophia Scott's interest in Scott Partners *was, and is, an asset of the trust* and her death is immaterial; thus, no limitation period began to run at Sophia Scott's death.

⁹ Petitioner's Exhibits for January 2007 Trial, Final Accounting for period from May 31, 1991 to September 20, 1992.

The Respondent attempts to advance the date the statute would begin to run, arguing that at the time Sophia became incompetent, the partnership would dissolve and her two-year period to request an accounting began to run.

First, Sophia was not adjudicated to be incompetent until May of 1991, at which time the Respondent had been appointed as her conservator and was responsible for marshalling and protecting her assets. He was advising the Court that he had collected, identified, valued and transferred all of her assets into the Court-approved trust.

Second, C.R.S. § 7-61-121, which states a partnership is dissolved upon the insanity of a general partner, does not operate to rob the insane partner of her interest. It merely signals a change in the relationship of the partners from which the partnership may move to a “winding up” and then termination. See 1 Colo. Prac., Methods of Practice § 4.45 (6th Ed.). A termination may ensue, that is, unless the business is continued by the remaining partners, pursuant to either a right to do so in the certificate, or with the consent of all the remaining partners. In this case, we know, by virtue of the Respondent’s actions and testimony, that Scott Partners continued after Sophia Scott was adjudicated to be incompetent: first, it continued to own property, and second, the Respondent testified that as late as 1995 he was advised by his certified public accountant that Scott Partners was a continuing business. Testimony of the Respondent on Thursday, January 25.

Third, and perhaps more pertinent in the context of these proceedings, if an accounting should have been requested within two years of Sophia Scott’s adjudication of incompetence, that duty fell solely to the Respondent who was her guardian and conservator. The Respondent’s failure to bring an action for an accounting, if one was

required, should not now allow the Respondent to defeat the claims for an accounting and effectively give him a “pass” for failing to transfer Sophia’s Scott Partners partnership interest into the trust and thereafter to administer it properly as part of the trust.

The Court now concludes, unequivocally, that Sophia Scott was the owner of no less than a 10% interest in Scott partners when the Inventory of her assets was presented to this Court and when the Court ordered the Respondent to transfer all of her assets into the trust in 1991. Therefore the trust, not the Respondent, was the owner of that interest at the time of her death.

The Respondent’s representations in his final accounting filed in the conservatorship are directly at odds with the Court’s findings. The Respondent affirmatively misled the Court by failing to report this asset. That 10% interest, therefore, was properly part of the Scott Trust and, as her separate asset, was required, by the terms of the Estate Plan, to be allocated as part of the Scott Trust to the Scott Family Trust. The Court’s finding is supported and confirmed by the investigation and report of successor trustee. See successor trustee’s Report #1 (Exhibit 168 @ pp. 28-29).¹⁰

The Petitioner claims that the Respondent’s actions amount to civil theft, justifying the imposition of treble damages pursuant to C.R.S. § 18-4-405. The Court DENIES Petitioner’s claim. The Court does not reach that issue because the asset can be restored to the trust and the Scott Family Trust can be made whole.

The Court HEREBY ORDERS the Respondent to transfer to the Scott Family Trust a 10% interest in all of the assets that comprised Scott Partners on the date the Respondent was ordered by this Court, in 91PR564, to transfer all of Sophia’s assets to

¹⁰ The successor trustee filed his report in November 2003. The report consists of two books, an asset map and an asset map explanation, all of which were admitted into evidence as Exhibits 168, 169, 170 and 171.

the Court-approved trust, including but not limited to the real property investment referred to as 2519 Walnut and the other assets that comprised the assets of Scott Partners. This amount is referred to as the “Scott Partners surcharge amount.” Petitioner’s claim for attorney fees is dealt with infra.

b. Funding of the Generation-Skipping Trust

The Respondent has consistently misrepresented¹¹ to the beneficiaries and to the Court that the combined estates of his mother and his father made funding of the generation-skipping trust (hereinafter “the GST Trust”) impossible. Only when the successor trustee presented his Report did the Court learn, for the first time, that ample assets were available to fund the GST Trust; the trustees, W.C. and the Respondent, failed to carry out the provisions of the (then-irrevocable and un-amendable) trust; and the Respondent failed or refused to disclose their failure to the Court or to the other beneficiaries of the trust.

In an effort to eliminate the conservatorship in favor of the unsupervised trust, the Respondent represented to this Court: “The GST Trust will be funded with an amount equal to approximately \$400,000. This amount is calculated by taking the total generation skipping transfer tax exemption (i.e., \$1,000,000.00) and subtracting the amount funded into the Family Trust (\$600,000.00.) See Exhibit B titled Financial Plan for William C. Scott and Sophia H. Scott, bearing the stamp of “Sandra Franklin, Clerk.”

The un-rebutted evidence adduced at trial showed that the GST Trust was not funded. The failure to create and fund the GST Trust was not due to lack of sufficient

¹¹ The first instance wherein the respondent misrepresented to the Court that funding the GST trust was impossible due to insufficient funds may be found in Respondent Samuel C. Scott’s Opposition to Motion for Partial Summary Judgment, July 3, 2000. This argument was subsequently repeated on numerous occasions.

assets, as the Respondent represented to the Court after this suit commenced. Rather, the failure to fund the GST Trust was mere refusal to carry out the terms of the agreement Estate Plan and the W.C. and Sophia Trust Agreement presented to this Court. As a result, the Respondent positioned himself to appropriate trust assets for himself at the expense of his children with whom he was in conflict.

The failure to fund the GST Trust constituted a breach of fiduciary duty. It also constituted disobedience to the Court who relied on the Respondent's representations about his motives and intentions. The Respondent is, therefore SURCHARGED in the amount of \$400,000, the initial corpus of the GST Trust that he failed to create, plus interest at the statutory rate from the date of Sophia's death ("the GST Trust surcharge amount").

Affirmative Defenses. The Court rejects the Respondent's argument that the Petitioner is foreclosed from this removal and surcharge action by virtue of a statute of limitations. A trustee cannot seek protection of the statute of limitations set forth in C.R.S. §15-16-307 until an accounting or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary has been received by the beneficiary. C.R.S. §15-16-201(1).

As of March 21, 2000 the Petitioner reported to the Court that he had received "no accounting from the Respondent for, or been granted access to any records of, the Sophia H. Scott and William C. Scott Trust." See Status Report filed by counsel for the Petitioner on March 21, 2000. The Respondent rendered a partial accounting for the Spousal Trust and what the Respondent calls "The Second Codicil Trust" on August 26, 2000 pursuant to a direct Court order but same was filed after this litigation was

commenced. As of January 2007, during the trial of this matter, the beneficiaries and the independent successor trustee had yet to receive an accounting as to at least \$600,000 of trust assets. Testimony of John S. Holt, successor trustee. The Court FINDS and DETERMINES that no final account had yet been rendered by the Respondent entitling him to rely upon a statute of limitations defense on the date the Petitioner brought suit in 2000PR225.

No other applicable limitations law has been cited to the Court and no other limitations law applicable to trusts is known to the Court that would prevent the Petitioner from seeking redress. The statute of limitation defense is therefore without merit.

The Court has considered the other affirmative defenses asserted by the Respondent, including the statute of frauds, laches, consent, estoppel, waiver, release, affirmance, property not subject to trust, respondent not trustee at time of alleged incidents, trustee's actions authorized by trust agreement and applicable laws, successor trustee selected by Settlor, absence of interested parties, dead man's statute and failure to state a claim. Most affirmative defenses have been abandoned and not argued or addressed at trial. The affirmative defenses that were not abandoned are addressed throughout this Order.

c. Capacity to Exercise Power of Appointment

In case 00PR620 the primary remaining unresolved issue focuses on the capacity of W.C. Scott on December 24, 1997, the date he executed a document purporting to exercise a general testamentary power of appointment. Here the Court outlines the evidence, its findings, and Orders as follows.

