PROBATE COURT CITY AND COUNTY OF DENVER, COLORADO City & County Building 1437 Bannock Street, Room 230 Denver, CO 80202	**EFILED Document** **CO Denver County Probate Court 2nd JD** **Filing Date: Oct 30 2003 11:24AM MST** **Filing ID: 2630238** **Review Clerk: Jeff Kelly**
IN THE MATTER OF THE ESTATE OF **SHELDON K. BEREN,** Deceased.	Case Number: 96PR0401

FINDINGS OF FACT
CONCLUSIONS OF LAW
ORDERS

THIS MATTER comes before the Court on the Petition, by Miriam Beren, for Order Determining the Augmented Estate, the Amount of Payment of the Elective Share to the Surviving Spouse and Ordering Payment of Such Amount, and the Amended Petition, by Miriam Beren, for Order Determining the Augmented Estate, the Amount of Payment of the Elective Share to the Surviving Spouse, and Ordering Payment of Such Amount (hereinafter referred to collectively as "the Petition").

BACKGROUND

The Court adopts the stipulation of facts set forth in the (Amended) Trial Management Order as if set out in full. In addition, the following factual findings provide background and context to this Order.

Sheldon K. Beren ("the decedent") died a resident of the City & County of Denver on February 12, 1996 survived by his wife Miriam ("Mrs. Beren") and seven adult children. Four of his sons were born during his prior marriage (and were adopted by Mrs. Beren), one son and one daughter (born to Mrs. Beren during her prior marriage) were adopted by the decedent, and one daughter was born of the decedent's marriage to Mrs. Beren.

The decedent's will (*Ex. 1, dated August 11, 1994*) and codicil (*Ex. 2, dated January 17, 1996*) were informally admitted to probate by this Court on March 1, 1996[1], without contest. No member of the family was aware of the contents of the decedent's will prior to his death. Pursuant to their nomination under the provisions of the will, Mrs. Beren and Robert Goodyear were appointed as personal representatives. Robert Goodyear was the chief financial officer of the decedent's wholly-owned corporation, Berenergy.

[1] The will and codicil (hereinafter referred to as "the will") were subsequently also admitted in a formal proceeding on April 15, 1997.

Under the decedent's will Mrs. Beren was entitled to receive one hundred percent (100%) of the residuary estate in a qualified terminable interest property ("QTIP") trust pursuant to 26 U.S.C.A. § 2056(b)(7).

Shortly after the decedent's death, tensions among family factions increased and the family broke into the following three interest groups:

> Mrs. Beren – the surviving spouse;
>
> "the four Berenergy sons" – this group consists of Daniel Beren, David Beren, Jonathan Beren, and Zev Beren –these four sons were born during the decedent's first marriage, worked at Berenergy during some period(s) and/or participated in the decedent's oil and gas business;
>
> "the CJD group" – this group consists of Cheryl Beren Feldberger, Joshua Beren, and Dena Beren Grossman – Cheryl Feldberger and Joshua Beren were born during Mrs. Beren's first marriage and were adopted by the decedent. Dena Grossman was born of the marriage of Mrs. Beren and the decedent.

On November 8, 1996 Mrs. Beren filed an election to take her spousal share of the decedent's estate pursuant to C.R.S. § 15-11-201 in lieu of the QTIP trust. Following Mrs. Beren's election, and pursuant to the provisions of the decedent's will, Robert Goodyear (hereinafter "Goodyear") has served alone as personal representative of the decedent's estate.

On May 12, 1997, Goodyear, in his capacity as personal representative, filed the federal estate tax return Form 706 and paid the federal and state estate taxes then due. On June 14, 1999 the Internal Revenue Service, having completed its audit process, issued its "closing letter."

On January 11, 2000 Mrs. Beren filed her Petition for Order Determining the Augmented Estate, the Amount of Payment of the Elective Share to the Surviving Spouse and Ordering Payment of Such Amount. The four Berenergy sons objected to the calculation of the elective share. On April 26, 2001, Mrs. Beren filed an Amended Petition for Order Determining the Augmented Estate, the Amount of Payment of the Elective Share to the Surviving Spouse, and Ordering Payment of Such Amount. This amended petition, the family conflict, and other issues arising therefrom, comprised the subject matter of the hearing in November 2002 and April 2003.

THE AUGMENTED ESTATE

The majority of common-law property states, including Colorado, recognize some restriction on testamentary freedom by providing the surviving spouse with a claim ("the forced share") on the decedent's "estate" at death.

In 1990 and 1993 Article II, Part 2 of the Uniform Probate Code was revised and reorganized. This part was modified by the Colorado legislature and adopted as Article II, Part 2 (C.R.S. § 15-11-201 thru 208) of the Colorado Probate Code, effective for decedents dying on or after July 1, 1995. That portion comprising the elective share law reflects the uniform commissioners' "view of marriage as an economic partnership." Uniform Probate Code, Part 2, cmt., p. 56 (2001).

This is an action to determine the value of Mrs. Beren's elective share of the decedent's augmented estate under C.R.S. § 15-11-202. The length of the marriage in the instant case entitles Mrs. Beren to the maximum elective share amount of fifty percent (50%). C.R.S. § 15-12-201(1). The elective share percentage is applied to the value of the "augmented estate." The augmented estate is a mathematical calculation composed of the sum of four elements: the value of the decedent's net probate estate; the value of the decedent's nonprobate transfers to others, consisting of will-substitute-type inter-vivos transfers made by the decedent to others than the surviving spouse; decedent's nonprobate transfers to the surviving spouse; and surviving spouse's property and nonprobate transfers to others.

A. TRANSFERS TO CHILDREN

The Court is confronted, first, with the question of which transfers, if any, from the decedent to his seven (7) children should be included in the augmented estate for purposes of calculating the value of the augmented estate. Based upon the evidence presented, exhibits and testimony, the Court makes the following findings of fact and conclusions of law.

The decedent was an extraordinarily generous parent. The evidence reveals to the Court a consistent and pervasive pattern regarding transfers to his children. The decedent transferred wealth to his seven (7) children through a variety of means based primarily on what the children asked for or what their father wanted to do for them. Contemporaneously or subsequently, his legal and financial advisors devised methods to make the transfers appear in a favorable tax light.

The law presumes that a transfer from a parent to his or her child is a gift. Mancuso v. United Bank of Pueblo, 818 P.2d 732, 739 (Colo. 1991); Morgan v. Wright, 156 Colo. 411, 415, 399 P.2d 788, 791 (1965) ("the presumption is that a transfer between a parent and a child is a gift until the contrary is clearly and unequivocally shown"); First Nat'l Bank v. Honstein, 144 Colo. 176, 178, 355 P.2d 535, 536 (1960) ("transfers… between parents and children are presumed to be gifts until the contrary is clearly and unequivocally shown"). *See* Restatement (Second) of Trusts § 442.

