96PR110 (7/9/99)

PROBATE COURT, CITY AND COUNTY OF DENVER, COLORADO

Case No. 96PR110

IN THE MATTER OF

The Estate of JAMES W. FENNELL,

Deceased.

FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER

THIS MATTER comes before the Court upon a Petition for Supervised Administration and a Petition for Removal and Surcharge of Personal Representative and Trustee, both filed by the decedent's wife, Marjorie Fennell, and his descendants (hereinafter referred to collectively as "Petitioners"). A trial was held over the course of several sessions beginning January 17, 1999 and concluding June 4, 1999. The Court received extensive documentary evidence, heard testimony of witnesses as well as the statements of counsel, and reviewed the applicable legal authority. Being fully advised, the Court hereby makes the following Findings of Fact, Conclusions of Law, and Order.

I. FINDINGS OF STIPULATED FACT

The following facts were stipulated as set forth in the Trial Management Order, as amended, or conceded by all parties in the course of testimony and presentation of evidence at trial.

The decedent, James W. Fennell, died on January 2, 1996 leaving a will and codicil (hereinafter referred to as the "will"), both dated April 1, 1994. The decedent also executed a revocable trust agreement dated April 1, 1994 and an amendment to that trust agreement dated July 18, 1994. In his will and revocable trust, the decedent nominated his nephew, Michael Bessler, (hereinafter sometimes referred to as "Respondent") as personal representative, testamentary trustee, and successor co-trustee. The decedent also directed informal probate and unsupervised administration of his estate, "unless changed circumstances occur[red] which [the decedent] could not have anticipated and which would necessitate formal or supervised judicial proceedings for the protection of persons interested in [his] estate." (Will of James W. Fennell, Pet'rs' Ex. 1.)

Prior to his death, the decedent had employed Michael Bessler for approximately six years, teaching Respondent the decedent's investment strategies and acting as mentor to Respondent to groom him for the roles of personal representative and trustee upon the decedent's death. (Test. of Pet'r Dennis Fennell, Tr. Mar. 16, 1999 at 95.) (See also Resp't's

Response to Consolidated Petition for Removal and Surcharge of personal representative and trustee ¶ 4). The will and codicil were admitted to probate and Respondent was appointed informally as personal representative of the decedent's estate on January 24, 1996. Proceedings related to the California properties were conducted there with Respondent acting as sole fiduciary.

While acting as personal representative and with the consent of Petitioners, Respondent retained attorney Mathew Zieringer (hereinafter "Zieringer") to provide legal advice concerning estate and trust administration matters. Respondent also retained Beverly Beatty (hereinafter "Beatty"), who had been the Fennell's accountant, to provide tax and accounting services. With the consent of Petitioners, Respondent hired Evelyn Golosow (hereinafter "Golosow") to perform supplemental accounting services for the estate and related trusts.

During the administration of the estate and without the consent of Petitioners, Respondent decided to and did stop making mortgage payments on the California property known as Condominium Unit 166, causing the foreclosure of the mortgage attached to that property.

II. ANALYSIS OF APPLICABLE LAW AND CONCLUSIONS

This is an action to remove and surcharge Respondent as personal representative and trustee. Because Respondent has consented to the appointment of a corporate trustee upon the closure of this estate and this Court agrees that a corporate fiduciary may fulfill that function, this Order focuses primarily upon the removal of the Respondent from his role as personal representative of this estate.

The decision of whether removal or surcharge of the personal representative is appropriate is solidly within the jurisdiction of the Court. Colo. Rev. Stat. §§ 15-10-302, 611 (1998). See also In re Estate of Jefferson, 140 Colo. 347, 344 P.2d 179 (1959) (recognizing that "the probate court is vested with full discretion in the area of removal of fiduciaries . . . ."). The Court may grant the Petition for Removal or may order corrective action where necessary to fulfill its obligation to oversee the administration of estates. See O'Neill v. Irwin, 160 Colo. 99, 101 414 P.2d 122, 123 (1966).

The second issue involved in this case is whether the fees of the personal representative and the various professionals in his employ were reasonable. This is also a question within the jurisdiction of the Court. Colo. Rev. Stat. §§ 15-10-302, 15-12-719, 15-12-721 (1998). Therefore, the Court considers both issues below.

A. REMOVAL OF THE PERSONAL REPRESENTATIVE

One important purpose of probate is to give effect to a testator's intent. Colo. Rev. Stat. § 15-10-102(2)(b) (1998). Numerous authorities have recognized that a decedent's choice of a personal representative or trustee is to be given deference when considering whether removal is warranted. In re Estate of Robbin, 747 P.2d 869 (Mont. 1987) ("The appointment of a personal representative should not be annulled except under the most extreme circumstances."). See also Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts § 107.1, at 117 (4th ed. 1987). Removal of a personal representative is not a decision this Court makes lightly, especially where, as here, the decedent has nominated this person to the exclusion of any other individual.

There are circumstances in which it is nevertheless appropriate for a court to remove a personal representative. Colo. Rev. Stat. § 15-12-611(1) (1998). The applicable portion of Colorado law states that "[c]ause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative . . . has mismanaged the estate or failed to perform any duty pertaining to the duties of his office. . . ." Colo. Rev. Stat. § 15-12-611(2) (1998). Petitioners have asserted a variety of factual grounds for the personal representative's removal. The Court has consolidated Petitioners' claims into categories and discusses them below.

