

98PR1121 (9/8/99)

PROBATE COURT, CITY AND COUNTY OF DENVER STATE OF COLORADO

Case No. 98PR1121

IN THE MATTER OF

The Estate of DALE L. HAVARD,
Deceased.

FINDINGS OF FACT, CONCLUSIONS OF LAW, & ORDERS

THIS MATTER comes before the Court on a Petition for Return of Estate Property and Surcharge for Breach of Fiduciary Duty.

I.

Background Facts

In November, 1995 Dale Havard had a stroke and was hospitalized. On November 21, 1995 he signed a power of attorney appointing his cousin Alvin Havard as his agent. Dale Havard did not make a complete physical recovery and, after a period of rehabilitation, returned to his home located at 1470 Clayton Street with 24-hour home health care assistance.

Alvin Havard served as agent until Dale Havard signed a revocation of the power of attorney on February 6, 1997. On the same date, Dale Havard signed a "General Power of Attorney" appointing Richard Berumann as his agent. Richard Berumann served as agent until his resignation on December 11, 1997.

On December 11, 1997, the date that Richard Berumann resigned as agent under the power of attorney, Dale Havard signed another General Power of Attorney appointing Christopher Moorehouse as his agent. On that same date he also signed a will naming Richard Berumann as personal representative. Richard Berumann and Christopher Moorehouse were named as residuary devisees, each to receive 50% of the estate.

Dale Havard died of cardio-respiratory arrest on March 30, 1998.

The present action is brought by heirs of Dale Havard who allege that Richard Berumann and Christopher Moorehouse breached their fiduciary duty to Dale Havard, resulting in economic damage to his estate during his lifetime, and exerted undue influence on Dale

Havard to execute the will(s) under which Richard Berumann and Christopher Moorehouse would be devisees of his estate when he died. The Court agrees.

II.

Legal Status of Richard Berumann and Christopher Moorehouse.

Double Identity of Richard Berumann. Richard Berumann has at least two separate identities: Richard Berumann and Augustus R. M. Von Stauffenberg (Social Security numbers 916-50-4881 and 524-19-5455). The testimony establishes that these two identities are the same person. Accordingly, Richard Berumann is hereinafter referred to as "Berumann-Von Stauffenberg."

Common Identity of Berumann-Von Stauffenberg & Moorehouse. Based upon all of the evidence and testimony in this case the Court FINDS that Richard Bermudan/Augustus Von Stauffenberg and Christopher Moorehouse (hereinafter referred to as "Berumann-Von Stauffenberg/Moorehouse") acted jointly in connection with all of the matters related to Dale Havard. As with a partnership, the acts of one were the acts of the other. During the trial, efforts were made to portray Berumann-Von Stauffenberg and Moorehouse as two individuals who had separate personal and legal relationships with Dale Havard at different times. The reality established by the evidence is to the contrary. In virtually every action, the acts of one were indistinguishable from the acts of the other. The Court rejects the argument that the actions of Berumann-Von Stauffenberg and Moorehouse should be analyzed separately and finds instead that the Berumann-Von Stauffenberg/Moorehouse combination was a single actor.

This finding is supported by the following facts:

Prior to execution of the powers of attorney, Berumann-Von Stauffenberg/Moorehouse had a relationship and interactions with Dale Havard and others, including Dale Havard's cousin, Alvin Havard. The testimony established to the satisfaction of the Court that Dale Havard and those who were related to him or provided services to him viewed Berumann-Von Stauffenberg/Moorehouse as partners, acting in concert, both before and after the powers of attorney were signed.

In the first power of attorney document where Berumann-Von Stauffenberg is designated as "Agent," Moorehouse is named as "Successor Agent" to act "whenever the Agent is unable to serve for any reason." Their powers were co-extensive.

The testimony is overwhelming that Dale Havard referred to Berumann-Von Stauffenberg/Moorehouse as "the boys." Most of the witnesses who were friends or caregivers to Dale Havard referred to Berumann-Von Stauffenberg/Moorehouse as "the boys." Some witnesses were unable to distinguish between them in the courtroom. Acts were referred to as having been done by or ordered by "the boys." Their attorney referred to them during the trial as "the boys."

Berumann-Von Stauffenberg and Moorehouse were friends; they lived together. Berumann-Von Stauffenberg and Moorehouse had business relationships including a partnership in their primary business called CR ("C" for Christopher and "R" for Richard) Gems.