The presumption recognizes that parents have "a natural interest in the welfare of [their] posterity," and, accordingly, the law places on the party claiming a transfer was not a gift the burden to show it was intended otherwise. Howard v. Barrett, 101 Colo. 249, 253, 72 P.2d 474, 475-476 (1937). "The law presumes that such gifts arise between parents and children, and this legal presumption prevails until the contrary is clearly and unequivocally established." Id. at 253, 476. *See also* Perry v. Comm'r of Internal Revenue, 92 T.C. 470, 481 (1989) ("[a] purported loan between family members is always subject to close scrutiny", and the law presumes that such a transfer is a gift).

1. RELATIONSHIPS WITH THE FOUR BERENERGY SONS

The four Berenergy sons participated in the decedent's wholly-owned corporation, Berenergy. While there is controversy about which days each worked at the office and the contribution each made to the enterprise, there is no question and the Court specifically FINDS that the Berenergy sons participated with their father in his oil and gas business.

Highly credible evidence regarding the relationship among the four Berenergy sons, their father, and Berenergy is set out in *Exhibit C-59*, a June 28, 1992 letter from the four Berenergy sons to their father, and *Exhibit C-60*, the July 6, 1992 response letter from the decedent to the four Berenergy sons.

The Court FINDS that while the overall financial relationship among the four Berenergy sons, the decedent and Berenergy was confusing and changeable over the years, the following facts are proven by a preponderance of the evidence.

Berenergy Corporation was formed in 1981. Until his death, the decedent was president and the sole shareholder of Berenergy. Each of the four Berenergy sons owned a separate subchapter S corporation, Daven Corporation, Zalman Resources, Inc., Sport Resources, Inc. and ZAB Inc.

Loans. The Court FINDS that beginning in 1985, the decedent gave (*"I advanced all the money required for your participation in these purchases." "I also advanced all of the money for the drilling of certain wells . . . ." ". . . these commitments of capital were made by me." Ex. C-60*) each of the four Berenergy sons a ten percent (10%) working interest (or the money to purchase the working interest) in certain oil and gas properties owned or acquired by Berenergy. The decedent advanced the four Berenergy sons or their respective corporations at least $10 million during this period. (*Exs. C-49, C-60*)

Based upon all the facts and circumstances, as highlighted by the quoted material in the preceding paragraph, the Court expressly FINDS and CONCLUDES that although these transfers were ostensibly made by the corporation known as Berenergy, this situation amply justifies application of the alter ego doctrine, and the Court's disregard of the corporate entity is well-founded. <u>Fink v. Montgomery Elevator Co.</u>, 161 Colo. 342, 421 P.2d 735 (1966). By his own declarations, these transfers were not made by Berenergy, they were made <u>by the decedent</u> within the meaning of C.R.S. § 15-11-202(2)(b)(III). This was not a corporation acting; it was a father. Berenergy was a mere instrumentality of the decedent for the accomplishment of his transfers to the four Berenergy sons. <u>Fink</u> at 350, 739.

The Court also expressly FINDS that these transfers were <u>not</u> compensation paid to the four Berenergy sons. First, both prior to these transfers and after, the four Berenergy sons were paid salaries for their services to Berenergy. (*Ex. C-59*) Second, there was no evidence introduced at trial that any one of the four Berenergy sons <u>ever</u> included in their income, for purposes of their individual income tax returns, any of these transfers from their father, thus negating the suggestion that these ten percent (10%) working interests or the revenues therefrom were transferred to them as compensation for past, current or future services to their father or to Berenergy.

All of the transfers were recorded and maintained on the books of Berenergy as "loans." The Court FINDS two motives that supported this action. First, by characterizing the transfers as loans, the decedent avoided gift tax liability. No gift tax returns were filed documenting any of these transfers and, at the time of the decedent's death in 1996, the personal representative claimed a remaining unified transfer tax credit amount.

Second, the decedent wanted the four Berenergy sons to feel some obligation to repay him and wanted them to be bound to him in their common enterprise. By letter dated July 6, 1992, he reminded the four Berenergy sons that his own father and uncles had provided him with the opportunity to go into the oil and gas business and he appreciated the "access to capital which they provided." (*Ex. C-60*) He referred to borrowings he had made from the Harris Bank supported by their guarantees or letters of credit. The decedent emphasized that he had the obligation to repay all his borrowings.

The Court FINDS that the decedent wanted the four Berenergy sons to prosper, become financially independent, and demonstrate their respect and gratefulness to him by playing a significant role in the oil and gas business. "I endeavored to assist you, my sons, to lead a pleasant productive life and, as the occasion presented itself, to begin the acquisition of oil and gas assets." (*Ex. C-60*) Referring to the transfers as "loans" advanced this motive.

Except for the accounting entries on the Berenergy books, there was no documentation of the decedent's transfer to the four Berenergy sons as "loans." The decedent did not refer to these transfers as "loans" in his July 6, 1992 letter. There were no promissory notes or other evidence of the indebtedness. Neither the decedent, nor Berenergy, ever received a pledge or mortgage as collateral. There were no appraisals made of any of the properties that could have secured the loans. (*Ex. X-4*)

The Court FINDS that, except as provided below, the four Berenergy sons never considered themselves obligated to repay their father. ("we were family partners…" "…you wanted to help launch us to a more substantial financial situation." "You and we devised this method for the transfer of financial means to your children . . . " *Ex. C-59*).

> The loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrowed.

Easter Oil Corp. v. Strauss, 52 S.W.2d 336, 340 (Tex. App. 1932). *See also* Bankers Mortgage Co. v. Comm'r Internal Revenue., 142 F.2d 130, 131 (5th Cir. 1944) ("[t]he word 'loan' implies an advance of money with an absolute promise to repay.")

Although the Court recognizes and appreciates that the decedent intended and desired that the four Berenergy sons would recognize an obligation to him for his generosity to them, the Court CONCLUDES that, except as provided below, these transfers lacked the requisite "promise to repay," Bankers Mortgage, *supra* at 131, necessary to characterize them as enforceable contracts, and overall the transactions lacked sufficient substance to overcome the presumption that they were gratuitous transfers from a generous father to his children.

Not only did the four Berenergy sons make it clear that they did not consider themselves under an obligation to repay, they sought additional distributions to defray the income tax liability attracted by the income they realized on the profitable wells they purchased with the gifts.