1. Responsiveness of Respondent to Petitioners' requests for information. (See claim nos. 1, 3, 4, 5, 6, 7, 18, and 19 of Pet'rs' Fourth Am. Inserts to Proposed Trial Management Order.)

This litigation is primarily about Petitioners' dissatisfaction with the reports they received from Respondent during his administration of the estate. The majority of their claims supporting the Petition for Removal highlight individual complaints about the timing, detail and quantity of the reports.

From this assortment of complaints they have concluded that Respondent should be removed because he has committed mismanagement and waste of the estate assets. It is important, therefore, to discuss the obligations of a personal representative to administer the estate, as contrasted with the obligations of a personal representative to account and report concerning his administration.

During the informal administration of an estate the personal representative has a duty to:

Inform the heirs and devisees of his appointment as required by Colo. Rev. Stat. § 15-12-705 (1998);

Prepare an inventory and supplement it as required by the discovery of assets as set forth in Colo. Rev. Stat. §§ 15-12-706, –708 (1998);

Take possession or control of the decedent's property as required by Colo. Rev. Stat. § 15-12-709 (1998) and proceed to manage the estate property pursuant to the "prudent person" standard set out in Colo. Rev. Stat. §§ 15-16-302, -703 (1998);

Handle claims of creditors as required under Colo. Rev. Stat. § 15-12-801 to –816 (1998);

Pay all estate taxes due and make distribution of the remaining assets of the estate to the devisees as required by Colo. Rev. Stat. §§ 15-12-901 to –916 (1998); and

Close the estate, which includes the submission of a final accounting to distributees and creditors as required by Colo. Rev. Stat. § 15-12-1003.
Unless required by the terms of the governing will or upon Court order, the personal representative has no duty to make interim accountings to the heirs, devisees, creditors, or to the Court. See Colo. R. Prob. P. 31; James R. Wade & Howard E. Parks, Colorado Law of Wills, Trusts and Fiduciary Administration § 28.1, at 28-1 (rev. ed. 1998). Even when a Court orders supervised administration, the Court may, but need not, order that interim accountings be made. See Colo. R. Prob. P. 31.

Nevertheless, the personal representative has a duty to maintain records and accounts so that those interested in the estate may determine what has been done. Wade & Parks, supra, § 20.6, at 20-7. The personal representative has a duty to keep all interested parties reasonably informed about the administration and affairs of the estate because, under the Colorado Probate Code, they have the burden of protecting their own interests. See Colo. Rev. Stat. 15-12-1002 (1998); Colo. R. Prob. P. 8.3, 8.4.

Colorado laws regarding the duties of a personal representative to interested parties and those of a trustee to beneficiaries are similar. See Colo. Rev. Stat. § 15-12-703(1) (1998). Subject to the requirements that may be set out in the governing trust agreement, the applicable trust law provides, "(1) The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. . . . (4)Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee." Colo. Rev. Stat. § 15-16-303(1),(4) (1998).

Thus, Michael Bessler's duty was to be reasonably responsive to the Petitioners' requests for information and to keep them reasonably informed of the status of the estate and trusts. The decision of the Court in this case must, therefore, focus on whether Michael Bessler maintained adequate records and accounts and acted reasonably in informing the interested parties of the administration and affairs of the James Fennell estate.

The Court finds that Respondent supplied Petitioners with his own personal accountings as well as quarterly accountings and financial statements prepared by professionals; in addition, he met with Petitioners on numerous occasions to report on his administration.

Petitioners assert that Respondent failed to provide them with adequate accountings on a reasonably frequent basis. Their testimony reflects that they believed they requested monthly "accountings" (from Beatty) and an "audit" (from Golosow) of all estate and trust accounts. Even if the Court had found this testimony credible, such accounting goes substantially beyond what was required to keep Petitioners "reasonably informed."

In a normal, unsupervised estate administration, a review of the personal representative's accounts, covering the entirety of his administration of the estate, can be scheduled by an interested party at a formal closing of the estate. Colo. Rev. Stat. § 15-12-1002 (1998), and see C.R.P.P. 33. The interim accounting required by Petitioners in this case was extraordinary, and while it was not unreasonable for Respondent to attempt to accommodate their interest in additional reports and information, it was not required that he supply that information in any particular format.

The Court finds that Respondent went beyond the statutory requirement in accounting to Petitioners. He not only submitted reports to the Petitioners before the close of the estate, but he also met with Petitioners to get their input and to hear their concerns regarding the administration of the estate on a frequent and timely basis, gave adequate regard to Petitioners' concerns, and appropriately responded to their requests for information. In support of this finding, the Court has determined that the Respondent provided three separate forms of reports to the Petitioners.

First, he supplied them with periodic reports called "Fennell Family Portfolio." The preparation and distribution of these reports was prompted by the pattern that had occurred prior to the death of James Fennell. After James Fennell's death, the reports were distributed to the decedent's children as well as to Marjorie Fennell. The Court finds that

Respondent had Marjorie Fennell's implied consent to distribute these reports to her children.

Second, Respondent provided Petitioners with various inventories of the Fennell family property, including the property in the probate estate. Colorado law requires that a personal representative "prepare an inventory of property owned by the decedent and subject to disposition by will or intestate succession at the time of his death." Colo. Rev. Stat. § 15-12-706(1) (1998). He need not file it with the Court nor provide it to anyone unless an "interested person" requests a copy. Colo. Rev. Stat. § 15-12-706(2) (1998). The evidence is not clear that any of the Petitioners requested a copy of the inventory. Nevertheless, the Respondent prepared and provided to them a first inventory dated April 2, 1996 and a second dated October 25, 1996.