Because Moorehouse could not qualify for an automobile loan, Berumann-Von Stauffenberg agreed to co-sign on Moorehouse's loan and their names appear as co-obligors on loan documents submitted as exhibits in this case.

When Moorehouse could not qualify for a checking account, Berumann-Von Stauffenberg agreed that Moorehouse could be a joint account holder with him on Berumann-Von Stauffenberg's bank accounts.

Further, Moorehouse is a signatory on Berumann-Von Stauffenberg's credit cards, including the Discover card that was used extensively during the period of their joint agency relationship with Dale Havard.

Berumann-Von Stauffenberg and Moorehouse frequently and freely delegated responsibilities between each other during the times they were employed by Dale Havard as his agent(s). The use of their joint credit cards and bank accounts to process Dale Havard's income and expenditures is but one illustration of how they "shared" the responsibilities of agent(s).

These extensive financial connections would be less significant but for the way they impacted on the relationship between Dale Havard and Berumann-Von Stauffenberg/Moorehouse. The evidence was overwhelming that monies belonging to Dale Havard were deposited by both Berumann-Von Stauffenberg and Moorehouse indiscriminately into joint accounts and transferred among their joint accounts in a puzzling jumble that could only be explained by an "all for one and one for all" mentality. No efforts were made to distinguish Berumann-Von Stauffenberg from Moorehouse, nor to distinguish either of them from Dale Havard in their financial affairs.

All of these interconnections substantiate the Court's conclusion that, as to Berumann-Von Stauffenberg and Moorehouse, the acts of one are properly attributable to the other, that they acted in concert, and that, in analyzing this case, the Court should consider the actions of Berumann-Von Stauffenberg/Moorehouse as the actions of co-agents.

Fiduciary Relationship Established. The evidence establishes to the satisfaction of the Court that from February 6, 1997, when Dale Havard signed the power of attorney naming Berumann-Von Stauffenberg and Moorehouse as his agent and successor agent, until the date of Dale Havard's death on March 30, 1999, Berumann-Von Stauffenberg/Moorehouse served as agents for Dale Havard under written powers of attorney. An agent acting under a power of attorney is a fiduciary, see C.R.S. § 15-1-103(2)(1999), and is under a duty to "use due care to act in the best interests of the principal in accordance with the terms of the agency." C.R.S. § 15-14-606 (1999).

Both documents entitled "General Power of Attorney" were prepared by Berumann-Von Stauffenberg/Moorehouse and presented to Dale Havard for his signature. Consequently, the Court will construe them strictly in favor of the principal and against the agents. See *Allstate Ins. Co. v. Avis Rent-A-Car System, Inc.*, 947 P.2d 341, 346 (Colo. 1997).

In addition to the duties an agent undertakes under the specific provisions of the power (which, in this case, were extensive), an agent is subject to the common law duties of a fiduciary. "It is a relation of trust and confidence, in which the utmost good faith is required. . . ." *Brown v. Foulks*, 657 P.2d 501, 505 (Kan. 1983). See also *O'Bernhard v. Farmers Insurance Exchange*, 915 P.2d 1285, 1289 (Colo. 1996), *McKinney v. Christmas*, 353 P.2d 373, 374 (Colo. 1960), and *Mackey v. Burns*, 64 P. 485, 487 (Colo. App. 1900).

Where the actions of a fiduciary are analyzed, the Court applies a high standard and scrutinizes the transactions carefully. "[S]omething stricter than the morals of the market place," is the standard applied by Mr. Chief Justice Cardozo in one of the leading cases, *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (C.A. New York 1928):

Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions (*Wendt v. Fisher*, 243, N.Y. 439, 444 [154 N.E. 303]). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Id. at 546.

III.

Breach of Fiduciary Duty.

In considering whether there has been a breach of fiduciary duty in this case, the Court has considered a number of factors.

Applicable Legal Standard. An agent has a duty to protect the assets of the principal, act in the best interests of the principal, and account for the actions taken. See Restatement (Second) of Agency § 13 cmt. a.

The Court may take into account, in determining whether there has been a breach, the circumstances of the situation. Restatement (Second) of Agency § 13 cmt. c. The Court here holds that the standard of fiduciary responsibility is heightened when the principal is vulnerable and hence entitled to expect an increased level of protection.

Dale Havard's Physical & Mental Condition. All of the following factors relating to Dale Havard have been considered by the Court in its analysis of both breach of fiduciary duty and application of undue influence.