Section 5.01(c) of the Court-approved Scott Trust granted to W. C. a testamentary general power of appointment. W.C. was the “donee” of the power and had the right, therefore, to identify the person or persons who would receive the remainder of the Spousal Trust at the time of his death. In this trial the Court was required to address whether W.C. possessed the requisite testamentary capacity to exercise that power¹² on December 24, 1997. Both sides presented extensive evidence on capacity.

The Petitioner argues that W.C.’s attempted exercise of the power in 1997 was invalid due to lack of testamentary capacity, undue influence and failure to abide by the provisions of the trust. The Respondent argues that W.C. had capacity to exercise the power of appointment, acted of his free and voluntary will, and acted in compliance with the terms of the trust.

There now having been notice to all interested parties,¹³ and a sufficient evidentiary hearing held, the Court now must apply the test for testamentary capacity first articulated by the Colorado Supreme Court in Cunningham v. Stender, 127 Colo. 293, 255 P.2d 977 (1953); see also Breeden v. Stone, 992 P.2d 116 (Colo. 2000), to the evidence presented.

Dr. Todd Ogawa, W.C.’s treating physician, testified¹⁴ that W.C. suffered from Alzheimer-type dementia from 1995 through the date of his death in 2000. Dr. Ogawa

¹² No evidence had previously been presented to this Court on the capacity of W.C. Scott. This Court initially had determined that the issue of capacity had to be decided in this case as a matter of law under the circumstances and the language of the trust. The Court of Appeals disagreed and held that whether W.C. Scott had the requisite testamentary capacity to exercise the power was a question of material fact that this Court would have to decide upon hearing the evidence. See Opinion of the Court of Appeals announced December 16, 2004.

¹³ Previously, the court could not rule on capacity as a matter of fact because (a) the Second Codicil was not eligible to be admitted to probate without notice and a hearing, (b) notice was defective and (c) no hearing was ever scheduled or held.

¹⁴ Long-settled law in Colorado provides that the physician-patient privilege is waived in circumstances such as exist in this case. See In re Shapter’s Estate, 35 Colo. 578, 85 P.688 (1905) in which Justice

testified that W.C. had difficulty with higher cognitive functions such as memory, problem solving, orientation. He further testified that W.C.'s condition grew progressively worse throughout the time he treated W.C., including throughout 1997 when the purported power of appointment was executed. See Ogawa Deposition, pp. 37:4-19; 78:23-25; 79:1-2. Dr. Ogawa indicated that his diagnosis addressed "other psychosocial factors such as a patient's ability to care for themselves and to attend to financial and legal matters." See Deposition of Dr. Todd Ogawa, p. 19, line 6-9.

Dr. Ogawa was a reluctant witness who had no interest in the outcome of the litigation. He testified that he had received specialized training in geriatric medicine and was engaged in the practice of "internal medicine with an emphasis in geriatrics" when he treated W.C. from May 1995 [W.C. was his first patient] through the Fall of 1999. Ogawa Deposition, p. 23, 8-17. Considering the depth and breadth of the passions in this case and the tendency of witnesses to flavor testimony towards their self interests, Dr. Ogawa's testimony on the issue of W.C.'s testamentary competency was the most credible and was given the most weight by the Court in its findings. See In re Shapter's Estate, 35 Colo. 578, 85 P.688, 691 (1906). Thus, the Court finds that the diagnosis supporting his letter of April 1996¹⁵ was based on his good faith diagnosis of W.C.'s condition.

Goddard of the Colorado Supreme Court cited Justice Black of the Missouri Supreme Court with approval in Thompson v. Ish, 99 Mo. 160, 12 S.W.760, 17 Am. St. Rep. 552: "We conclude . . . that when the dispute is between the devisee and heirs at law, all claiming under the deceased, either the devisee or heirs, may call the attending physician." Id. at 691. Colorado's law is consistent with a majority of states holding that confidential communications between testator and a physician about mental or physical condition affecting competency is waived in a will contest. See Will Contests, 2nd edition Ross & Reed (1999) @ §15:16, p. 15-51.

¹⁵ Dr. Ogawa's April 4, 1996 letter stated:
To whom it may concern,

Dr. Ogawa's testimony convinces the Court that the April 1996 letter was not, as Respondent earlier claimed, to render optional housekeeping and companionship expenses for W.C. deductible for tax purposes by falsely characterizing them as necessary medical expenses.

W.C.'s medical records from the Rose Medical Center corroborate Dr. Ogawa's opinion. See Exhibit 14 of Petitioner's 00PR620 Vol. I, which contains the records of W.C.'s hospitalizations from February 14-18 of 1997 (pp. 1-120) and from February 21-23, 1996 (pp. 121-236), viz.:

- Page 3, Dr. Ogawa on February 18, 1997, recorded a secondary diagnosis: W.C. Scott suffered from dementia; confirmed at page 7 in the Discharge Summary.
- Pages 10-14, physical history: dementia is listed as part of W.C. Scott's past medical history.
- Page 12 (and also in handwritten notes at page 41) describes results of a mini-mental status exam of W.C. Scott, conducted by hospital staff; a score of 15 out of 29. Dr. Ogawa testified that a mini-mental status exam allows doctors to "assess the level of impairment in someone's mental state." Ogawa deposition, pp. 75-76. When asked what W.C. Scott's score of 15 meant, Dr. Ogawa testified, "That tells us he had a significant - - significantly advanced dementia at the time of his admission." *Id.* at p. 75:3-5.
- Pages 28 and 29, a social services assessment and outcome evaluation: W.C. Scott needs assistance with *all* of the items listed, which were: ambulation, transfer, bathing, bowel/bladder care, eating, cooking, housekeeping, laundry, shopping, medicine supervision, dressing, phone use, money management, access resources, twenty-four hour supervision. Similarly, the social services outcome evaluation concluded that W.C. Scott needed help or total assistance with all of those same items except eating. More importantly, it was recommended and "accepted by family" that there be skilled home care and 24-hour supervision for W.C. Scott.

This letter is in reference to Mr. William Scott, an 87 year old gentleman under my care. This patient suffers from progressive dementia which makes caring for his own health and safety needs impossible. He requires assistance with all activities of daily living, including food preparation, dressing, taking of medications and transportation, as well as supervision for safety. It is necessary for his Power of Attorney to make medical, legal and financial decisions for him as he cannot do this for himself.

Sincerely,

Todd K. Ogawa, MD

- Pages 30-31, note: during the February 1997 hospitalization, W.C. Scott was so disoriented and confused that he had to be placed in a restraining vest for his own safety.
- Pages 41, 42, 47, 49, 50, progress reports: notations of W.C. Scott's dementia by medical personnel other than Dr. Ogawa.
- Page 55, Nursing Assessment: W.C. Scott appears not to understand, dementia, poor short term memory, needs repeated instructions. *The notes go on to detail throughout how W.C. Scott was disoriented and didn't even know he was in the hospital.*
- Page 125, dementia was noted as a part of W.C. Scott's past medical history and on page 126 a Dr. Nicholas diagnosed dementia as a problem to be addressed.
- Exhibit 10 in Petitioner's 00PR620 Vol. I which is a prescription, prepared by Dr. Ogawa on February 21, 1997, for twenty-four hour care givers and stating as part of the diagnoses that W.C. Scott suffers from dementia. *See also* Deposition pp. 72-24.