Third, the Respondent gave Marjorie Fennell a copy of the Federal Estate Tax Return Form 706 and all of the Petitioners had access to this copy. There is no statutory duty on a personal representative to provide any interested person with the federal estate tax return but it was not unreasonable that Respondent allowed Petitioners to view the 706. This act further supports the Court's finding that Respondent kept the interested parties reasonably informed of his administration.

In collaboration with Petitioners and to assist in answering their questions and assuaging their concerns about his performance, Respondent subsequently commissioned separate accountings from certified public accountants Golosow and later from Beatty (the latter in the form of financial statements). Again, neither of these acts is required by the Colorado Probate Code and would not have been provided by a personal representative in a routine estate administration; nevertheless, the Court finds that it was appropriate for Respondent to commission the extra accountings in response to Petitioners' concerns. This act further supports the Court's finding that Respondent willingly and readily provided to Petitioners sufficient additional information to protect their interests.

In sum, the Court FINDS that Respondent was responsive and kept Petitioners reasonably informed regarding the status of estate accounts and trusts.

2. Accuracy of Accountings. (See claim nos. 4, 7, 9, 10, 18, and 19 of Pet'rs' Fourth Am. Inserts to Proposed Trial Management Order.)

Petitioners allege that the accountings Respondent prepared or had others prepare were confusing and misleading, being so useless as to constitute waste and mismanagement and consequently reflect a failure of Respondent to fulfill his duties so that his removal is appropriate. Petitioners rely primarily on In re Estate of Jefferson, 140 Colo. 347, 344 P.2d 179 (1959) in making this assertion. The Court finds Jefferson inapplicable to the facts of this case.

In Jefferson, the trial court based its conclusion that the personal representative had caused confusion and waste constituting grounds for his removal upon a finding of:

a total failure on the part of the administrator to perform the acts required by statute except when specifically ordered to perform those acts by the Court. The inventory was filed late; no reports were made to the Court until specifically ordered by the Court; real property was sold in the estate without the authority of the Court and there is a general lack of regard by the fiduciary of the orderly procedure in handling [sic] estate running through his administration of the estate. The Administrator has shown a total disregard for the

procedures required of a fiduciary [sic] and this in spite of the fact that he is an attorney at law and is familiar with such duties.

Id. at 349, 344 P.2d 180. Thus, the personal representative in Jefferson virtually disregarded his duties.

The Court here finds that Petitioners exhibited some confusion about the meaning and accuracy of the various accountings that Respondent and the accountants produced. In contrast to Jefferson, however, such confusion appears to stem primarily from variations in accounting methods on the different reports and from Petitioners' inexperience with financial reports, rather than from critical failings in the accuracy of the various accountings individually.

The periodic reports the Respondent supplied Petitioners, called "Fennell Family Portfolio," summarized the values of all of the holdings of James and Marjorie Fennell without regard to title; that is, assets held by them as joint tenants, as tenants in common, in revocable trusts, in Colorado and California, and eventually, those assets "owned" by the estate. These reports mirrored the reports Respondent had provided to James and Marjorie Fennell prior to James' death. Acting as Marjorie's agent under a power of attorney and as personal representative of James' estate, it was prudent and responsible for Respondent to continue to produce and to provide these consolidated reports to Marjorie.

With the benefit of hindsight, Respondent might have been advised not to provide copies of these reports to the adult children who were confused rather than informed by them; however, his reasons for doing so and his effort to provide more, rather than less information, reinforce the Court's finding that Respondent was keeping all interested persons "reasonably informed."

The inventories that the Respondent prepared also included assets that, while part of the "Fennell Family Portfolio," were not part of the probate estate. Respondent conceded and the Court finds the inventories overly inclusive. The adult children of the decedent allege that they were consequently misled, concluding upon review of the first inventory, "[W]ow, . . . more money than we thought." (Test. of Pet'r Nancy Landauer, Tr. Mar. 17, 1999 at 62.)

The Court finds that, in both of the overly inclusive inventories, the assets that comprise the non-probate parts of the estate are so identified. A knowledgeable reader, or a novice acting with the advice of a knowledgeable counselor, would not have been misled. The Court recognizes that the adult children were disappointed when they ultimately understood the size of the probate estate; however, the evidence does not support a finding that Respondent misunderstood and hence erred in his administration of the estate as a result of the overly informative reports and inventories he supplied to Petitioners.

Furthermore, while every accounting that the Respondent prepared or had prepared by professionals was not perfect, after thorough review of the accountings, this Court finds they were generally accurate and were calculated to inform the family members who received them.

Overall, Respondent was been diligent in executing his duties and has exhibited the degree of attention and accuracy required of a fiduciary. A review of the timeline of administration reveals that on the date the Petition for Removal and Surcharge was filed, the Respondent

had performed virtually all of the administrative tasks prerequisite to closing the estate in an appropriate and timely manner.

The Respondent had the duty to "observe the standards in dealing with trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills." Colo. Rev. Stat. § 15-16-302 (1998). See also Colo. Rev. Stat. § 15-12-703 (1998) (equating the duties of a personal representative with those of a trustee).

Here, the Respondent submitted reports based on an accounting system taught to him by and utilized by the decedent. Respondent's special training or expertise was that of one trained in and very well acquainted with Mr. and Mrs. Fennell's assets and investment strategies. Consequently, the Respondent's overly inclusive accountings and inventories were consistent with his special training and expertise. In this regard his skills differed greatly from those of the personal representative in Jefferson, who was an attorney allegedly familiar with probate procedures.