Dale Havard was 73 years old at the time the first power of attorney with Berumann-Von Stauffenberg/Moorehouse was signed. While age is not a determinative factor in assessing competence, it is considered in this case in combination with the other facts. Dale Havard suffered from multiple physical problems, including hypertension, chronic obstructive pulmonary disease, coronary artery disease, hyperlipidemia, abdominal pain, and right side paralysis due to a stroke.

Dale Havard suffered a stroke in November 1995. The stroke was sufficiently severe that he was hospitalized and placed in a nursing home for rehabilitation. Following rehabilitation Dale Havard had to live in a home fitted for the handicapped and had to receive 24-hour care. He was wheelchair-bound and was incontinent.

Although the medical evidence does not sustain a finding that he suffered a second stroke, it is clear that during 1997 he exhibited additional symptoms that resulted in a second hospitalization and further deterioration in his medical condition. He wore adult diapers. In sum, physically, Dale Havard was entirely dependent on others.

Dale Havard also suffered from mental problems. At the time of the execution of some of the questioned documents he was receiving Haldol, a psychotropic medication administered for the purpose of reordering his thinking processes. In addition, Dale Havard was, from time to time, taking other medications that may have had an effect on his ability to think and reason.

Dale Havard had difficulty speaking. Some witnesses described his speech as a whisper. Others said that he had slurred speech and was difficult or impossible to understand.

The "expert" testimony about Dale Havard's mental acuity was not consistent. Dr. Westfall, who had little actual contact with Dale Havard, testified that the patient was totally incapacitated and lacked even the most basic ability to care for his own affairs. Dr. Westfall's written opinion comprised legal conclusions and provided scant medical information.

In contrast, Dr. Garcia, Dale Havard's last treating physician, testified that although Dale Havard had no significant impairment at the time he signed the February power of attorney, he was "increasingly paranoid, hostile, and demented" in the last six months of his life.

The Court has cautiously considered Dr. Garcia's testimony because he was the doctor selected by Berumann-Von Stauffenberg to replace Dale Havard's long-time treating physician. Dr. Garcia signed a statement requested by Berumann-Von Stauffenberg on the date Dale Havard died attesting to Dale Havard's mental acuity. In addition, the evidence established that Dr. Garcia's fellow resident at St. Anthony's Hospital prescribed morphine for Dale Havard over the telephone without having met or talked to Dale Havard. The morphine was picked up at a pharmacy by Christopher Moorehouse and was subsequently administered to Dale Havard by Berumann-Von Stauffenberg and a nurse on the scene. A few hours later Dale Havard was dead.

Nevertheless, Dr. Garcia's testimony is helpful in that it supports the testimony of others that Dale Havard's physical and mental condition deteriorated from 1997 through the time of his death.

The medical evidence supports this Court's finding that Dale Havard's mental abilities were significantly impaired and deteriorated throughout 1997 and the early part of 1998.

The Court FINDS that Dale Havard met the definition, under the Colorado Probate Code § 15-14-101(3), of a person in need of protection. In addition, he was extremely vulnerable to financial and personal exploitation because of his dependency and his disordered thinking processes. Accordingly, the Court has applied the standard of care attendant to a conservator acting on behalf of a protected person to its analysis of the acts of the agent(s) in this case. See C.R.S. § 15-14-401 et seq. (1999).

Acts Constituting Breach. Having considered the responsibilities of the fiduciaries and taking into account the heightened standard applicable when, as here, the principal is particularly vulnerable, the Court finds that Berumann-Von Stauffenberg/Moorehouse breached their fiduciary duty to Dale Havard in the following particulars.

Failure to Safeguard Assets. An agent is required to use reasonable care and diligence in the protection and preservation of the principal's property. *Executive Estates v. Prudential Ins. Co. of America, Inc.*, 369 N.E. 2d 1117, 1127 (Ind. App. 1977); *Crouse v. Cachell Transfer & Storage Co.*, 285 N.W. 623, 625 (Iowa, 1939).

The evidence established that Berumann-Von Stauffenberg collected \$42,657.21 from GE Capital Assurance Company, a retirement fund owned by Dale Havard.

The bank records show that the check was made payable to Dale Havard, "in care of Richard Berumann" and was mailed to Richard Berumann's residence at 1474 Clayton Street. The check was deposited by Berumann-Von Stauffenberg into an account titled in the names of Dale L. Havard or Richard N. Berumann POA on March 11, 1997.

Berumann-Von Stauffenberg testified that the funds from the GE Capital Assurance Company check were used by him to purchase gemstones through his company CR Gems for Dale Havard. The gemstones cannot be found. The Court is asked to surcharge the agent for the loss of the \$42,657.21 from the retirement account.