> "I have advanced you millions of dollars, have helped to acquire wealth in the millions, I am still owed many millions of dollars by you, I propose a certain allocation of funds until January 1, 1993, because it was apparent to me that my sons were not prepared to pay their own income taxes from their own funds which they had received and are receiving." (*Ex. C-60, p.5*)

The conflict was clearly framed: the decedent wanted his sons to pay their own way; they persisted in their efforts to limit their obligation to pay anything. On June 28, 1992, the four Berenergy sons wrote their father a letter in which they objected to payment:

> "Aren't we dad's children and shouldn't the matter be looked upon as a prudent avenue for the transfer of wealth from father to children? . . . Are we viewed in this matter as "debtors" or are we viewed as children?" (*Ex. 59, p. 5*)

Berenergy kept records of the amounts the decedent had transferred to the four Berenergy sons by entering them on the Berenergy books as "loans" from Berenergy to the four Berenergy sons' corporations. As their personal wealth increased, the decedent pressed the four Berenergy sons to undertake some obligation of repayment:

> "The question which I posed to you is whether excess capital available to you should be utilized in connection with the pay back of personal loans which are on the books, or whether these loans should be relegated to some strange category while my sons employ their capital in any fashion in which they desire. . . The logic of everyone paying their own way when the money is available to everyone is indisputable." (*Ex. C-60, p. 3*)

When the decedent, exasperated and disappointed but in total control of Berenergy, attempted to enforce the "loans" by applying the four Berenergy sons revenues (in excess of $10,000 per month) to recoup some of his generosity to them, they vehemently protested *("We feel that such taking of our revenue is not right…" "…we felt you would not just proceed unilaterally to take our net revenue." Ex. C-59*).

The four Berenergy sons reiterated their view that the transfers were gratuitous:

> "[W]e have endeavored to explain that we feel that the relative financial pictures of yours versus ours is still obviously a major consideration that must be recognized in this situation. Transfer of a share of one's wealth during his lifetime is most certainly appropriate." (*Ex. C-59, p. 2*)

On July 27, 1992, the decedent wrote a memo reflecting his state of mind regarding meetings he had attended with his son David.

> "David does not give an inch. I told him he was holding up the distribution of funds after I offered to distribute with payback within a year. He also did not like the payback of 10% from the paid out properties." (*Ex. C-70*)

The decedent went on to write:

> "David stated he is weighing a written reply since our conversations do not appear productive. He is <u>very threatening</u>! I feel like I need an attorney to defend myself against my sons!" (Emphasis in original.) (*Ex. C-70*)

During 1994, David Beren himself retained Richard Robinson, a lawyer, and Larry Unruh of Hein & Co., who developed the concept of "non-recourse loans." Michelle Sorenson, who was the bookkeeper for the decedent and his companies, testified that the term "non-recourse loans" originated with Richard Robinson in 1994.[2]

Ultimately the hostile impasse calmed when the four Berenergy sons agreed to repayment of some of the transfers, but only to the extent that the specific property to which the transfer related generated sufficient income to repay the transferred amounts.[3]

Although the recommendation of Richard Robinson in his memo dated April 14, 1994 regarding documentation of the "loans" was ignored, the Court FINDS and CONCLUDES that the Berenergy sons obligated themselves to Berenergy corporation to repay the "loans" to this limited extent, thus forming a binding agreement.

Sometime after April 1994 and with the decedent's specific authorization, Robert Goodyear wrote off $973,196 which the decedent had previously transferred to the four Berenergy sons' corporations and carried on the Berenergy books as "loans." Sometime in 1995, another write-off in the amount of $1,388,143 in loans of the four Berenergy sons or their corporations was authorized by the decedent. These write-offs represented implementation, on the Berenergy side, of the accord reached between the decedent and the four Berenergy sons reflecting the limited extent of their obligation to repay their father.

In spite of the attempts at trial to characterize Sheldon Beren's transfers to the four Berenergy sons as bona fide business practices, the Court FINDS and CONCLUDES that the

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[2] Mr. Unruh testified there was some confusion early on in his assignment with respect to the intent of the parties. He was unable to state whether there was complete consensus at the time they entered into" this thing." (Unruh Deposition dated April 2, 2002, pp. 36-40). He testified that he believed that the consensus evolved when Richard Robinson issued a letter of March 23, 1994. (*Exhibit P-40*).

[3] *See Ex. 8*, wherein Daniel Beren's proposed agreement provided that all of these transfers were gratuitous "except "to the extent such debt is related to a specific property . . . which is generating sufficient income to currently pay such related debt as it becomes due." (*Ex. 8*)

decedent wanted his children to be successful, responsible and financially independent in the oil and gas business or elsewhere, and, as an inducement to achieve his goals, he transferred money or interests in certain properties to them without securing a binding obligation from them to repay. When he tried unilaterally to create a binding obligation to repay, he was met with fierce resistance. Except to the extent of the four Berenergy sons agreement to repay the transfers that related to specific properties, the Court FINDS and CONCLUDES that these transfers were gratuitous. Mancuso, Morgan, First Nat'l, *supra.*

When calculating the value of the augmented estate, the decedent's nonprobate transfers to others within two years of date of death are added to the total C.R.S. § 15-11-202(2)(b). Excluded from decedent's nonprobate transfers to others is: "the value of any property . . . . (i) to the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property." C.R.S. § 15-11-202(3)(a). Because the Court FINDS that the amounts represented by the write-offs were gratuitous transfers when originally made, the Court declines to include the write offs as part of the value of the augmented estate as transfers of property within two years of death without adequate and full consideration in money or money's worth under C.R.S. § 15-11-203(3)(a).

As of December 31, 1995, six weeks before date of death, Berenergy Corporation continued to reflect on its books the amount of $4,327,887 for monies advanced by Sheldon Beren to the four Berenergy sons' corporations to drill wells and related costs. Following the decedent's death, Mr. Goodyear, in his capacity as Co-Chief Executive Officer of Berenergy, and as Personal Representative of the Estate, estimated that based upon the agreement between the decedent and the four Berenergy sons regarding the non-recourse loans, the recoverable balance of that amount was $1,892,786.

Based upon the acquiescence or non-objection of Mrs. Beren and other heirs and based upon a legal opinion from David Beren's counsel, Richard Robinson, Mr. Goodyear, for purposes of the Form 706 Estate Tax Return, wrote off $2,435,101 from Berenergy's assets and did not include the $2,361,339 written off in 1994 and 1995. (*Exs. P-23, P-24, P-25, P-26, P-27, P-28 and P-38 list the amounts owing by the four Berenergy sons' corporations and the amounts written off*). Because the Court has concluded that the amounts represented by these write-offs were gratuitous transfers when originally made, the Court declines to include these write offs as part of the value of Berenergy.

The Estate's valuation of Berenergy Corporation done by Shenkin Kurtz Baker and utilized for the Form 706 valuation valued the "non-recourse loans" at $1,873,000 which included the write-off of $2,435,101. The Court FINDS and CONCLUDES that this valuation represents the amount that the four Berenergy sons had a binding obligation to repay and was the appropriate valuation for Berenergy's interests in the loans to the four Berenergy sons as of the date of Sheldon K. Beren's death.