The various "professional accountings" that Respondent commissioned to further inform Petitioners were substantially accurate. Any errors were minor and any resulting confusion on the part of Petitioners was avoidable, had they been aware that the reports and accountings were inherently varied due to methods of accounting.

Also important in the Court's analysis is the irrefutable conclusion that the estate itself suffered no harm as a result of the overinclusiveness of and minor errors in the reports, inventories, and accountings. Again, the Court contrasts the personal representative's duty to administer the estate with his duty to account and report to others concerning his administration. Here, Respondent's administration of estate property was proper although some of his reports included not only estate administration but also covered some of Marjorie Fennell's financial affairs to the confusion of the decedent's adult children.

Related to Petitioners' claim that Respondent's accountings were inaccurate is an allegation of misallocation of expenses among the various estate and trust accounts. The Court finds that, while Respondent initially paid some expenses from accounts that were not ultimately responsible for them, this was a reasonable act at the time in light of the fact that the assets were not yet allocated among the various entities. That is, the Respondent had no choice but to pay expenses from accounts that actually had cash in them. When the various entities over which the Respondent had responsibility were funded, the Respondent reallocated expenses and fees among them. Moreover, evidence suggests the Respondent maintained a proper record of those expenses at all times and, when asked to do so by the accountants, was able to make appropriate final allocations.

Minor errors, such as those iterated here, are not grounds alone for removing a personal representative. For example, in a case in which it was established that the administratrix had failed to file reports and the inventory on time and used nonstandard accounting procedures, the Colorado Supreme Court found that since the inventory was eventually filed and no prejudice or harm to the estate resulted, the trial court had acted within its discretion in refusing to remove the administratrix for such errors. Canaday v. Kauffman, 140 Colo. 165, 168-69, 342 P.2d 1027, 1029 (1959). See also In re Estate of Robbin, 747 P.2d 869, 871 (Mont. 1987) (noting that "irregularities not directly harmful in the management of the estate will be overlooked") (internal quotes and citation omitted).

Thus, while some of the Respondent's accountings and inventories were overly inclusive, and some accountings contained minor reporting errors, the Court FINDS that these inadequacies do not rise to the level of mismanagement or constitute a failure of the Respondent to perform his duties in the administration of the estate such that removal is merited.

3. Hostility. (See claim no. 2 of Pet'rs' Fourth Am. Inserts to Proposed Trial Management Order.)

Petitioners argue that it would serve the best interests of the estate to have the Respondent removed as personal representative because there exists hostility and ill will between Petitioners and Respondent. In support of this contention, Petitioners cite In re Estate of Malone v. Cavanaugh, 42 Colo. App. 353, 597 P.2d 1049 (1979). Malone involved the removal of a trustee rather than a personal representative; however, the law regarding removal for either is similar. See Colo. Rev. Stat. § 15-16-201(1)(a) (1998) (granting courts exclusive jurisdiction to determine when it is appropriate to remove trustees).

In Malone, the trustee had engaged in self-dealing, trying to secure employment for himself, and alienating himself from his co-trustees by making "incessant harassing telephone calls" and directing insulting language at them. Id. at 355, 597 P.2d at 1051. Thus, in Malone the trustee's "actions led to the hostility and impasse among the co-trustees." Id. at 356, 597 P.2d at 1051. Here, the Court finds no such evidence that the Respondent exhibited hostility toward the Petitioners; rather, the evidence and the Court's observation throughout the hearings establishes that Respondent has treated Petitioners with respect and attentiveness.

In cases where this is so, courts have been very reluctant to remove a personal representative, trustee, or fiduciary. "The mere fact that a certain hostility has arisen between the beneficiary and the executor absent some showing of wrongdoing on the part of the executor or other factors which will prejudice the administration does not warrant such drastic action as removal." In re Estate of Murphy v. Pace, 336 So.2d 697, 698 (Fla. Dist. Ct. App. 1976). See also George T. Bogert, Trusts § 160, at 574 (6th ed. 1987) (noting that "[d]isagreement and unpleasant personal relations between the trustee and beneficiaries are not usually enough to warrant removal"). Thus, the facts of Malone distinguish it from this case.

There is abundant evidence in this case that Respondent accommodated Petitioners' input about the administration of the estate when he found their suggestions appropriate. For example, he changed brokerage houses to A.G. Edwards at their suggestion, hired Zieringer at their suggestion, hired Golosow at their suggestion, and contacted another accountant at Nancy Landauer's suggestion. The overall impression created by the testimony was that the adult children wanted to be included in the administration of the estate and, to the extent that he could, Respondent attempted to include them and their suggestions. The Court found Respondent's testimony credible that Marjorie Fennell did not always want him to share information about her financial affairs with the children.

In addition, the Court notes that it would go against common sense to allow the heirs of an estate to obtain removal of a personal representative simply because they bear hostility toward him, even when they are beneficiaries of testamentary trusts to be created from the estate. If this were the case, Courts would too often find themselves removing a personal representative based entirely on the natural antagonisms of testamentary trust beneficiaries who view fiduciaries as impediments to their inheritances. Here, the decedent created an

estate plan, nominated the Respondent to implement it, named him as the primary devisee in his trustee capacity, and trained him to carry out his responsibilities. Understandably, the almost complete exclusion of the decedent's wife and adult children from this plan would result eventually in antagonistic feelings.