The evidence is un-rebutted that Respondent himself secured the April 1996 letter from Dr. Ogawa on the premise that W.C. lacked the capacity to care for his own needs, including financial and legal affairs. See fn. 15 supra. No evidence supports Respondent's original argument that he secured this letter from Dr. Ogawa to obtain an otherwise dubious tax deduction.

The Court believes Dr. Ogawa's testimony: he prepared and signed the letter at the request of W.C.'s caregivers, including the Respondent, because the entire family, including the Respondent, and Dr. Ogawa agreed that W.C. was incapacitated by Alzheimer's-type dementia, could no longer care for his daily needs, and could not make legal or financial decisions. See Ogawa Deposition, p. 78:4-9. The evidence now convincingly eliminates all other possible explanations for the creation of this letter. All corroborating evidence supports the statements made by Dr. Ogawa in his April 1996 letter. The evidence resounds with proof that (a) the entire family, including the Respondent, agreed with Dr. Ogawa's diagnosis and recommendations and (b) W.C.'s impaired condition continued throughout 1997, including Christmas Eve 1997.

The Respondent testified that his father was disoriented but never confused. He testified that W.C. played golf nearly every day in 1997 at Park Hill or Kennedy golf courses. No other witness corroborated this testimony. W.C.'s primary non-family caregiver in 1997, Gilda Taune, testified that she was unaware that W.C. ever played golf in 1997. In fact, she adamantly testified that he was incapacitated by appendicitis and an appendectomy during 1997. No appendectomy is revealed in the medical records and no other witness mentioned appendicitis or surgery in 1997.¹⁶

The evidence is un-rebutted that W.C. "lived in the moment," to quote the Respondent. To the grandchildren who testified, this meant that he had no memory of the past and no ability to comprehend the future. Dr. Ogawa testified, in part:

During appointments, he was able to answer simple questions regarding symptoms, how he felt, if he was having discomfort, but he always seemed somewhat distant and I usually obtained more of the history from his caregivers in terms of what the presenting problems were. Ogawa deposition, p.26, l.6-12. Getting a time line, a specific history of what had transpired over a period of time that prompted the visit, that information was always obtained from the caregiver or [the Respondent].

Ogawa deposition, p.28, l 19-23.

The thrust of the evidence in this case weighs against the Respondent's version of events and against the dubious recollections of the Respondent's supporting witnesses. For example, every family witness testified that W.C. suffered from macular degeneration that rendered him functionally blind. Meanwhile, the attorney who drafted and presided over the signing of the exercise of the power of appointment testified that he was unaware that W. C. had any vision problem. In fact, attorney Scheffel testified that he was entirely oblivious to any of W.C.'s physical or mental limitations and considered

¹⁶ All of the testimony confirmed that W.C. suffered a bout with pneumonia in 1997.

him “very adroit” and “sharp.” January 2007 Trial. Scheffel gave this testimony in the face of evidence that his paralegal, Diana Bern, had recorded a phone conversation with the Respondent (referred to in Scheffel’s office as “Buck”) in which the Respondent advised the paralegal that W.C., among other issues, was “sometimes disoriented” and was “also drinking.” Exhibit 163.

It is not credible that this conversation did not put attorney Scheffel on notice to inquire about his client’s mental status at the time the exercise of the power of appointment was under consideration. Attorney Scheffel also testified that he was unaware of Dr. Ogawa or his role in the treatment and diagnosis of W.C. and was oblivious to the dementia that all other witnesses observed. See Ogawa Deposition at p.35:5-8. He further testified that he would not have substantially altered his own actions even if he had known these facts. Consequently, the testimony of attorney Scheffel was not credible and has not been given any weight by the Court.

The Petitioner’s other supporting witnesses generally and consistently support the proposition that W.C. lacked the capacity necessary to exercise the power of appointment in 1997, though none were disinterested as Dr. Ogawa was. The Court has approached with caution the testimony of Mrs. Cooney, one of W.C.’s granddaughters. She is not a litigant in this case, but she is a beneficiary and potential beneficiary of the Scott Family Trust and not entirely independent of self interest. Nevertheless, her testimony was remarkably consistent with Dr. Ogawa’s assessment and was not inconsistent in most regards with Respondent’s version of the facts. Accordingly, the Court has given some weight to her testimony.

Mrs. Cooney lived with W.C. in his house from the spring of 1996 through the spring of 1998. According to her testimony, in the spring of 1996, the Respondent called a family meeting to address W.C.'s condition, where he announced to Mrs. Cooney and attending grandchildren that W.C. wasn't himself and could no longer take care of himself. It was the Respondent who then dictated that W.C. be provided 24-hour supervision.

Mrs. Cooney's subsequent observations corroborated the Respondent's assessment and decision about taking care of W.C. He was both a wander risk, having been picked up by the police and returned home on at least one documented occasion; he was a fire risk, having set papers in the kitchen on fire at least once. The wandering issue was addressed during the day by never allowing W.C. outside the house without a companion and at night by giving him a sleeping pill at 7 p.m. The fire issue was addressed by banning him from the kitchen.

In the two years Mrs. Cooney was W.C.'s caretaker, her grandfather never called her by name; rather she was "Darling," like all other women with the exception of one, Vicki Peterson. He did not know the names of any of his other grandchildren or caregivers. He referred to a great grandchild who actually came into his home nearly every day in 1997 as "the boy." Petitioner's testimony corroborated Mrs. Cooney's conclusion that W.C. did not know his grandchildren's or great grandchildren's names.

Mrs. Cooney testified that her grandfather, while she lived with him, never once was able to tell her what he had done during the time she was out of his presence; the caretakers would have to tell her what they had done during such absences. While she acknowledged taking him to hit golf balls, neither she nor any other witnesses, for that

matter, suggested that he, independently, made plans for any outings. The routine consisted of her laying out his clothes, telling him to shower, preparing breakfast and ushering him to a chair where he could watch television (including, at times, Spanish-language soap operas). When she returned from work in the evening he would not know if he had eaten dinner, and, thus, she would often prepare him something to eat as she ate her own dinner.

Mrs. Cooney related that W.C. never had a colloquy with her or anyone else she witnessed during the time she stayed with him; he lived in the moment -- while she was in his presence. These are the same descriptive words used by the Respondent.

Mrs. Cooney was married in 1999. She had arranged for her grandfather's presence at the wedding. Later, when he failed to appear, she confronted the Respondent as to her grandfather's absence. The Respondent stated that W.C. would not have known where he was or who she was; thus, he did not miss anything. The Court recognizes that this event post-dates the Christmas Eve 1997 execution of the purported exercise of the power of appointment; however, it undermined the Respondent's version of W.C.'s cognitive ability and was consistent with Dr. Ogawa's assessment of a progressive and debilitating dementia.

Likewise, the Court has cautiously weighed the testimony of Victoria Peterson because she was an employee of Styro Materials, a company owned and operated by the Respondent. Nevertheless, like Mrs. Cooney, Mrs. Peterson is not a litigant and much of her testimony is corroborative of other evidence. Mrs. Peterson was employed by Styro Materials to take care of company affairs and to carry out the instructions of the

Respondent regarding the Scott Trust legal and financial affairs. Reporter's Transcript - 11/20/01, Afternoon Session pp. 89-90.

Ms. Peterson explained how, over many years, she prepared checks for W.C.'s signature and how she would tell him during face-to-face meetings what each was for and then put a pen in his hand and position the check to try and keep his signature on the line. Id. at 101-102. She, like the Respondent and his family, knew W.C. suffered from macular degeneration; essentially, he was blind. At one point she began using a felt-tipped pen in an effort to make it easier for him to see his signature. But she abandoned the practice as useless. Id. at 103: 7-15.