Even if the Court found the testimony about the purchase of gemstones credible, the agent would be liable for this loss.

An agent is not an insurer of the safety of the principal's property, and he will not be liable if, in keeping and protecting it, he exercises ordinary care, skill and diligence, or such as an ordinarily prudent person would exercise with regard to his own property. *Williams v. O'Daniels*, 1872 WL 7439, *2 (Tex. 1871), see also *Bryant v. Bryant*, 882 P.2d 169 (Wash. 1994).

According to Berumann-Von Stauffenberg, after he purchased the gemstones on behalf of Dale Havard, he hid them under a bed in Dale Havard's house. The testimony established that multiple people had access to Dale Havard's house, caretakers and others had questionable backgrounds, and Dale Havard had already made accusations that gems had been stolen from his house. Berumann-Von Stauffenberg and Moorehouse echoed this testimony. It was irresponsible and reckless for both agent(s) to fail to take any reasonable action in regard to the safekeeping of the gemstones.

The powers of attorney charge both agents with liability "for willful misconduct or the failure to act in good faith" while serving as agents. The act of purchasing gemstones for Dale Havard and hiding them under a bed constitutes both willful misconduct and a failure to act in good faith.

Berumann-Von Stauffenberg/Moorehouse argue that they could take no action without Dale Havard's permission or over Dale Havard's objection. The Court rejects this argument. On a practical level, Dale Havard was wheelchair bound, in constant need of physical assistance, in diapers, unable to talk above a slurred whisper. Berumann-Von Stauffenberg/Moorehouse ask the Court to accept that, acting as fiduciaries, they hid over \$42,000 worth of gemstones under the bed in an upstairs bedroom because to safeguard them would have violated Dale Havard's instructions. No ordinary, rational person would do this with his or her own property. To do it with the property of another, while under fiduciary restrictions and, in light of the circumstances of this case, is reckless and constitutes a clear breach of fiduciary duty.

The Court holds that the agents are liable for the loss of the \$42,657.21 from the retirement account plus interest thereon from the date the GE Capital Assurance Company check was deposited. See *Estate of Smith*, 718 P.2d 1069, 1074-75 (Colo. App. 1969); C.R.S. § 5-12-102 (1999).

Contents of the House. Expert testimony established that the contents of Dale Havard's

house had a value of \$48,905 in 1991. The agents cannot account for the contents at the time of the trial. There was no testimony that Dale Havard disposed of any property during his lifetime. The agents deny disposing of the property during Dale Havard's lifetime. After his death they had no fiduciary or other capacity under which the property could be sold or otherwise disposed of. Only a Court-appointed fiduciary would be authorized to sell Dale Havard's tangible personal property.

The agents are liable to the estate for the difference in value between the property presently in the estate and the value of the property that was in Dale Havard's estate on the date that the agents took over his affairs. The Special Administrator is directed to make the calculation required to establish this element of damages.

Wasteful Expenditures. The evidence established that responsibility for all of payment of bills, management of financial resources, and decisions about the day-to-day expenses of Dale Havard were made by his agents. The evidence also established that there were significant financial pressures to restrict expenses. All of the witnesses were aware that the in-home health care insurance Dale Havard was receiving was about to terminate. His cash reserves were exhausted.

Nevertheless, Berumann-Von Stauffenberg/Moorehouse testified that they took Dale to eat and shop at expensive stores in Denver. The agents' credit card bills show expenditures at Saks Fifth Avenue, Neiman Marcus, and Abercrombie & Fitch. They both testified that they might have made purchases for Dale in these stores and reimbursed themselves from his funds to pay off their credit cards. They unfortunately could not recall the exact purchases and could not produce receipts or the actual items purchased.

The Court finds that the agents breached their duty to Dale Havard by wasting his cash resources. One example is typical. Berumann-Von Stauffenberg testified that he purchased a crystal figurine at Saks Fifth Avenue for \$462.00 and gave it to "Debbie" because Dale told him to do this. During this same time period the agents were restricting the household expenditures of food and supplies because Dale Havard was running out of money.

The Court does not find the testimony explaining the purchases of expensive clothing and extravagant gifts credible. Even if it were credible, under such circumstances, it was grossly irresponsible, constituting a breach of fiduciary duty to act in the best interests of the principal.