Petitioners' assertion that it is in the best interests of the estate to remove the Respondent on grounds of hostility fails due to the absence of any evidence that animosity has affected Respondent's ability to fulfill his duties. Consequently, the Court FINDS no grounds for removing the personal representative due to alleged hostility.

4. Conflict of Interest. (See claim nos. 11, 12, 13, 14, and 15 of Pet'rs' Fourth Am. Inserts to Proposed Trial Management Order.)

Petitioners argue that the Respondent operated under a conflict of interest in acting as both personal representative for the estate and as attorney-in-fact for Marjorie Fennell. Petitioners assert that this conflict colored the Respondent's handling of the disposal of a California condominium in the estate; therefore, Respondent is liable for damages arising out of that transaction.

This Court finds that the Respondent operated under a potential conflict by acting as fiduciary for the estate and trusts as well as for Marjorie Fennell personally. However, those conflicts were known and acceptable to James and Marjorie Fennell who created them, and were waived by Marjorie and the adult children alike before the commencement of this litigation. Furthermore, despite operating under such potential conflicts, the Respondent acted reasonably and fairly in these multiple roles, as did the professionals he employed to assist him.

Colorado law states in pertinent part that "any transaction which is affected by a conflict of interest on the part of the personal representative, is voidable by any person interested in the estate . . . ." Colo. Rev. Stat. § 15-12-713(1) (1998). Thus, in order to succeed on this claim, Petitioners must demonstrate not only a potential conflict, but that this alleged conflict affected a transaction into which the Respondent entered.

The Court notes that potential conflicts of interest abound in this case. First, there is the conflict of which Petitioners primarily complain; i.e., Michael Bessler serving as both personal representative of the estate and as attorney-in-fact for Marjorie Fennell. In addition, there is a potential conflict inherent in the nebulous role played by attorney Mathew Zieringer; testimony conflicted as to whether he represented the interests of the estate, the devisees, Marjorie Fennell, and/or the Respondent. Furthermore, a potential conflict exists in having Petitioners' attorney represent the interests of the decedent's children as well as those of Marjorie Fennell in this litigation. Finally, conflicts exist between Marjorie Fennell's current agent (her daughter Nancy) individually and in her role as her mother's agent. Marjorie Fennell is a life tenant in a trust in which Nancy is a remainderman—a classic conflict of interest. Also, the same attorney purports to represent and advise her in these potentially conflicting roles.

The mere existence of potential conflicts of interest is not sufficient to provide cause for removal of a personal representative (or for that matter, the attorneys involved in this case). See Hauck v. Second National Bank of Richmond, 286 N.E.2d 852, 864, 866 (Ind. Ct. App. 1972) (holding that the trial court did not err in refusing to remove a bank as the personal representative "merely because of an alleged conflict of interest resulting from the [bank] serving as personal representative of both [testator's and testatrix'] estates,"

especially when the bank acted with "scrupulous integrity and honesty" in the management of the estates). For a general discussion and citations to other such cases, see Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts § 107.1, at 120 & n.3 (4th ed. 1987).

Petitioners argue, first, that Respondent acted improperly when he allowed Marjorie Fennell to resign as co-trustee of the California trust. The evidence established that Respondent did not suggest her resignation and did not use his position as Marjorie's agent to accomplish her resignation. The California attorney recommended that Marjorie resign and Marjorie resigned. The evidence and the Court's observation is inconclusive as to Marjorie's capacity; however, Petitioners' consistent position in the litigation has been that Marjorie is fully competent and fully capable of participating in decisions about the administration of her deceased husband's affairs. Giving full benefit to Petitioners' position, the Court, therefore, finds that Marjorie acted voluntarily in resigning her position as co-trustee and cannot here complain that she was incapable of making that decision.

Petitioners must show evidence that the Respondent's conflict somehow harmed the estate. They allege that when the Respondent let the California condominium known as "Unit 166" go into foreclosure, he wrongfully ignored their wishes and harmed Marjorie Fennell because as cosigner to the note on the property, she became liable for the deficit between the sales price and what was due on the mortgage. This allegation is not accurate.

First, contrary to Petitioners' allegations, the evidence is overwhelmingly persuasive that Respondent listened to and took into account Petitioners comments about retaining or not retaining Unit #166. Therefore, the Court rejects as totally unfounded the allegation that Respondent was "callous" in this regard. Secondly, Petitioners' wishes (as the beneficiaries of the trusts) were not binding upon the Respondent unless the decedent's will or trust mandated to the contrary, which, in this case, they did not.

Until termination of his appointment, a personal representative or trustee has the same power over the title to property of the estate that an absolute owner would have (in trust however) for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or action of a court. Colo. Rev. Stat. § 15-12-711 (1998). Contrary to the apparent view of Petitioners in this case, Respondent had no duty to include the heirs at law, even those who may be devisees or beneficiaries of testamentary trusts, in decisions about the day-to-day administration of the estate, or to garner the consent of these interested persons to his actions as fiduciary.

Petitioners argue that they would have given consent to holding the California condominium as an asset of the by-pass trust. Therefore, they assert, Respondent is liable for his failure to accede to their wishes. There is no legal basis for their claim.

Respondent was required to "observe the standards in dealing with [estate and] trust assets that would be observed by a prudent man dealing with the property of another." Colo. Rev. Stat. § 15-16-302 (1998). See also Beyer v. First National Bank of Colorado Springs, 843 P.2d 53, 58-59 (Colo. Ct. App. 1992). Thus, as long as the foreclosure of Unit 166 represented reasonable and prudent estate administration, Petitioners' willingness to consent to an investment strategy that the personal representative had concluded was ill advised could be ignored without liability.