Ms. Peterson was aware of Dr. Ogawa's letter, his diagnosis that W.C. suffered from dementia, and Dr. Ogawa's assessment that W.C. was unable to handle legal and financial matters or otherwise to care of himself. Reporter Transcript, 11/21/01, Morning Session, p. 55:4-25. The Respondent had made Ms. Peterson aware of that assessment. Id. at pp. 62-63. In addition to showing her the Ogawa letter, Ms. Peterson testified that Respondent told her several times that:

W.C. needed 24-hour care and that he [the Respondent] would keep him at home and he would be cared for at home and not at a facility, he would not put Buck into a home - - I mean, put W.C. in a home.

Id. at p. 62: 3-10.

Ms. Peterson's testimony concerning W.C.'s access to checkbooks for the accounts on which he was a signatory is equally revealing, again because it was the Respondent who instructed her:

Q. And in the mid '90s, do you recall if W.C. Scott maintained any checkbook personally?

A. No.

Q. That is, did he carry a checkbook around?

A. No.

Q. Were you given any instructions by Samuel Scott as to whether he should be allowed to carry a checkbook?

A. Yes.

Q. And what were those instructions?

A. Buck [the Respondent] told me he was not allowed to carry a checkbook.

Id. at pp. 18-19.

Vicki Peterson testified on the extent of W.C.'s lack of capacity to understand the consequences of his acts:

Q. You testified that you -- you believe he understood what he was signing? Do you recall that?

A. Yes

Q. How is it you can say he understood what he was signing?

A. He understood if I said, "Please, sign this check for Public Service. It's \$54.73." He would say, "Okay, darling," or, "Okay, Vicky," and he would sign it. That's where his comprehension ended. That was it. He had forgot about it in a minute or two. He understood when you were talking to him, but he didn't retain the information.

Q. Now, you were examined fairly extensively by the Respondent's counsel as to his never objecting to a check. Do you remember that?

A. Yes

Q. Do you recall if at any time he ever objected to anything that Samuel Scott said to him?

A. No, he didn't.

Id. at 64: 5-23.

The Respondent never rebutted Ms. Peterson's testimony. In fact, the record suggests that he relied on the Ogawa letter to justify his authority to delegate to Ms. Peterson the responsibility for preparing checks and otherwise managing W.C.'s financial affairs. In this regard he was acting pursuant to the terms of the trust and his power of attorney. W.C.'s incapacity either provided no impediment or provided a justification for his actions.

From the testimony of Mrs. Cooney, Ms. Peterson, and Dr. Ogawa, however, the picture clearly emerges that the Respondent believed W.C. was so impaired that he had, prior to December 24, 1997 (the date on which the purported exercise of the power of appointment occurred), taken away from his father every opportunity to act independently in his personal, legal or financial affairs. W.C. signed whatever the Respondent or Ms. Peterson put in front of him. Ms. Peterson's testimony supports this Court's finding that W.C.'s signature did not prove he intended any consequences to follow -- that he understood the consequences of his act of signing or that signing represented his wishes.

There is no credible evidence in the record surrounding the details and events of the Christmas Eve 1997 signing of the Second Codicil to support the Respondent's argument that W.C. had capacity to exercise a power of appointment, a legal device that

seasoned trust attorneys view as complex and sophisticated. There was no evidence at all as to why the exercise of the power of appointment had to be completed on Christmas Eve 1997, a circumstance suggesting extreme urgency.

Even if the Court had accorded any weight to attorney Scheffel's testimony, his own notes of his interview¹⁷ with W.C. during the December 24, 1997 meeting reveal that he never mentioned or referred to the exercise of the power of appointment, or even the Second Codicil.¹⁸ See Exhibit 163, pp. 24-25. His notes reflect only a purported discussion about an amendment to the [then-unamendable (by his own drafting)] trust appointing his own law firm as a successor trustee, thus giving him an interest in the outcome of this litigation.

The Colorado Supreme Court is clear that:

[T]he mental capacity to make a will requires that: (1) the testator understands the nature of her act; (2) she knows the extent of her property; (3) she understands the proposed testamentary disposition; (4) she knows the natural objects of her bounty; and (5) the will represents her wishes.

Cunningham v. Stender, 127 Colo. 293, 255 P.2d 977 (1953); Breeden v. Stone, 992 P.2d 116 (Colo. 2000). Applying this test, and based upon the totality of the evidence presented at trial, the Court FINDS that Petitioner has proven by the preponderance of the evidence that on December 24, 1997, W.C. Scott [1] lacked the mental capacity to understand the legal consequences of the exercise of a general testamentary power of appointment, [2] lacked the memory necessary to know the extent of his property, [3] lacked the mental clarity and judgment required to understand the proposed exercise of a general testamentary power of appointment, [4] did not consistently know or recognize

¹⁷ Attorney Scheffel recalled that W.C. and he had a conversation that Christmas Eve about golf.

¹⁸ The Court of Appeals has summarily admitted the Second Codicil to probate and that issue, therefore, is not addressed in this Order.

his grandchildren who were the beneficiaries of the Scott trust (“the natural objects of his bounty”), and [5] lacked the requisite mental capacity to understand the act of exercising a general testamentary power of appointment in the context of “his wishes.”

Furthermore, as testified by Dr. Ogawa, W.C. was vulnerable to undue influence. Ogawa Deposition, p. 172: 6-24. W.C. depended entirely on caretakers to provide for him during every waking moment. Essentially, according to Mrs. Cooney, he lived an isolated existence, entirely in the present, relying on others to direct him from one activity to the next. There is no evidence that from 1997, including on Christmas Eve and until the end of his life, W.C. Scott exercised any independent will. That conclusion was corroborated by Dr. Ogawa, who said W.C.’s caretakers described his medical history at each appointment (his past); and it was his caretakers to whom Dr. Ogawa gave instructions as to his care (his future). The Respondent, himself, testified that W.C. “lived in the moment.”

Respondent testified that during 1996 and 1997 he was giving his father \$300 “pocket money” at a time. He allowed W.C. to have \$100.00 in cash for the entire year of 1997 when in 1996 he had allowed W.C. to have \$9,100.00 in cash. See Exhibit 167, pp. 77 and 62, respectively. The Respondent decried that caretakers would take advantage of W.C. and his cash, recounting a situation where a caretaker had somehow gotten W.C. to leave a \$30.00 tip on a five dollar restaurant tab that the Respondent claimed W.C. did not want to leave. Based on such concerns, the Respondent stopped allowing W.C. to carry cash. The Respondent himself knew that W.C. was susceptible to undue influence. The Respondent arranged for 24-hour care, not because W.C. asked for it, but because the Respondent knew W.C. could not provide for himself and everyone

else agreed. Dr. Ogawa's observations, as expressed in his April 1996 letter, confirmed the Respondent's assessment.

The Respondent shared a confidential relationship with W.C. Not only was he W.C.'s attorney-in-fact, he acted for many years as the sole trustee of the trusts created by W.C. and Sophia Scott. See March 2002 Order, p. 3. Thus, a presumption of undue influence attached to such a relationship. Gehm v. Brown, 245 P.2d 865 (Colo. 1952).