Co-Mingling of Assets. Dale Havard had several sources of income and he owned several assets. At the time Berumann-Von Stauffenberg took over Dale Havard's financial affairs as his agent under the power of attorney, Dale Havard had two bank accounts at Colorado State Bank. Instead of arranging for signatory authority on Dale Havard's bank accounts, Berumann-Von Stauffenberg/Moorehouse ran all of Dale's income and assets through their myriad of bank accounts in such a tangled web of checks, telephone transfers, openings and closings of accounts, etc. that it is virtually impossible to trace the sources or destinations of the money.

No records were produced at trial by Berumann-Von Stauffenberg/Moorehouse to account for the distributions from the many joint accounts. Remarkably, Berumann-Von Stauffenberg/Moorehouse, at trial, make little or no effort to reconstruct the transactions to provide this Court with any opportunity to resolve doubts in their favor. Co-mingling of assets is particularly egregious where the agent(s) fail to properly account for their activities while serving in fiduciary office.

Failure to Account. Failure to account constitutes another breach on the part of both

agent(s) to Dale Havard. Both powers of attorney provide that the agents are required to provide "an accounting for all funds handled and all acts performed as my Agent, if I request or if such a request is made by any authorized personal representative or fiduciary acting on my behalf." In spite of several days of detailed testimony these agent(s) cannot specifically account for their expenditures from Dale Havard's assets.

Richard Berumann testified that he spent two days with Dale Havard in early December 1997 going over an extensive accounting he had prepared for Dale as he was preparing to resign as agent. All of the accounts and supporting documents are now missing. The Court does not find Richard Berumann's testimony credible.

Having tried to understand Berumann-Von Stauffenberg when he testified in this trial, the Court can observe that it would not be possible for an elderly, incapacitated person to understand a complex, lengthy explanation from this person. Even Berumann-Von Stauffenberg's own attorney had to interrupt his client's testimony on many occasions to ask him to speak louder, slower, or more clearly.

Even if the testimony of Berumann-Von Stauffenberg were credible in this regard, the Court nevertheless FINDS that the agents breached their duty to account.

The Court has previously found that as of December 1997 Dale Havard was a person in need of protection and lacked the capacity to manage his own affairs effectively. A two-day, marathon session of accounting for his expenditures, such as that described by Berumann-Von Stauffenberg, constituted a breach of fiduciary duty.

Moorehouse's failure to require a thorough account from Berumann-Von Stauffenberg constituted a breach and highlights again the malignant impact the relationship between Berumann-Von Stauffenberg and Moorehouse had on the need for independent, loyal representation of Dale Havard's interests at this critical time. Where the agents were serving together and had so many connections, the need for meticulous record keeping and accounting was amplified.

Finally, both Berumann-Von Stauffenberg and Moorehouse paid themselves or each other for their time in caring for Dale Havard, in addition to the reimbursements they took for their expenditures. The payments and reimbursements flowed dizzyingly from and among their jointly held bank accounts, personal and business, some accounts with Dale Havard's name included and some without.

Both Berumann-Von Stauffenberg and Moorehouse testified that they were compensated for their time while employed as Dale Havard's agent(s). Each will be required to report his compensation as income on his 1997 & 1998 income tax returns. Incredibly, Berumann-Von Stauffenberg testified that he intended to claim the income on his 1997 tax return but, as of April 1999 when he first testified, he had not yet filed that return. Moorehouse did not testify as to whether or not he has filed his 1997 and 1998 income tax returns (both of which would now otherwise be delinquent).

Unlike Berumann-Von Stauffenberg, Moorehouse did not testify that he gave a complete written accounting to Dale Havard. To date Robert Steenrod, the court-appointed Special Administrator of the estate, has received no such accounting, although the power of attorney specifically requires the agent to account to the Court-appointed representative of Dale Havard's estate.

The Court has carefully considered the evidence in this case and the arguments of counsel. The Court has concluded that the agents should be surcharged for their failure to account,

failure to marshal and manage assets, and for co-mingling of assets. The Court ORDERS that both Berumann-Von Stauffenberg and Moorehouse forego any fee otherwise paid to or due to them for their services as agents.

Self Dealing. The paramount duty that an agent owes to his principal is the duty of loyalty. *Moore & Company v. T-A-L-L, Inc.*, 792 P.2d 794, 798 (Colo. 1990). The duty of loyalty requires, among other indicia of fidelity, that the agents not engage in self dealing. *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 823 (10th Cir. 1986); *Arst v. Stifel, Nicolaus & Company, Inc.*, 86 F.3d 973, 978 (10th Cir., 1996).