Cost of Capital. For federal gift tax purposes it was necessary to compute interest on the "non-recourse loans." *Exhibit P-28* reflects the loan balances and the interest charges. The interest charges were determined by taking the applicable federal rate for loans without a stated interest rate calculated on a monthly basis. Sheldon Beren did not require the four Berenergy sons to actually pay interest on the non-recourse loans. Instead, on the books of Berenergy, they were each deemed to have received a "bonus" each year in the amount of the accrued interest, through a bookkeeping entry. In each year from 1991 through 1994, the four Berenergy sons, each, received a bonus of $200,000 to pay the "cost of capital." The whole transaction, which was eyewash for the IRS, lacked economic substance and the Court FINDS and CONCLUDES that neither the imputed interest nor the phantom compensation should be taken into account in computing the value of the augmented estate.

Interest on the "Non-Recourse Loans." The evidence established that the decedent did not charge interest to his children for the use of his money. No interest amount was agreed to by the decedent or the four Berenergy sons on the decedent's transfers to them or their corporations. The imputed interest and the offsetting "bonuses" were a device designed to avoid gift taxes otherwise attracted by interest-free loans among family members and did not go to the substance of the transactions between the decedent (through Berenergy) and the four Berenergy sons. Accordingly, the Court declines to include interest as requested by Mrs. Beren at the statutory rate of eight percent (8%) on the loans outstanding as of December 31, 1994 through February 12, 1996.

The $150 Per Month Subsidy. Berenergy Corporation operated certain wells in which it owned a sixty percent (60%) working interest and the four Berenergy sons' corporations each owned a ten percent (10%) working interest. The four Berenergy sons' corporations were charged operating overhead on the basis of $150 to the one hundred percent (100%) working interest, per well, per month. Sheldon Beren had granted this $150 charge to his sons initially as part of his overarching plan to make them into successful oil and gas producers. Sheldon Beren subsidized his sons' operating overhead.

There is no question that all of these exchanges between Sheldon Beren and the four Berenergy sons were confusing, changed over time, included rancor and dissention, and were poorly documented. The financial officers of Berenergy carried out the directions of the decedent and did their best to document and record the shifting relationship. The Court FINDS and CONCLUDES that the $150 rate that Sheldon Beren charged the four Berenergy sons companies for operating overhead was initially a father-to-son gratuity but became a part of the "agreement" among them that the four Berenergy sons could continue to operate the properties he had given them on fixed terms in exchange for their agreement to repay him in part. Because the grant of this subsidy from Sheldon Beren to them occurred more than two years prior to his death, the Court CONCLUDES that it falls outside of C.R.S. § 15-11-202(2) and is not included in the augmented estate. Because of this ruling the Court finds it unnecessary to calculate and place any value on the subsidy.

Salaries. Based upon all of the evidence presented, the Court has concluded that all of the salaries paid by Berenergy Corporation to all of the family members reflected the decedent's gratuitous nature. While some witnesses questioned the "value" of the services provided, the Court has determined that the decedent was purchasing more than the mere services of office workers when he employed his children in various capacities over the years, and he was uniquely qualified to determine their worth. The Court will not substitute its opinion regarding appropriate salaries for the decedent's. Furthermore, Berenergy's accounting staff reported all of the salary income to the IRS as compensation to the recipient. Accordingly, none of the salaries paid by Berenergy Corporation to the decedent's children are includable in the augmented estate under C.R.S. § 15-11-202(2).

2. "LOANS" TO CHILDREN

Sheldon Beren gave money to all of his children for various purposes. The letter from Daniel Beren's attorney to the attorney for the estate reveals that the children depended upon the support of their parents for weddings, bar mitzvahs, houses, taxes, etc. (*Ex. 8*) The Court is asked to determine that the amounts set forth on *Exhibits 117* and *118* should be included in the decedent's estate as loans due and payable on the date of death.

A purported loan between family members is subject to close scrutiny. *Reynolds v. Comm'r Internal Revenue*, 55 T.C. 172 (1970). Daniel and David testified that these "loans" were intended by their father as gifts to them or, if they were loans, were forgiven (*i.e.*, gifts to them). The record corroborates their testimony. Sheldon Beren observed that "I provided for each of you to live comfortably in your homes and I assisted each of you to improve your homes in a major way. This was accomplished . . . through gifts to you over a period of time." (*Letter to Zev, Jonathan, David, and Daniel, Ex. 60*)

The Court FINDS and CONCLUDES that the transfers to Daniel and David reflected on *Exhibits 117* and *118* were gifts on the date given. The word "loan" written on these checks has no economic significance except as it might implicate the tax consequences of the transfers. For purposes of inclusion in or exclusion from the augmented estate, the date on the check controls.

3. CJD PARTNERSHIP

The decedent, through Berenergy Corporation, as general partner (the "General Partner"), and three of his children: Cheryl Feldberger, Joshua Beren and Dena Beren Grossman, as limited partners (the "Limited Partners"), entered into a limited partnership agreement (the "Limited Partnership Agreement"), to form a Colorado limited partnership called CJD Investors Ltd. Partnership ("CJD") (*Ex. C-2*), pursuant to the Colorado Limited Partnership Act.

The sharing ratio of each partner was as follows:

Berenergy Corporation	1% (as general partner)
Cheryl Feldberger	33% (as limited partner)
Joshua Beren	33% (as limited partner)
Dena Beren Grossman	33% (as limited partner)

(*Ex. C-2 at Section 1.6*). Unless sooner terminated by the unanimous consent of all the partners, CJD was scheduled to dissolve on December 31, 2021.

The purpose of CJD was "to transfer assets to the three children" (*November 25, 2002 Testimony of Doug Pluss; also November 20, 2002 Testimony of Robert Goodyear),* "to transfer wealth to Cheryl, Joshua and Dena"*; (Testimony of Donald Hopkins, Miriam Beren, Cheryl Feldberger and Joshua Beren and Exs. C-1; C-8; C-9; C-49*), and "to provide investment opportunities for the three children" (*Ex.* C-1).

The decedent's estate planning counsel, Donald Hopkins, testified that the decedent recognized that he had created a financial disparity between the four Berenergy sons on the one hand and Cheryl, Joshua and Dena on the other hand. Mr. Hopkins' testimony further established that he was familiar with the decedent's investments for estate planning purposes prior to the decedent's death, and that CJD was the only vehicle that he was aware of that was structured to transfer wealth to Cheryl, Joshua and Dena. (*Testimony of Donald Hopkins*).