The Court expressly CONCLUDES that W.C. Scott was not simply vulnerable to influence, he was completely incapable of protecting against it. One of the better examples of his lack of individual will was in attorney Scheffel's notes when attorney Scheffel asked the leading question, "You don't want the kids [meaning the grandchildren] to be in charge of it?" The question, attorney Scheffel agreed, suggested the answer, and true to form, W.C. yielded. See Exhibit 163, p. 25.¹⁹

It is clear that the change occasioned by the exercise of the power of appointment unquestionably reflected the *Respondent's wishes*. Attorney Scheffel acknowledged in his testimony that through his paralegal (a) it was *from the Respondent*, not W.C., that he learned of the terms of the Second Codicil and (b) that the Second Codicil had in substance been prepared *before* he met W.C. on December 24, 1997 as a result of information provided to his office **by the Respondent**.²⁰ Attorney Scheffel regarded the Respondent, Buck Scott, as the "spokesman" for W.C.

¹⁹ Attorney Scheffel testified that W.C. arrived at his office on Christmas Eve 1997 with the intent to leave all of his assets "to Buck" [Respondent] but that he (Scheffel) and Buck "talked W.C. out of this plan." The credible part of this testimony is the fact that W.C. signed what Scheffel and Buck put in front of him. Interestingly "the kids" to whom attorney Scheffel makes reference in his notes are NOT W.C.'s kids but are the Respondent's kids – further supporting the conclusion that attorney Scheffel and the Respondent were seeking to exclude the Respondent's children.

²⁰ Attorney Scheffel testified that "his office" and not he prepared the documents that were signed on Christmas Eve, 1997.

Instead of the Spousal Trust assets flowing into the Scott Family Trust when W.C. died, the Respondent insured, by having W.C. sign the testamentary power of appointment, that he would have a life estate in a trust over which he was sole trustee and which, based on the evidence of his renaming it the “Buck Scott” trust after W.C. died, he fully intended to consume before his own death. By Christmas Eve 1997 the Respondent and the Petitioner, his son, were deeply involved in a collateral dispute. Not surprisingly, the Respondent sought to limit the Petitioner’s interest in the Scott Family Trust by diverting the assets of the Spousal Share away from the Scott Family Trust and to his own uses.

There is no evidence anywhere in this trial or prior trials that credibly suggests that W.C. Scott independently exercised his will when changing the purposes he and his wife set out in detail. No credible evidence suggests that he recanted those purposes and made his attorney-in-fact and trustee the recipient of the Spousal Trust. There is no logical basis for such a change to the long-standing Estate Plan aside from the Respondent’s dispute with the Petitioner. Of particular import to the Court in this analysis is the Respondent’s emphatic disclaimer before this Court of any interest in his parents’ estate, claiming as his mother’s conservator: “The Scott’s only child is not in need of the estate assets and passing the assets to him would only subject them to a 2nd potential estate tax upon his death.” Exhibit 20 (Gray Notebook²¹) Financial Plan, General Statement.

The Court concludes that, based upon the preponderance of the evidence, on Christmas Eve 1997, W.C. Scott was aware only of his immediate condition; he was practically blind and substantially demented, but he was nonetheless happy with the

²¹ The Gray Notebook is comprised of the exhibits admitted from an earlier trial in the case that went up on appeal -- 02CA820. Parties did not contest the use of previously admitted exhibits.

care and attention of the Respondent; on that basis, he agreed to sign documents, as he had on countless other occasions, because his son put the documents in front of him and told him to sign his name; he relied on attorney Scheffel to do what the Respondent instructed and no more. In a word, W.C. was “in the moment,” (Testimony of Respondent re W.C.’s general condition in 1997). Consequently, this Court FINDS that W.C. was unduly influenced by the Respondent in 1997 when applying his signature to the testamentary power of appointment. The Court therefore FINDS that the exercise of the testamentary power of appointment is Void.

Who Was Acting as Trustee? In the March 2002 Order, this Court found and concluded that the Respondent “acted substantially as the sole trustee of the Scott Trust following the death of Sophia” and prior to the death of W. C. The evidence presented in this final phase of the case during the January 2007 trial reinforces and substantiates that finding and conclusion.

The evidence establishes that from and after 1996²² the Respondent acted as the sole trustee. Any involvement or participation of W.C. in trust actions, including signing documents or making investment or distribution decisions, came at the direction or under the control of the Respondent and lacked any meaningful substance or intent on W.C.’s part.

The Respondent admitted he obtained Dr. Ogawa’s letter, and, in this most recent trial, he maintains that he did not intend to use it to change nondeductible housekeeping expenses into deductible medically-necessary expenses. The Respondent admitted he never challenged Dr. Ogawa’s assessment that W.C. lacked capacity to handle his own

²² About the time of the meeting Mrs. Cooney testified occurred in the spring of 1996, Respondent was requesting that Dr. Ogawa write the April 1996 letter confirming W.C.’s incapacity.

legal and financial matters. He failed to rebut Dr. Ogawa's testimony that the incapacity diagnosis was largely based on reports received from caregivers, including the Respondent. The Respondent admitted he never sought a second opinion. The Respondent never asked Dr. Ogawa to change his diagnosis that W.C. suffered from dementia or his assessment that someone should act for W.C. in all legal and financial matters.

The Respondent did not successfully rebut Mrs. Cooney's testimony that W.C. did not know the nature of any act (*e.g.*, attendance at his granddaughter's wedding) and did not know the natural objects of his bounty (*e.g.*, names and identities of his grandchildren and great-grandchildren).

The Respondent both initiated and acquiesced to Dr. Ogawa's incapacity assessment. In fact, he believed that assessment to be entirely true. Based on his own prior experience with Sophia Scott, the Respondent followed Dr. Ogawa's prescription to the letter: He placed W.C. under a 24-hour watch, and he acted as W.C.'s attorney-in-fact and trustee. He took the added step of handling all of W.C.'s medical, legal and financial affairs. The Respondent, himself, substantiated Dr. Ogawa's assessment when he showed Vicki Peterson the Ogawa letter as a predicate to his authority to act on W.C.'s behalf.

No one questioned the Respondent's authority to proceed as sole trustee and as W.C.'s surrogate/agent. Attorney Scheffel considered the Respondent to be the sole trustee of the Scott Family Trust. His statements were rendered to SCOTT FAMILY TRUST, c/o Samuel Scott and **his wife Monida Scott**. See Exhibits 8, 32, 39, 55, and 100 (gray notebook – see footnote above). He did not copy W.C. See Exhibit 5 attached

to the Respondent's Colo. R. Civ. P. 26(a)(1) Supplemental Disclosures. A written memorandum about the Scott Family Trust prepared by Mary Flanigan Smith, the trust's accountant, is addressed to Buck (a/k/a Samuel Scott) **and Mo Scott**. It is not even copied to W.C. See Exhibit 7 attached to the Respondent's Colo. R. Civ. P. 26(a)(1) Supplemental Disclosures.

ACCORDINGLY, the Court FINDS and CONCLUDES, based on overwhelming evidence, that the Respondent intended to and was acting as W.C.'s attorney-in-fact, agent, and as the sole trustee of the Scott Trust and its sub-trusts from April 1996 through the date of the death of W.C. in January 2000.²³

If the matter went no further, the facts set out above present few problems. However, Respondent had fiduciary duties to the beneficiaries of the Scott Trusts and its sub-trusts. He ignored these duties. During his administration of the Scott Trust, he acted improperly, and as described above, he often confused his duties as a fiduciary with his role as son, agent, beneficiary and litigant in conflict with the Petitioner. He proceeded in his own interests without regard to his obligations to other beneficiaries. For these improper actions, the Court has already entered some findings and orders.²⁴ Herein, the Court reaffirms and expands on its prior orders and enters additional findings and orders and a procedure for implementation.