The Court finds that allowing Unit 166 to go into foreclosure was a reasonable estate administration decision. The evidence in this case reveals that the personal representative

took into consideration a number of factors, including the deteriorating condition of the condominium unit, the declining property values in the area at the time, the decedent’s expressed intent to investigate disposition of Unit 166 by a deed in lieu of foreclosure before his death, the surviving family’s wishes, as well as their realistic prospects of using the condominium if it were to be held as an asset of the family trust, and the tax/valuation issues involved in allocating an asset with liabilities in excess of estate tax value to the estate tax exempt trust versus the marital share trust.

Among the Petitioners, only one party, Marjorie Fennell, argues that she was financially harmed by the decision to permit foreclosure of Unit 166. This was because she, rather than the decedent’s adult children, may bear the cost of the foreclosure deficiency as cosigner on the property mortgage. Because Marjorie Fennell was a cosigner, she would have borne ultimate financial responsibility for any deficiency.

The evidence is inconclusive as to whether or not the Veterans Administration will attempt to collect the deficiency against Marjorie Fennell. Thus, even she did not establish actual financial harm resulting from Respondent’s action.

Furthermore, the foreclosure did not create the liability, which resulted from there existing in the estate an asset with a debt in excess of value. Respondent’s action in allowing Unit 166 to go into foreclosure was to fix the liability and secure it against the value of Marjorie Fennell's taxable estate while maintaining or increasing the size of the exempt portion of James Fennell’s estate known as "the family trust." While this action, like the educational trust funding, graphically illustrates the potential for conflict between Marjorie Fennell on the one hand and the decedent’s descendants on the other hand, it also highlights the overall estate plan that James Fennell fashioned and charged Respondent to implement.

Petitioners have failed to show that Respondent callously disregarded their emotional reasons for wanting to retain Unit 166. They have also failed to prove any financial harm resulting from the foreclosure to either the descendants or to Marjorie Fennell; therefore, they cannot recover damages on a conflict of interest theory. Furthermore, since the conflict of interest resulted in no financial harm to Petitioners and arguably created a tax benefit, it does not constitute waste or mismanagement of estate or trust assets giving cause for the Respondent’s removal. The Court FINDS that Respondent did not act imprudently in allowing the foreclosure of the California property.

Finally, while the testimony revealed some confusion among the parties regarding the disposal of personal property located in the California condominiums, the Court finds Respondent’s testimony convincing that he was asked by Marjorie Fennell, who was the sole beneficiary of that tangible personal property, to distribute certain personal property to her, and that he did so. There was no evidence that the adult children asked for any items of personal property from the California condominium until the commencement of this litigation. Consequently, this Court FINDS that the Respondent did not violate his fiduciary duty in disposing of such property.

5. Investment Decisions. (See claim no. 22 of Pet’rs’ Fourth Am. Inserts to Proposed Trial Management Order.)

Petitioners also contend that the Respondent violated his fiduciary duty in placing stop loss orders on the stock holdings of the trusts because doing so was not a prudent investment decision. Again, the standard of care to which the Respondent was bound was that of a "prudent man dealing with the property of another." Colo. Rev. Stat. § 15-16-302 (1998).

See also Colo. Rev. Stat. § 15-12-703 (1998). In observing this standard the trustee was "required to exercise care in assessing an investment opportunity with regard to its safety and income potential by evaluating the history of the type of investment to be made and considering the opinions of experts, if necessary." Beyer v. First National Bank of Colorado Springs, 843 P.2d 53, 58-59 (Colo. Ct. App. 1992).

In deciding whether stop loss orders were appropriate, Respondent looked at the history and current status of the stock market. He consulted with a reasonable and credible professional who testified at the hearing, Steve Marsters. After careful consideration of all of the available information, Respondent made an informed investment decision and placed stop loss orders on the stocks. Hindsight is not the standard to be applied to the evaluation of a fiduciary's investment decisions. Id. at 59. Petitioners have failed to show that the Respondent committed waste and mismanagement at the time of the decision in placing stop loss orders on the stock portfolio. The Court FINDS that Respondent observed the standard of care required of him.

Petitioners have also asserted that the Respondent failed to take appropriate action to reinvest the proceeds from the sale of the stocks after the exercise of the stop loss orders, resulting in a loss of income to the estate and trusts constituting waste and mismanagement, for which loss the Respondent is liable.

Colorado law prohibits a personal representative who has had a removal proceeding initiated against him from taking further action "except to account, to correct maladministration, or to preserve the estate." Colo. Rev. Stat. § 15-12-611(1) (1998). In this case the Court allowed—but did not require—Respondent to seek consent from Petitioners or permission from the Court to deviate from the statutory prohibition. (See Ct. Order of July 20, 1998.) In the context of this litigation, it was unrealistic to assume that Petitioners would consent to Respondent's investment of the cash, unreasonable to expect Respondent to delegate his fiduciary responsibility to invest the cash to Petitioners, and unlikely that the Court would make investment decisions in the face of objections from either side. Petitioners knew when they filed the Petition to Remove and Surcharge that the personal representative's authority to invest would be suspended; they have no cause to complain here.

The Court FINDS Petitioners' claim that, by not reinvesting the proceeds from the stock sale, the Respondent engaged in mismanagement and waste giving just cause for his removal and damages, is without merit.