Immediately after the CJD Certificate of Limited Partnership was filed of record with the Colorado Secretary of State (*Ex. C-1*), the decedent directed Bob Goodyear to assign to CJD a three percent (3%) royalty in oil and gas properties that Berenergy was prospecting and developing. This direction is probative of the decedent's intent to gift the assets to CJD, because, as Bob Goodyear testified, the decedent equated the three percent (3%) override to the ten percent (10%) working interests he had given to the four Berenergy sons' companies. (*Testimony of Robert Goodyear, Ex. C-49)*

The decedent intended to invest most of the cash capital of CJD in Lipco Partners, L.P., an out-of-state investment familiar to the decedent and from which he previously had earned good rates of return. On July 31, 1992, his counsel provided him an opinion letter to assist with that investment program. The letter provided, in pertinent part, as follows:

> We have reviewed the Agreement of Limited Partnership of CJD Investors Limited Partnership as of November 21, 1991 (the "Partnership Agreement"). It is our opinion that the Partnership Agreement is in full force and effect . . . .
>
> We have based our opinion on the assumptions that the Partnership Agreement has not been amended, . . .
> (*Ex. C-11*)

The following day, on August 1, 1992, the decedent contributed $1 million to the partnership. On December 1, 1992, he contributed a second $1 million to the partnership. On February 1, 1993, he contributed the final $1 million to the partnership. (*Ex. P-14, attachment F-11*).

The decedent's Will and prior testamentary documents (*Ex. 3, Ex. 4, and Ex. 5*) are very persuasive on the issue of his intent at the time these funds were contributed to CJD. Specifically, the document dated July 12, 1988 provided for a devise of $1 million to each of his seven children. (*Ex. P-3*) On April 14, 1992, the decedent changed his testamentary plan to provide for an additional $1 million bequest to each of Cheryl, Joshua, and Dena. (*Ex. P-4*) The amended Article 1-1.3 provides:

> 1-1.3 <u>Pecuniary Gifts to Children</u>.
>
> (a) <u>Amounts of Gifts</u>. My personal representative shall set aside property equal in amount to One Million Dollars ($1,000,000.00) for each of Zev A. Beren, Jonathan Z. Beren, David I. Beren, and Daniel J. Beren. **My personal representative shall set aside property equal in amount to *Two Million Dollars* ($2,000,000.00) for each of Cheryl Beren Feldberger, Joshua Beren and Dena Beren Grossman. The additional amount set aside for Cheryl, Joshua and Dena is intended to compensate**

> **in whole or in part for the additional investment worth afforded to Zev, Jonathan, David and Daniel during my lifetime**. (Emphasis added).

The decedent executed his final will (*Ex. P-1*) on August 11, 1994. The cash devises to his seven children were again equalized at $1 million each. Mr. Hopkins, who drafted this will and witnessed its execution, testified that it was his understanding that the additional $1 million bequest to Cheryl, Joshua and Dena had been removed from the final will because the decedent felt that the disparity between his children had been addressed. (*Testimony of Donald Hopkins)*

Sheldon Beren informed the four Berenergy sons that he had decided to use the CJD entity to transfer wealth to Cheryl, Joshua and Dena. (*Ex. C-49*) This is borne out in letters written by Jonathan and Daniel Beren wherein they ask their father for permission to participate in CJD. (*Exs. C-49; C-51; BP-116; BP-123*)

A gift *inter vivos* is accomplished by the intent to make a gift, accompanied by delivery and surrender of control over the asset. Shores v. Shores, 134 Colo. 319, 322, 303 P.2d 689, 691 (1956); Ramsey's Estate v. State Dep't of Revenue, 42 Colo. App. 163, 167, 591 P.2d 591, 595 (1979). Once the donor has given up possession and relinquished control both present and future of the property, the gift is complete, and "it is beyond the power of the donor to recall it." Johnson v. Hilliard, 113 Colo. 548, 554, 160 P.2d 386, 389 (1945); Cass v. Blake, 98 Colo. 381, 387, 56 P.2d 42, 44 (1936) (a gift, once executed, cannot be revoked); In re Estate of Heyn, 47 P.3d 724, 727 (Colo. App. 2002) (citing Johnson v. Hilliard and stating that once a donor has surrendered control and dominion over the property, the donor cannot resume control without the consent of the donee).

The Court FINDS and CONCLUDES that the November 1991 to February 1993 transfers to CJD were gifts from a generous father to his children. The Court further FINDS and CONCLUDES that because the assets transferred into CJD were a gift, they ceased to belong to Sheldon Beren or Berenergy as of the date they were gifted, and they could not therefore comprise part of Berenergy or the estate on the date of Sheldon Beren's death. Finally, the Court FINDS and CONCLUDES that the transfers to CJD as then or presently constituted cannot be included under C.R.S. § 15-11-202(2)(a) as part of the augmented estate or for any other purpose.

Amendment to the CJD Agreement. In the summer of 1993, the attorney who had drafted the Limited Partnership Agreement prepared an Amended and Restated Agreement of CJD Investors Limited Partnership ("Amended Agreement") changing the capital structure of the limited partnership. This attorney testified that he did not then know whether capital had been contributed to the partnership. (*Testimony of Doug Pluss*) The restructuring was necessary to try to avoid the gift tax consequences of CJD. (*Exs. C-14A and 14B*) No gift tax returns were filed for the 1991, 1992 or 1993 funding of the partnership.

The amended and restated agreement provided that the decedent would receive a return of all of his capital and an aggregate, preferred seven percent (7%) rate of return. A purported investment, like a family loan, is subject to strict scrutiny. Perry v. Comm'r, *supra* at 480. On the front page of the Amended and Restated Partnership Agreement, signed by the decedent in the summer of 1993, was a statement that the amendment was "to be effective as of July 1, 1992." The decedent signed his own name on the Amended and Restated partnership Agreement and he signed the names of Cheryl Feldberger, Joshua Beren, and Dena Grossman. He apparently put the amended agreement in a desk drawer where it remained until after his death.

The Court FINDS and CONCLUDES that the obligation in the Amended Partnership agreement to refund the cash capital with a guaranteed rate of return had no economic substance but was intended merely to attract favorable tax treatment.

After the purported amendment, CJD never distributed the seven percent (7%) preferred return to Sheldon Beren or Berenergy. Furthermore, CJD continued to distribute $5,000 per month ($60,000 annually) each to Cheryl, Joshua and Dena, without regard to whether or not CJD generated sufficient revenues to cover the distributions. This course of conduct continued until the decedent's death in 1996.[4] (*Testimony of Bob Goodyear, Tammy Hoffman, Joshua Beren and Cheryl Feldberger, Exs. B-142; B-146*). The Court finds this fact extremely persuasive. It underscores (1) the lack of economic substance attributable to this provision in the partnership amendment and (2) Sheldon Beren's intent that Cheryl, Joshua and Dena were the primary intended recipients of the economic benefits of CJD.