²³ The Scott Trust agreement provides strict standards, see Article 9.17, for the actions of a beneficiary acting as sole trustee after the death of W.C.. According to the tortured construction of Section 10.09 of the W.C. and Sophia Trust Agreement by attorney Scheffel, however, the possibility that Respondent would act alone as sole trustee during the lives of his parents or either of them due to the disability of one or both of them was never addressed in the trust agreement. This is remarkable in light of the circumstances that existed at the time the Court approved the trust initially—*i.e.*, Sophia was then already disabled and had been adjudicated an incapacitated person by this Court. (Attorney Scheffel testified that he did not draft the W.C. and Sophia Trust Agreement, “his office” did).

²⁴ March 2002 Order.

II. ORDERS

In fashioning a remedy in this case, the Court is mindful that “trusts are peculiarly and almost exclusively within the equity jurisdiction of courts.” Learned v. Tritch, 6 Colo. 432, 443 (1882); see also De Tenorio v. McGowan, 510 F.2d 92, 103 (5th Cir. 1975) (“The law of fiduciary relationships is a creature of equity”); Melville v. Weybrew, 106 Colo. 121, 103 P.2d 7 (1940) (“The jurisdiction over trusts, expressed or implied, being always within the domain of a court of equity, such court has power to terminate a trust and have the property distributed where the trust is impossible of fulfillment”); Mertens v. Hewitt Assoc., 508 U.S. 248 (1993) (“[A]t common law, courts of equity had exclusive jurisdiction over all actions by beneficiaries for breach of trust ... money damages [normally a remedy at law] were available in those courts [of equity] against the trustee”). 90A C.J.S. § 347 (“In addition to their general and inherent jurisdiction over trusts and actions to establish and enforce them, courts of equity have the right to exercise a supervisory control over trustees, and their jurisdiction is generally deemed to be exclusive ... the power exists solely for the protection of the rights of the grantor who created the trust and the rights of the beneficiaries of the trust”). Finally, the power to fashion equitable remedies lies within the discretion of the trial court. Wilson v. Prentiss, 140 P.3d 288, 293 (Colo. App. 2006).

Accordingly, in preparing this final Order, the Court has endeavored, through application of its equitable powers, to restore the beneficiaries of the Scott Trust to the approximate positions they would have occupied on the date of this Order if Respondent had not breached his fiduciary duties, while taking into account that Respondent is a

potential income tenant of the Scott Family Trust from the date of W.C.'s death until the date of its termination on May 30, 2015.

a. Affirmation and Expansion of Prior Orders

Surcharge for Failure to Maintain and Render Accountings. At the time the Petitioner filed the Verified Petition in case #2000PR225 no accounting of the Scott Trust or any of its sub-trusts had been provided to the Petitioner. The Respondent maintained and retained no records of his transactions that could be considered a contemporaneous record of receipts and disbursements. The Court has already found and concluded that the Respondent breached his fiduciary duty to maintain and render accountings to the beneficiaries of the trust. March 2002 Order

From and after Sophia's death the Scott Trust was unamendable and irrevocable. The Scott Trust then had some beneficiaries with whom Respondent was and remains locked in conflict. The failure to account confirms that this Court acted properly in removing Respondent and assessing against him the charges for recreation of the trust accounts and for the litigation to secure this Order. In addition, in its March 2002 Order, this Court noted:

A trustee is under a duty to the beneficiaries of the trust to keep clear and accurate accounts. The duty to keep accounts is one of the most basic of the fiduciary responsibilities owed by a trustee to the beneficiaries. A. Scott, Trusts, § 172, (1987 edition). If the trustee fails to keep proper accounts, all doubts will be resolved against him and not in his favor.

In addition to removing the Respondent as trustee of the Scott Family Trust in 2002, the Court froze all of the non-Family Trust assets under the control of the

Respondent and ordered him to render a complete accounting of his actions with regard to those assets from the date of Sophia Scott's death. March 2002 Order.

The Respondent subsequently prepared an accounting for the Spousal Trust that was admitted into evidence as Exhibit 167. The Court has applied the rule that all doubts must be resolved against the Respondent, so the Respondent will be surcharged for the unexplained expenses revealed in his accounting.²⁵ The successor trustee is ORDERED to calculate this amount and to file a report and proposed order of surcharge with the Court within 60 days of this Order.

Surcharge for Costs of Reconstructing Trust Funding and Accounting. The Respondent has previously been ORDERED to pay the cost of successor trustee's independent account of the Scott Family Trust. See Findings of Fact, Conclusions of Law, and Orders dated March 11, 2002. That Order is affirmed. The Order is hereby expanded to require the Respondent to pay the costs of the successor trustee's reconstruction of the funding and the accounting of the Scott Trust, including the Spousal Trust, the GST Trust and the Scott Family Trust. See Murphy v. Central Bank and Trust, 699 P.2d 13, 15 (Colo. App. 1985) (Imposition of a surcharge is reasonable when the fiduciary breached its duty to the beneficiary); Buder v. Sartore, 774 P.2d 1383, 1390 (Colo. 1989) ("trustee is individually liable for losses incurred by the trust property if his misfeasance caused the losses").

If the trust were burdened with the costs of the reconstruction and accounting necessitated by the Respondent's acts, the beneficiaries of the Scott Family Trust would not be whole. Accordingly, the Respondent is SURCHARGED for the costs of the

²⁵ According to Petitioner, these unexplained charges total \$76,028.80. The final calculation of unexplained distributions is assigned to successor trustee.

successor trustee's efforts to reconstruct the funding of the Scott Family Trust, tracing the assets, accounting for Respondent's actions, and providing the beneficiaries and the Court with its report detailing the proper funding pursuant to the Court-approved trust.

The successor trustee is ORDERED to file with the Court within 60 days after the date of this Order, an affidavit and proposed order reflecting the reasonable and necessary fees and costs incurred by the successor trustee in its investigation, reconstruction, accounting and report tracing the funding and accounting for the Family Trust, which now consists of the original assets allocated to the Scott Family Trust, the GST Trust Surcharge Amount (identified supra) and the reconstructed remainder of the Spousal Trust.

These two surcharge amounts (the unexplained distributions and the costs of the reconstruction/accounting) shall constitute an asset of the Scott Family Trust to the extent such fees and costs have been already been paid or could²⁶ have been paid by the Scott Trust or any sub-trust and shall constitute a judgment against the Respondent and in favor of successor trustee on behalf of the Trust to the extent the Scott Trust and all of the sub-trusts are insufficient to pay.

Attorney Fees and Reimbursement of Costs. The Respondent has previously been surcharged²⁷ for the costs of the litigation to accomplish the accounting, the reconstruction of the funding, and the detail that has now taken over seven (7) years to

²⁶ The amount of the successor trustee's fees and costs that could be but have not yet been paid by the Scott Family Trust shall be listed, also, as a liability of the Scott Family Trust for purposes of the computations required in this Order.

²⁷ The law in Colorado has long recognized an exception to the rule that each side pays its own attorney fees and costs when fiduciaries are sued for nonfeasance or malfeasance. Even if no wrongdoing is found the beneficiaries are entitled to be "made whole." See, e.g., Heller v. First Nat. Bank, 657 P.2d 992, 999 (Colo. App. 1982) (Held: Award of attorney fees in breach of trust action is an exception to the general rule prohibiting awards of attorney fees. Trial court did not abuse its discretion in awarding attorneys [and accountants'] fees. The purpose of the award in a breach of trust action is to make the injured party whole); see also In re Estate of Shuler, 981 P.2d 1109, 1113 (Colo. App. 1999).

accomplish. See March 2002 Order. The Court previously delayed entering judgment against the Respondent for a specific amount until the completion of the presentation of evidence in this case and the complete trial on the Respondent's defenses. Now, counsel for the Petitioner is Ordered to file with the Court, within 60 days, an affidavit of attorney fees and costs representing the amount of fees and costs incurred by the Petitioner to accomplish the final funding, reconstruction, and restoration of the Scott Family Trust;

In reaching its decision the Court has carefully considered whether this litigation was necessary to obtain the reconstruction of the funding of the Trust accounts and an accounting of the Respondent's activities with regard to trust assets and has concluded that the following factors are most persuasive:

1. On Friday afternoon before trial Samuel C. Scott was delivering documents to the grandchildren that had first been ordered by this Court to be provided in the year 2000.
2. This case has already gone through multiple appeals and final orders have yet to be issued.
3. The animosity among the parties is so severe that the Court is absolutely persuaded that Petitioner and any grandchild sympathetic to him would have received no information whatsoever about the Scott Trust had it not been for this litigation. Even at trial the Respondent maintains that the Petitioner is not entitled to the information and accountings that he seeks, despite the fact that the Petitioner is unquestionably a beneficiary of the trust and its sub-trusts.