B. REASONABLENESS OF FEES

In this action, Petitioners claim that the fees charged by the Respondent and the professionals he employed to assist him in his duties were excessive given the benefit they conferred upon the estate. Accordingly, Petitioners seek an award of damages for any fees the Court finds excessive.

As to the Respondent, the law states he "is entitled to reasonable compensation for his services." Colo. Rev. Stat. § 15-12-719 (1998) (emphasis added). If a personal representative employs professionals to assist him in his duties, the Court may review both the "propriety of employment . . . [and] the reasonableness of the compensation of any person so employed . . . ." Colo. Rev. Stat. § 721(1) (1998) (emphasis added). In evaluating the reasonableness of the fees of both the personal representative and persons in his employ, the Court must consider:

(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly;

(b) The likelihood, if apparent to the personal representative, that the acceptance of the particular employment will preclude the person employed from other employment;

(c) The fee customarily charged in the locality for similar services;

(d) The amount involved and the results obtained;

(e) The time limitations imposed by the personal representative or the circumstances;

. . .

(g) The experience, reputation, and ability of the person performing the services.

Colo. Rev. Stat. § 15-12-721(2) (1998). See also In re Painter's Estate, 39 Colo. App. 506, 509 567 P.2d 820, 823 (1977) (holding that "the trial court must consider all of the factors which the code enumerates"). Therefore, the Court applies and balances these factors below to determine the reasonableness of the fees of the Respondent and the various professionals he employed.

1.Personal Representative's Fees. (See claim nos. 18 and 23 of Pet'rs' Fourth Am. Inserts to Proposed Trial Management Order.)

Michael Bessler has been paid approximately $72,000 for his services as personal representative through February 1998 (the Petition for Supervised Administration was filed in March 1998). In evaluating the reasonableness of this fee the Court has considered all of the required statutory factors.

The Court finds that the administration of this estate was not simple. Some of the real property in the estate required ancillary administration, repairs and marketing or negotiations incident to its disposition, and difficult decisions due to the family's emotional involvement. In addition to the issues related to the California condominiums, the Court notes that the family home in Denver was also sold after being owned by the Fennells for over 45 years. The valuation of the stock market made the handling of the stock portfolio a thorny investment decision as well. In addition, difficult tax issues arose in connection with the funding of the trusts.

The size of the probate portion of the decedent's estate required a federal estate tax return and multiple fiduciary income tax returns. Finally, the evidence in this case reveals an extraordinary level of involvement by decedent's adult children and a concomitant time commitment from the Respondent. As a result, the administration throughout required a high degree of coordinating supervision. Though the Respondent was retired when he undertook his appointment, the Court accepts as true his testimony that the administration of the estate has been significantly time consuming and would have precluded his ability to take another job.

The Court finds that given the training the Respondent had undergone in the six years prior to his appointment and the degree of skill required to manage the estate effectively, the Respondent's rate of $50 per hour was within an acceptable range. As to the amounts

involved, while not a huge estate, the estate was of a considerable amount. Further, the results of the Respondent's labors were generally of a sufficiently high quality to warrant his rate.

The Court has recognized the overinclusiveness of some his reports and inventories; however, given that the Respondent credibly testified that he significantly under reported his hours, the Court finds the results obtained warranted the overall fee charged. Time constraints do not appear to have been severe in this case, so the Court does not consider this factor in the determination of the reasonableness of the fees. Nevertheless, the Court finds that Respondent generally performed his duties in a prompt and timely manner, incurred no fines or penalties for delays, and by March 1998 had essentially completed the administration of the estate, had the federal estate tax closing letter on file, and had funded the testamentary trusts. But for this litigation, the estate could have been closed in 1998.

The experience and abilities of the Respondent weigh heavily in the evaluation of the appropriateness of a fee. Here, the Respondent was singularly suited for his position, having been under the tutelage of the decedent and having managed the decedent's assets for several years prior to James Fennell's death. This does not mean the Respondent was a tax or investment professional; however, he was an "expert" on this particular estate, having become well acquainted with the Fennells' investments. Consequently, the Court considers this background and experience to have been of value to the estate and finds it a significant factor in judging the Respondent's rate as reasonable.

Finally, the Court has considered the involvement from family members and has concluded that, while Respondent spent a portion of his time administering the estate, he was required to commit a substantially large portion of his time reporting to, conferring with, and responding to the adult children about estate and trust affairs. He is entitled to be compensated for that time as well.

In summary, the Court FINDS both the rate and the overall fee of the Respondent to be reasonable. Petitioners' claim that the fees were excessive and should be disgorged to the estate is rejected. This portion of Respondent's fee will not be revisited at the closing of the estate.

2. Reasonableness of Professionals' Fees. (See claim nos. 8, 16, 17, 18 and 21 of Pet'rs' Fourth Am. Inserts to Proposed Trial Management Order.)

Petitioners claim that the fees for some of the professionals employed in the course of the administration of this estate are also excessive. Petitioners aver that the services rendered by the Beatty and Golosow accounting firms were unnecessary and duplicative, conferring little or no benefit to the estate. They also assert that the fees of attorney Zieringer (and his paralegal) were excessive and of little benefit to the estate. There has been no claim that the fees paid to Coleen O'Hara, California counsel, were excessive.

First, the Court finds that the fee issues as to hired professionals are not finally resolved. Zieringer testified that he will personally pay portions of Beatty's fees caused by his errors, if any. Beatty has already reduced her fee at the request of Respondent and testified that she would plan to reduce her overall fee if deemed appropriate due to the reallocation issue or to errors in tax returns caused by her. It is unclear whether or not a final statement has been rendered by the Golosow firm.