Just as Sheldon Beren wrote the word "loan" on gift checks he handed to Daniel and David, and just as he carried one hundred (100%) of the gifts to the four Berenergy sons to finance oil and gas exploration as "loans," he signed the amended partnership agreement on behalf of Cheryl, Joshua and Dena to create favorable tax results for CJD. There was no reason to obtain the children's consent or agreement to any of these transactions because the transfers were gratuities, not obligations. There was no reason to require the children to sign promissory notes or amended agreements because the "loan" language or the "guaranteed return" provision represented no economic substance to Sheldon Beren.

The Court is urged to find Cheryl, Joshua and Dena bound by the provision requiring refund of the capital contribution plus the aggregated cumulative seven percent (7%) return because evidence of their actions and the actions of their uncle <u>after the death of Sheldon Beren</u> require the Court to conclude that they knew or should have known about this provision.

First, the Court concludes that it is improper for the Court to consider actions of the limited partners or their counsel in the years <u>after</u> the death of Sheldon Beren to determine the value, if any, to be included in the augmented estate as of the date of death. Accordingly, in the first instance, the Court has rejected all of these arguments.

If the Court could properly consider these post-death actions, several arguments are advanced: equitable estoppel, ratification, acquiescence, constructive knowledge, etc. The Court has considered and rejects all of these legal analyses because the Court specifically FINDS that Cheryl, Joshua and Dena did not have full knowledge of all the material facts until pre-trial in this matter and when the facts were known to them, they promptly repudiated this amendment. *See*, <u>Hauser v. Rose Health Care Sys.</u>, 857 P.2d 524, 529 (Colo. App. 1993).

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[4] After his death, the course of conduct was continued by Bob Goodyear, the personal representative, through September of 1998, and thereafter by the substituted general partner, Bracha Enterprises. (*Testimony of Cheryl Feldberger, Joshua Beren, Dena Grossman, Bob Goodyear and Michelle Sorenson, Ex. B-293*).

The Court finds Morris Werner's testimony credible and persuasive in that he was also ignorant of these facts. With respect to the tax returns, Michelle Sorenson testified that the returns were prepared under Bob Goodyear's direction and control and that she always overnighted the tax returns to all of the children and grandchildren, along with all of their other returns, with "sign here" stickers placed on the documents. The children signed without review or understanding of the documents. Goodyear was not aware that Cheryl, Joshua and Dena had not signed the amendment at the time he directed preparation of the tax returns.

The documents prepared by Morris Werner and signed by Cheryl, Joshua and Dena, as well as the tax returns prepared under Bob Goodyear's direction and control, did not amend the original Agreement or change the fact that the $3 million had been gifted to Cheryl, Joshua and Dena in 1992 and 1993 because they lacked the requisite intent or agreement to repay.

Because the Court has concluded that (1) the creation and funding of CJD constituted a completed gift; (2) the purported amendment to CJD creating an obligation on Cheryl, Joshua and Dena to pay the estate was ineffective; and (3) neither the estate nor any devisee thereunder is entitled to equitable relief under any legal theory, the Petition for Order Compelling Personal Representative to Collect Debts Owed to the Estate by CJD Investors LLP or for Leave to Bring Action of (sic) Behalf of the Estate, and Enjoining Further Distributions by CJD Investors LP, filed by Zev Beren, Jonathan Beren, Daniel Beren and David Beren on March 14, 2002 is DENIED.

B. VALUATION OF ESTATE ASSETS

Valuation of assets has multiple purposes: the estate inventory, the federal estate tax return, the augmented estate, and the final distribution. In the context of the current dispute, the primary purpose of the Court's determination of value is the computation of the value of the augmented estate and Mrs. Beren's elective share.

A substantial portion of the estate's value derives from oil and gas properties owned by companies in which the estate holds an interest. As noted by all of the oil and gas valuation experts who offered testimony in this case, no oil and gas valuation will ever perfectly predict the value of an oil and gas asset given the numerous variables involved. Thus, the weight afforded to a particular valuation is primarily based on credibility of each witness and the techniques they employed.

1. OIL & GAS PROPERTIES

The Personal Representative was required to file a Form 706 Estate Tax Return (hereinafter "the 706") as well as an estate tax return with the State of Colorado. Goodyear retained independent experts to value the assets of the estate to obtain fair market values of assets owned by the estate to include on the 706.

Goodyear retained two oil and gas experts, Ryder Scott & Co. and Kenton L. Hupp. Ryder Scott & Co. evaluated the oil and gas properties operated by Berenergy, and Kenton L. Hupp valued the oil properties operated by others. Goodyear also retained Shenkin Kurtz Baker

P.C. to value the estate's interest in several entities owned by the estate, and Bayless & Associates, Inc. to value the estate's interest in Beren Corporation and S.K. Beren Family LLC.

Goodyear testified that Mrs. Beren did not influence his decision to hire any of those experts. Both Goodyear and the experts themselves testified that Mrs. Beren had no contact with any of those experts. The Court found this testimony credible. After she filed her election, Mrs. Beren was removed as co-personal representative by this Court on April 15, 1997. The Court specifically FINDS that Mrs. Beren had no influence on the values finally determined by the personal representative.

Ryder Scott & Co. is an internationally recognized oil and gas engineering and valuation company with a client list including Amoco Corporation, the City and County of Denver, ARCO Oil and Gas Company, General Electric Capital Corporation, Phillips Petroleum Company and Texaco U.S.A. Ryder Scott valued the estate's oil and gas properties operated by Berenergy.

Kenton L. Hupp, from Wichita, Kansas, valued the oil and gas properties owned by the estate but not operated by Berenergy. Mr. Hupp had previously been engaged to evaluate oil and gas properties owned by the estate of a relative of the decedent.

Shenkin Kurtz Baker Inc., an experienced valuation firm, was retained to value the estate's interest in certain of the entities owned by the estate. In making these valuations, Shenkin relied on the valuation of oil and gas properties made by Ryder Scott and Kenton Hupp.

Goodyear retained Virginia Bayless of Bayless & Associates, Inc. to value the estate's forty-nine percent (49%) ownership interest in Beren Corporation and the estate's 17.75% interest in S.K. Beren Family LLC. Ms. Bayless is a qualified expert with significant experience.

The Court has read the extensive documentary evidence in this case and has considered all of the testimony. The personal representative retained qualified experts to develop independent fair market valuations of the estate properties as of the date of death. The personal representative exposed these valuations to the test of a tax audit. The Court FINDS these opinions to be the most credible and the most independent of influence. The methodologies of these experts were sound and were substantiated by their historical, consistent patterns of practice.