Accordingly, the court now reaffirms its Order that judgment will enter for the Petitioner and against the Respondent for the fees and costs of the Petitioner in

connection with this litigation to achieve the reconstruction of the trust, the funding of the sub-trusts, and the accountings. Within 60 days after the date of this Order, the Petitioner and the Petitioner's counsel shall prepare and file an affidavit reflecting the reasonable and necessary fees and costs of the Petitioner and counsel for the Petitioner in connection with this litigation.

Respondent's Fees and Costs. The Respondent has sought instructions from the Court regarding payment of Accountants Fees, Insurance, and Maintenance. See Petition for Instructions and for Reimbursement of Advances dated December 26, 2000. After hearing all of the evidence and considering the circumstances, it is hereby ORDERED that the successor trustee reimburse the Respondent for out-of-pocket expenses that directly benefited the trust, subject to set-off for amounts found to be due the trust from the Respondent.

However, it is further ORDERED that no expenses of the Respondent for this litigation shall be reimbursed to the Respondent from the Scott Trust or from any sub-trust.²⁸ See Murphy v. Central Bank and Trust, 699 P.2d 13, 15 (Colo. App. 1985); Buder v. Sartore, 774 P.2d 1383, 1390 (Colo. 1989) (Court's power to surcharge misfeasant trustee necessarily implies that the Court can refuse to reimburse trustee for unsuccessfully defending against a legitimate claim against him).

While a trustee who defends himself in good faith against a charge of breach can be entitled to reimbursement for litigation expenses, here the Court finds that, not only is

²⁸ During the trial in November of 2001, the Respondent gave conflicting testimony about the status of the assets in the Spousal Trust following the death of W.C. Scott, at times stating no withdrawals or distributions had been made, and at other times testifying he had distributed money to himself to pay his attorney's fees. At the most recent trial the Respondent admitted he had taken distributions to pay his attorneys in this case, as well as to pay the attorneys in the action his company, Scott System, Inc., pursued against Mark Scott and William Scott, and payments to attorney scheffel regarding self dealing which were properly his personal expenses as neither the trust nor its other beneficiaries were benefited.

the Respondent guilty of breach, but the Respondent's actions delayed rather than expedited the proceedings, obfuscated rather than clarified the accountings, and were designed to further protect the Respondent's interests at the expenses of the Petitioner and other grandchildren beneficiaries. Therefore the Court FINDS and CONCLUDES that the Respondent is not entitled to reimbursement for his attorney fees and costs from trust sources.

Further, to the extent the Respondent has taken any distributions from the Spousal Trust or from the Family Trust before his removal to pay his own attorney fees and costs in this litigation, he is ORDERED to restore such amounts to the trust by payment to the Scott Family Trust. Specifically, but without limitation, the court FINDS that the distributions on January 8, 2001 and April 14, 2001 to Hamil and Associates; the distributions on May 2, 2001 and November 10, 2001 to Thomas Scheffel; and distributions totaling \$307,000 between January 8, 2001 and March 2002 that were paid to the Respondent OR to his counsel, must be restored to the Scott Family Trust. The aggregate amount of these distributions shall constitute a judgment against Respondent in favor of the Scott Family Trust ("the Family Trust attorney fees surcharge judgment").

The Court also FINDS that the Respondent has retained the \$65,000 in estimated attorney's fees disclosed on the federal estate tax return Form 706; attorney Scheffel testified those fees had not been paid to his firm but were shown as a distribution and deduction on the Form 706. The amounts already distributed to attorneys directly from the trusts or any of them from and after the commencement of this litigation and the amounts distributed from any trust to the Respondent and used by him to pay his litigation costs shall be included in the judgment amount. The successor trustee is

ORDERED to calculate the amount of trust funds distributed to the Respondent's attorneys or distributed to the Respondent and used by the Respondent for the payment of attorneys fees and to file a report and proposed order of surcharge with the Court within 60 days of this Order.

Surcharge for Malfeasance in Administration and Investments. The language in the trust agreement governs the investments in a trust. Article 9.03 of the Scott Trust provides:

9.03 Investment of Assets. The Trustee may invest and reinvest in such classes of stocks, bonds, securities or other property, real or personal, including investment trusts, common trust fund participation, and life, annuity, accident, sickness and medical insurance in (sic) behalf of and for the benefit of trust beneficiaries, as it may select without being limited by statute or rule of law concerning investments by fiduciaries.

Respondent argues that this language imposes no investment standards on him and while he was acting as the trustee of the Scott Trust and its sub-trusts he was bound by no duties to the beneficiaries and by no fiduciary law. The common law makes clear that "an authorization to the trustee to make investments 'in his discretion' is ordinarily interpreted to enlarge his powers so that he can properly make such investments as a prudent person would make." Scott on Trusts § 227.14 @ p. 490. Professor Scott observes that even where a trustee is authorized to make such investments as in his absolute and uncontrolled discretion he may see fit" "he cannot properly lend trust funds to himself personally." Id. Consequently, the Respondent is SURCHARGED the \$10,067 for the losses resulting from the sale of two tax-exempt municipal bonds the Respondent sold prematurely to obtain the funds he then loaned his company, S.D.G. Properties, LLC.

The Court has made a finding with respect to an investment decision with which Respondent should be surcharged, namely, the investment in a start-up video production, Sports World Network. In a prior Order, the Court found that the Respondent invested \$30,000 of the Spousal Trust's funds; however, the evidence in this final trial confirms that he only invested \$15,000 of the Spousal Trust's money. Accordingly, the Court specifically CORRECTS its erroneous finding and conclusion that the loss occasioned by the Respondent's use of trust assets invested in Sports World Network, Inc. was \$30,000. The correct amount of the loss is \$15,000. The March 11 2002 Order is AMENDED accordingly.²⁹

Further, the Respondent is hereby SURCHARGED an amount equal to any tax penalties and interest caused by his delinquency or failure timely to file tax returns. The successor trustee is ORDERED to file a proposed order of surcharge for these breaches with the Court within 60 days of this order.

Surcharge for Self Dealing. The Respondent failed to establish that any distributions to himself during the time he was acting as sole trustee were distributed for his health, maintenance, education or support. See Exhibit 120. This Court found in the September 2000 Order that:

The [Respondent] testified, credibly that he had no knowledge or understanding of the meaning of or application of the "ascertainable standard" and its tax consequences as applied under the trust agreement.

When the Court made that conclusion, the Respondent had already taken \$105,000 for himself from the Spousal Trust. The Respondent has retained various items

²⁹ The Court's conclusion that no reasonable person would make the highly speculative and risky investment – and one in which Respondent was personally involved – with the investments of money on behalf of other beneficiaries is not disturbed, but is reaffirmed.

of tangible personal property and \$5,000 as disclosed in the Amended Estate Tax Return. See Exhibit 155. The Respondent is further SURCHARGED in the amount of \$10,886 for the monies he retained from the Veteran Affairs Life Insurance Policy, under which he designated himself as the beneficiary after W.C. lost capacity to make beneficiary designations. See Exhibit 139.