In spite of the tentative nature of the fees paid to or to be paid to these professionals, the court can make some interim findings. The Court must consider Petitioners' arguments that the fees of the hired professionals are excessive in light of the statutory factors.

Respondent hired Zieringer to advise him about estate administration matters at the specific behest of Petitioner Dennis Fennell. The Court finds that this was an appropriate and reasonable step for the Respondent to take. Zieringer is an attorney familiar with probate procedures, consequently he brought needed expertise to the administration of the estate, assisting the Respondent with preparation of a final inventory and advising him on estate and tax issues. The Court finds his fees commensurate with the time required to do this work, with Zieringer's expertise and reputation, and with fees customarily charged in the community for such legal services. The Court also finds that Zieringer attempted to render assistance only when asked and attempted to provide his services at minimal cost due to fee concerns raised by the adult children at the time he was first employed.

There was some dispute over the allocation of assets held by James and Marjorie Fennell as tenants-in-common between the testamentary trusts. Given the arcane and unclear nature of the tax code provisions at issue, Zieringer and the other tax professionals consulted on this matter had good reason to be uncertain as to the tax strategy best utilized here. Throughout this lengthy litigation the Court was never advised that there was a clear, simple, or safe analysis of this tax question. Consequently, any resulting reasonable costs incurred to analyze the tax consequences and to amend tax returns do not constitute waste or mismanagement as Petitioners aver. Given this, the Court's analysis of Zieringer's billings, and a lack of evidence showing unreasonable charges for other work that Zieringer's firm performed, Respondent did not commit waste in paying Zieringer's fees. (Test. of Matthew Zieringer, Tr. Mar. 21, 1999 at 78. See also Pet'rs' Exhibit 52.)

Beatty was a natural choice for assistance with tax and estate tax return preparation as she had been the Fennells' accountant for many years prior to James Fennell's death. The Court specifically finds that retention of Beatty and her accounting firm for these services was reasonable and prudent for the personal representative and the Beatty firm should be paid for its services. The Court commends, rather than condemns, Beverly Beatty for analyzing the possible tax benefits of disclaimers and raising possible tax concerns about the allocation of assets to the trusts. Accountants with expertise in estate and trust accounting as well as tax liability should be expected to alert their clients, particularly lay clients like Michael Bessler, about tax savings opportunities and unexpected tax consequences and they should expect to be paid for their services.

As for the Golosow firm, Zieringer recommended her firm to Petitioners and Respondent but only after Petitioners requested additional accountings on the status of the estate and trusts. The evidence establishes that Nancy Landauer suggested another accountant whom Respondent contacted. Ideally, Zieringer should have disclosed that his wife was an employee of the Golosow firm and might be involved in the preparation of the reports. Nevertheless, the Court has concluded that it was not unreasonable for Respondent to agree to this additional layer of accounting in light of Petitioners' continued requests for additional accounting information. While Respondent could have insisted that Petitioners pay for the Golosow reports themselves; nevertheless, he contracted for the services in good faith and the fees should be paid from the estate as a cost of administration.

The Beatty and Golosow firms provided valuable accounting services to assist the Respondent with the financial reports and tax forms needed to properly administer the estate and trusts. Their credible testimony and other evidence presented in this case has

convinced the court that they are highly regarded professionals in their field, charged customary fees, and performed necessary services in the amount of time requisite for the job. Further, as to Beatty's firm, the Court accepts as true her testimony that the estate will not be billed for work she concludes was done in error. Beatty has also testified that if any tax returns need to be amended due to her firm's error in analyzing the tax implications of the allocation of assets in the tenants-in-common account, she will not bill for that work. The preparation of the financial statements presented at the conclusion of the hearing were not necessary to the administration of the estate but were required to provide Petitioners with the additional information that they argued they needed in order to understand the prior accounting reports. Again, the Court concludes that it was not unreasonable for Respondent to contract for these services in an effort to answer the persistent questions Petitioners posed about the administration of the estate. The Beatty firm is entitled to be compensated from the estate for the reasonable value of all of its services, including the financial statements, subject to approval by the personal representative.

Regarding the Golosow firm, the services provided were also beneficial in that they addressed Petitioners' request for additional accounting information. Colo. Rev. Stat. § 15-16-303(1),(4) (1998). See also discussion at section I.A. infra.

In summary, some of the reasonable and necessary professional fees were comparable to those incurred in virtually every taxable estate. The Court FINDS that these fees have been properly paid or should be paid from the estate once the personal representative has examined the invoices and is satisfied that the amounts are reasonable and reflective of the work performed.

In this case, however, Respondent also incurred substantial professional fees in his good faith effort to address the requests of the Petitioners for additional information about the interim administration of the estate. The Court FINDS that it was reasonable, and arguably necessary, for Respondent to incur these extraordinary professional fees. They should also be paid from the estate once the personal representative has examined the invoices and is satisfied that the amounts are reasonable and reflective of the work performed.

ORDER

The Court hereby ORDERS:

The Petition for Removal and Surcharge of the personal representative is DENIED. At the time the estate is closed, the Court will accept the resignation of Michael Bessler as interim trustee in favor of a corporate trustee that will serve in his place as trustee of the trusts established by the decedent.

The Petition for Supervised Administration is DENIED. Subject to Respondent's claim for attorney fees which has been reserved, the estate shall be closed in a formal proceeding as soon as reasonably and prudently possible.

DATED July 9, 1999

BY THE COURT

C. Jean Stewart

Judge, Probate Court