The Court FINDS and CONCLUDES that the values obtained and presented by the personal representative (for purposes of estate administration and the estate tax) represent the fair market value of the assets of the estate and shall be used for purposes of the augmented estate calculation.

The Court FINDS the expert valuation opinions advanced by Mrs. Beren, by David Beren and by Daniel, Zev, and Jonathan Beren collectively less credible and hence the Court has accorded less weight to these opinions. The Court found all of the experts who testified by report or by appearance to be highly qualified; however, the Court has concluded that the experts retained by the personal representative were more credible. In addition, their values, which were reported on the 706[5] and were validated in the federal estate tax audit, were accepted initially by all of the litigants.

The 706 was filed in May 1997. During 1997, Christopher Lane, an attorney representing David Beren and Charles Brega, on behalf of Daniel, Zev, and Jonathan Beren, signaled acceptances of these values. Mrs. Beren does not dispute that she initially accepted the Form 706 values. Cheryl, Joshua and Dena have not participated in the dispute over the value of the oil and gas properties in any meaningful way.

The estate could have recouped substantial estate taxes if a valuation error could have been proven but none was brought to the attention of the personal representative in a timely way. The testimony established that the family, seeking to take advantage of tax benefits, purposely waited until after the dispute period with the IRS had expired to raise objections to the personal representative's valuations. It would be inequitable in the Court's view for all of the family to accept the 706 values as against the taxing authorities but argue different values to advance their self interests against each other.

2. OTHER REAL AND PERSONAL PROPERTY

The Court further FINDS and CONCLUDES that the values of the non-oil and gas real properties and the personal property as determined by the personal representative should govern in this case for purposes of the computation of the augmented estate. Although most of the parties stipulated to these values as reflecting fair market value, David Beren produced evidence of valuation of property for purposes of replacement through insurance coverage. Such valuation does not reflect fair market value, Kelley v. Sonny Boy Appaloosas, Ltd., 491 P.2d 67 (Colo. Ct. App. 1971), and the evidence is accorded little weight.

3. CHARITABLE GIFTS & PLEDGES.

Mrs. Beren argues that the augmented estate should include charitable pledges and gifts in the amount of $679,527 made in the two years next preceding the decedent's death. The Court rejects her argument. Mr. and Mrs. Beren acted in concert in regard to their community and charitable activities. There is no evidence that Mrs. Beren objected to the gifts or repudiated them when she learned of them following her husband's death. To the contrary, all of the evidence suggests that Mr. and Mrs. Beren were recognized and honored jointly for their charitable activities in the community. The gifts should be attributed to each of them equally (50%).

The personal representative included on the 706 as assets of the estate, accounts receivable from charitable or non-profit entities, in the total amount of $648,986. This Court ruled on April 30, 1997 that the obligations of the charitable institutions arising from the Estate's payment of notes and guarantees were forgiven by the decedent, but also specifically ruled that: "[t]his Order is without prejudice to the determination of the value of the claims by the Estate against the charitable institutions for augmented estate purposes." The value of the receivables is

[5] This Court is not a tax court and while the Court has given some consideration to the U.S. Tax Court's approach to resolving valuation disputes between taxpayers and the Internal Revenue Service, these cases are not controlling here.

properly included in the augmented estate. No evidence was presented to counter the personal representative's conclusion that these receivables were bona fide and collectible, and the Court therefore FINDS and CONCLUDES that they are properly included in valuing the augmented estate.

4. OTHER GIFTS

Mrs. Beren has also sought to include one hundred percent (100%) of certain other gifts made by the decedent in the two years next preceding his death. The Court rejects this argument. One of the underlying principles of the augmented estate, strengthened by the 1990 and 1993 revisions, was prevention of the problem of "fraud on the spouse's share" which arose previously when the decedent attempted to dilute the spouse's interest by "various kinds of nominal inter vivos transfers." See Uniform Probate Code, Part 2, cmt., p. 62 (2001).

All of the evidence establishes that Mrs. Beren supported her husband in his familial and charitable activities and encouraged his generosity. Additionally, the decedent's will gave Mrs. Beren one hundred percent (100%) of the economic benefit of his residuary estate. In sum, the Court FINDS their marriage consistent with the Uniform Commissioners' modern philosophical paradigm of the "economic partnership "

The Court expressly FINDS and CONCLUDES that, except as specifically set out above, only fifty percent (50%) of the transfers from the decedent to his children and to the charities should be included in the augmented estate because of the participation, consent and/or acquiescence of Mrs. Beren, which negates the concept of "fraud upon her interest."

C. REQUEST FOR FURTHER CONTINUANCE

On the final day of trial, one of the *pro se* litigants, David Beren, requested an additional continuance of the trial for the purpose of allowing him to present further argument and evidence to the Court. The Court denied the request because it represented, in the Court's view, part of a pattern of deliberate delay.

One of the primary purposes of the Colorado Probate Code is "[t]o promote a speedy and efficient system for settling the estate of the decedent and making distribution to his successors, . . . ". C.R.S. § 15-10-102(2)(c). Sheldon K. Beren died in March of 1996. The Court first attempted to bring this dispute to trial in its February 25, 2000 Delay Reduction Order. Hearing on the Petition was then set for May 11, 2000. David Beren requested that the hearing date and time be vacated (*See* David Beren's Motion for Vacation of Hearing Date and for Resetting, dated March 29, 2000). The hearing was vacated.

Two years later, the parties set the matter for trial from November 12 through November 26, 2002. On the morning trial was set to commence, David Beren filed a Rule 21 writ in the Colorado Supreme Court to delay the commencement of the trial. The Writ was dismissed and the trial proceeded on schedule.

Near the conclusion of the trial in November 2002 counsel and the litigants asked the Court to continue the trial for an additional day. Working with counsel and the *pro se* litigants and considering complex schedules, including the fact that many participants live out-of-state, the Court suggested that the litigants reserve **three** additional days instead of just one, to complete the trial. The continued trial was then set for April 1 through April 3, 2003. For four months between the two trial sessions the parties, whether *pro se* or through counsel and including David Beren, knew exactly how much time was available to complete this trial.

The Court concluded that the April 3, 2003 request for a continuance was an effort to further delay completion of the trial.

While litigants in the civil context are ordinarily free to opt for self-representation, they are still subject to the fundamental constraints of the legal environment. Pro se litigants are expected to follow the same rules of evidence and procedure by which officers of the court are bound. Knapp v. Fleming, 127 Colo. 414, 415, 258 P.2d 489, 489-90 (1953). Furthermore, a judge is not expected to act as a surrogate attorney for pro se litigants. Loomis v. Seely, 677 P.2d 400, 402 (Colo. Ct. App. 1983). "If a litigant, for whatever reason, sees fit to rely upon his own understanding of legal principles and the procedures involved in the courts, he must be prepared to accept the consequences of his mistakes and errors." Viles v. Scofield, 128 Colo. 185, 187, 261 P.2d 148, 149 (1953).