The successor trustee is ORDERED to calculate the amount of these self-dealing distributions, including the tangible personal property and the Kruegerrands, and to file a report and proposed order of surcharge with the Court within 60 days of this Order.

Surcharge for Unauthorized Gifts. Similarly, the Respondent has made gifts out of the Spousal Trust that this Court previously held were wrongful, finding:

Sam admits he made distributions, including gifts and loans, out of the Spousal Trust to persons other than William C. Scott while his father was still alive. He also admits that he made distributions without his father's knowledge and/or without his father's approval. Some of the loans have never been completely repaid and were either not reported or were underreported on the federal estate tax return. According to Samuel, the purpose of the gifts made to family (and non-family) members was to "spend down" W. C.'s assets so that he would not leave a taxable estate at his death. These distributions provided no benefit to W.C.

March 2002 Order.

The accountings prepared by the Respondent (Exhibit 167) prove gifts totaling \$315,017.77 were made during the life of W.C. Scott out of the Spousal Trust. For purposes of its analysis the Court has divided these gratuitous transfers into two parts: those occurring before April 1996 and those occurring during or after April 1996. This analysis includes transfers made to the Sophia H. Scott and W.C. Charitable Foundation.

As to the gifts made prior to April 1996 the Court has concluded that no adjustment or surcharge is appropriate.

As to the gifts made during and after April 1996, including the \$50,606 gift made by Respondent to the Sophia H. Scott and W.C. Charitable Foundation at W.C. Scott's death, the Court FINDS that the Respondent has provided insufficient support or justification for giving away assets of the trusts without the consent of the beneficiaries and without Court Order. The Court FINDS that the transfers were made to cut off the interests of the Petitioner and the other grandchildren with whom the Respondent was then disaffected. Therefore, the Court hereby SURCHARGES the Respondent for an amount the successor trustee determines was given away after April 1996 without consideration. The successor trustee is ORDERED to calculate this sum and file a report and proposed order of surcharge with the Court within 60 days of this Order.

III. FURTHER ORDERS

1. Respondent is REMOVED as trustee of the Spousal Trust (sometimes previously referred to by the Respondent as the "Buck Scott Trust" or the "Second Codicil Trust") and from any fiduciary position in regard to any aspect of the Scott Trust. Respondent shall have no further or additional fiduciary role in regard to the Scott Trust and all of its sub-trusts, including the GST Trust.

2. The Court APPOINTS John S. Holt, who is the current successor trustee of the Scott Family Trust, to be the successor trustee of the Scott Trust, including the GST Trust and the Spousal Trust, and reaffirms his appointment as the successor trustee of the Scott Family Trust. The successor trustee shall henceforth have all of the powers, duties and authority of a trustee under Colorado law and the terms of the Scott Trust as amended by

its timely amendments, without other limitations or restrictions until further Order of the Court or until his resignation or removal as provided by the W.C. and Sophia Trust Agreement.³⁰

3. Respondent is ORDERED, forthwith, to deliver to the successor trustee all of the assets of the Scott Trust and all of its sub-trusts to the extent not previously delivered to the successor trustee. All of these assets, including the assets of the Spousal Trust, shall hereinafter be referred to in this Order as the “Addition to Trust”.

4. The Court ADOPTS the successor trustee’s Report #1 (Exhibits 168 and 169 and attendant Appendices (hereinafter referred to as “the Report”)) as part of its Findings and Orders and incorporates it herein, as amended, as if set out in full, including the successor trustee’s interpretation of Article 1.00 of the Trust as set forth in the Report.

5. Without limiting the scope of the preceding paragraph, the Court specifically ADOPTS the funding mechanism described by the successor trustee in its Report @ section 3.a. on page 25 & 26, to wit: What the Court Ordered and What the Trust Required, including the funding of the GST Trust.

6. The successor trustee is ORDERED to implement the recommendations set forth in the Report, including the filing of any necessary federal estate tax returns and the making of any necessary elections to carry out this Court’s Orders and the provisions of the Scott Trust.

7. The successor trustee is FURTHER ORDERED, pursuant to the terms of the trust agreement, this and the prior Orders of this Court, and the funding mechanism and

³⁰ Because of the ambiguities in the drafting of the Scott Trust Agreement the mechanism for removal of a trustee by agreement of the beneficiaries is impossible to determine or to apply without a Court Order. This Court has previously informally and partially amended this administrative provision by allowing a majority in interest of the Respondent and the adult grandchildren to name a successor trustee. See September 2000 Order.

reconstructed accounting described and detailed in the Report, to calculate an amount equal to the difference between

(a) The Amount that Should Be in the Scott Family Trust: The amount that successor trustee calculates should be contained in the Scott Family Trust on the date of this Order based upon the Trustee's Report, taking into account the Scott Partners surcharge amount and the GST Trust Surcharge Amount³¹ as contained in this Order. In making this calculation, the successor trustee shall also take into account the amounts set out in the reports and proposed orders to be filed by the successor trustee calculating the various surcharge amounts above,

AND

(b) The Amount that is Actually in the Scott Family Trust: The amount under the control of successor trustee after receipt of the Addition to Trust.³²

If the amount successor trustee calculates in (b) above exceeds the amount the successor trustee calculates in (a) above, then the difference shall be referred to by the successor trustee as "Excess." If the amount the successor trustee calculates in (b) above is less than the amount the successor trustee calculates in (a) above, then the difference shall be referred to by the successor trustee as "Deficiency."

³¹ Such amounts shall be separately identified in the successor trustee's records and holdings of the trust until the judgment amount is paid in full.

³² For purposes of this computation the successor trustee shall make the computation based on the following assumptions: (a) the Scott Trust shall be deemed to have been properly divided at the time of the death of Sophia Scott into the marital share and the family share, and (b) the marital share shall further be deemed to have been divided into a properly-funded Marital Trust and a properly-funded Generation-Skipping Trust at the time of the death of Sophia Scott, and (c) at the time of the death of W.C. Scott all of the then-remaining assets of the Marital Trust, the GST Trust shall be added to and combined with the assets then deemed to be contained in the Scott Family Trust for administration and distribution as a part thereof.

Upon receipt of the calculations ordered in (7) above by the successor trustee, the Court shall enter additional orders to the end that the Scott Family Trust shall comprise all of the value that was originally intended and approved by this Court when the trust was created.

IV. EXEMPLARY DAMAGES

Pursuant to C.R.S. § 13-21-102(1)(a), exemplary damages in an amount not to exceed the amount of actual damages awarded, may be awarded if the injury complained of is attended by circumstances of fraud, malice or willful and wanton conduct. “The plaintiff must show, beyond a reasonable doubt, that the act causing the injury was done ‘with an evil intent and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidence a wrongful motive.’” Pizza v. Wolf Creek Ski Development Corp., 711 P.2d 671, 684 (Colo. 1986), quoting Ress v. Rediess, 130 Colo. 572, 278 P.2d 183, 187 (1954).

Exemplary damages may be increased by the Court to a sum not to exceed three times the amount of actual damages if:

- (a) The defendant has continued the behavior or repeated the action which is the subject of the claim against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or
- (b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

C.R. S. § 13-21-102(3)(a) and (b).

The Court expressly DEFERS ruling on this claim by the Petitioner.

DATED: 1/10/2008

BY THE COURT:

C. JEAN STEWART, DENVER PROBATE JUDGE