In this case, the Court was tolerant, patient, and gave extra consideration to both *pro se* litigants, taking into consideration the following additional factors: David Beren advised the Court that he is a graduate of the Benjamin Cardoza School of Law. He is presently a licensed attorney in the state of Colorado, and admitted to active practice before all the courts in this state. In addition to his own law degree the Court recognized that, although he appeared *pro se* at the trial, David Beren was not *pro se* throughout most of the proceedings leading up to trial. Since 1996 he has been represented by some of the most prominent law firms and attorneys in Denver.

Throughout these proceedings and particularly in connection with the trial, the Court admonished David Beren that he should hire counsel to represent him. Although he did not "appear" through counsel, David Beren frequently conversed and consulted during the trial with counsel for his three brothers, Daniel, Zev, and Jonathan. In addition, Peter Bjork appeared at the trial "on behalf of David Beren, et al."

The Court repeatedly urged the parties and counsel to meet for the purpose of planning for the trial or to settle discovery and evidentiary disputes between themselves. Opportunities to plan the presentation of evidence over the three-day continued trial were abundant during the four and one half months between the November session and the April session of the trial.

Repeatedly throughout this litigation and as recently as Tuesday, April 1, 2003, the Court ordered all of the attorneys and *pro se* litigants to meet and to go over exhibits so that all non-objectionable exhibits could be admitted on stipulation and without further delay to the end that no Court time would be wasted. On the final morning of trial the Court granted to David Beren the entire day for the purpose of presenting "his case." From 9:00 a.m. until the Court announced the luncheon recess, David Beren introduced exhibits that had already been admitted and to which there had been and were no objections by any party (save one that had been previously ruled upon and refused by the Court).

Finally, and of substantial significance to the Court in deciding whether any additional special considerations should be extended to this *pro se* litigant, the Court has weighed the concert of interests among all four of the Berenergy sons. There are very limited interests or positions in this case wherein David Beren's interests differ from that of the other three Berenergy sons. The other three Berenergy sons are ably represented throughout and at trial by Mr. Brega and Mr. Rogers and Mr. Bjork. Various summary judgment motions were filed on behalf of all four Berenergy sons.

David Beren questioned most witnesses, presented opening and closing arguments, argued many procedural motions during trial, and interposed many objections throughout the trial. He was a significant participant throughout. The Court is satisfied that no additional time was warranted under the circumstances.

D. ROBERT GOODYEAR, the personal representative

During these proceedings, Goodyear was accused of fraud (Dena Grossman and Joshua Beren); of corruption (David Beren), of bias (Daniel Beren, Zev Beren and Jonathon Beren) and of negligence (Mrs. Beren). The Court has considered these allegations in light of the extensive evidence in this case and makes the following findings regarding the actions of the personal representative in this case:

David Beren has characterized the personal representative and his actions as a part of a "corrupt situation," labeling the personal representative as one of Mrs. Beren's "henchmen," "lieutenants," and a part of her "cartel." There is no evidence of corruption or fraud.

The record is also entirely devoid of evidence of bias. Goodyear acted in the context of enormous pressure from the devisees, their attorneys, and family members. Some of it came in the form of legal demands and threats, some of it came in the form of emotional appeals, and some of it came in the form of resistance and silence. The Court finds that the personal representative was generally and appropriately receptive to input from all quarters and acted appropriately in allowing heirs and their representatives to have access to him and to information. The Court is satisfied that he remained consistently independent in his actions and decision-making.

Mrs. Beren has asserted that the personal representative negligently failed to include in the computation of the augmented estate a number of lifetime transfers made by the decedent and therefore the calculations should be changed to benefit her. The Court has found that Goodyear's work was generally methodical and accurate and directed towards carrying out the decedent's estate plan with careful regard to all facts and circumstances. There is no evidence of negligence.

Goodyear was uniquely qualified to serve as personal representative of this estate by experience, intellect, temperament and judgment. He was selected by the decedent. While the Court cannot conclude that merely because a personal representative has dissatisfied everyone, he must therefore be impartial; in this case, the nature and number of decisions made by Goodyear that evidence his independence from influence, his lack of favoritism, his commitment to advancement of the decedent's motives and enhancement of the estate for the benefit of all interested parties, and his resistance to intimidation, persuade the Court that the decedent's confidence in his employee was well placed.

Administration of an estate is not a democracy. The decedent excluded his children from participation in the administration of his estate (except for the testamentary charitable trust) and reposed his confidence, instead, in this business associate. In his 1988 will he had made provision for all of his sons and daughters to participate in estate administration (*Ex.3, pp. 2-1 to 2-2)*; however, in wills dated April 14, 1992 (*Ex. 4*) and September 1, 1992 (*Ex. 5*) the children had no administration authority regarding the estate. The arguments that they were excluded from various aspects of the administration by the personal representative are, therefore, without merit. To the extent they were excluded it was due to the decision of the decedent to give them no role in decision-making following his death. Contrariwise, the quantity and quality of information and involvement they were provided by Goodyear amply meets the requirements of the probate code.

The Court has not addressed the complaint that the four Berenergy sons did not have meaningful participation in the preparation of the Form 706 because this issue does not contribute to the resolution of the case. There is no duty on a personal representative, such as the four Berenergy sons have sought to impose, to include devisees and heirs in the preparation of tax documents. To the extent the four Berenergy sons were advised that devisees or remaindermen under a testamentary trust are entitled as a matter of law to participate in the filing of any tax returns, they were misled. *See* C.R.S. § 15-12-701 et seq.

The decedent's will provides that the personal representative's liability is limited to "gross negligence or willful misconduct." (*Article 2-6*). This provision first appeared in a will dated September 1, 1992. The evidence establishes that in 1992 the four Berenergy sons were exerting substantial pressure on the decedent to transfer additional wealth to them, and to stop transferring wealth to their siblings. This dynamic resulted in a fractured relationship between the four Berenergy sons and their father and led to their exclusion by their father as active participants in the estate administration process.

The record is so devoid of evidence that Goodyear was grossly negligent or engaged in willful misconduct as to make all of such allegations by the family members absolutely groundless.

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This Order deals with some, but not all, of the issues presented to the Court at trial. The remaining issues will be addressed in a subsequent, separate Order.

October 30, 2003

(Signed original on file with the Court)
C. Jean Stewart
Judge, Probate Court

IT IS FURTHER ORDERED that, pursuant to C.R.C.P. 5, counsel for the Trustee shall serve copies of this Order on all pro se parties and on all interested persons not otherwise served by LexisNexis File & Serve and shall file proof of service with the Court within 10 days.