In this case, the co-mingling of bank accounts, self reimbursement, self compensation, and the recurring pattern of providing themselves with benefits from Dale Havard's estate is self dealing. Transactions that involve self-dealing between a fiduciary and his principal may be voided by the principal, by a successor in interest, or by this Court. See generally 3 C.J.S. Agency § 284c.; *Meaney v. Conn. Hospital Assoc.*, 1996 WL 368205, *8 (Conn. Super. 1996).

There are two particularly egregious instances of self dealing, the disposition of the proceeds from the sale of Dale Havard's car and the sale of Dale Havard's house.

Proceeds from Sale of Car. The evidence establishes that Dale Havard owned a Mercedes automobile that was sold by Berumann-Von Stauffenberg. Arguably, the funds were needed to provide continuing care for Dale Havard, thus justifying the sale. Unfortunately, after the sale, Berumann-Von Stauffenberg distributed 100% of the proceeds of the sale to himself. As a result, the sale of the car benefited no one but Berumann-Von Stauffenberg as Dale Havard's estate was thusly diminished.

Berumann-Von Stauffenberg testified that Dale Havard had granted him a security interest in the car to secure a debt owed to Berumann-Von Stauffenberg. He testified that there was a promissory note evidencing the debt. At trial the note was not produced but a photocopy of the note was entered into evidence. An expert document examiner testified that the copy of the note reflected an "overlay" copy of Dale Havard's signature, identical to Dale Havard's signature appearing on a copy of a 1985 document.

The Court FINDS that there was no debt between Dale Havard and Berumann-Von Stauffenberg and no promissory note. The proceeds of the sale of the Mercedes in the amount of \$22,500 must be restored to the estate together with interest thereon from the date of the sale.

Sale of Residence. Much of the evidence in this case focuses on the sale of Dale Havard's house at 1470 Clayton Street to Christopher Moorehouse. The power of attorney authorized Berumann-Von Stauffenberg to sell the property at 1470 Clayton Street. For the reasons set out herein, however, the Court finds that the sale constituted willful misconduct on the part of the agent and should be voided by the principal. *Broughton v. Detroit Trust Co.*, 261 N.W. 115, 117 (Mich. 1935).

The Court has considered the following circumstances in determining whether the sale should be voided. Dale Havard had lived in the house for many years, he owned it free and clear, he wanted to stay in the house until his death, and the house was appraised prior to his death at \$134,000. At the time of the appraisal, there was a significant amount of deferred maintenance on the house, suggesting that its value could have been substantially higher.

Berumann-Von Stauffenberg signed a general warranty deed conveying fee simple absolute title to Dale Havard's house at 1470 Clayton to Christopher Moorehouse at a time when Berumann-Von Stauffenberg and Moorehouse were agents under the power of attorney.

The duty of utmost loyalty and good faith is strained when agents sell the principal's property to themselves because doing so raises the question of whether they have acted for the principal's interest.

This sale was not in the principal's interest but was overwhelmingly in the agents' interest. The value of the house was at least \$134,000; however, the deed recites consideration of only \$80,000. Berumann-Von Stauffenberg argue that Dale was selling only a remainder interest to Moorehouse and was retaining a legal life estate. The warranty deed belies their testimony and sets Dale Havard up for disaster. No rational person would sell his own property on these terms and no responsible fiduciary would allow his principal to do so; the fact that the agents were the beneficiaries of these favorable terms is an aggravating circumstance.

Moreover, the testimony revealed that Dale Havard did not receive even the \$80,000 recited on the face of the deed. Of the \$80,000 consideration required, Christopher Moorehouse kept \$35,000 and Richard Berumann kept \$25,000. Of the total \$80,000 recited on the deed as consideration for the transaction, only \$18,038.98 was actually given to Dale Havard in the form of a check.

Finally, the testimony established that although the \$18,038.98 was deposited into an account titled to Richard Berumann as POA for Dale Havard, in less than three weeks that account was closed. More than \$15,500 had been transferred into one of Berumann-Von Stauffenberg/Moorehouse's personal accounts, and the balance had been transferred into their CR Gems business account. There is no analysis under which this Court can conclude that Dale Havard's agents were acting in his best interests.

Berumann-Von Stauffenberg claimed that Dale Havard owed him money on the date of the sale, thus justifying the \$25,000 he received from the closing. There was no documentation of that obligation. The Court finds the testimony not credible.

Moorehouse claimed that Dale Havard had authorized him to keep \$35,000 from the consideration to finance improvements to the property during Dale's life estate. Again, the lack of a life estate and the failure to prove by any documentary evidence the existence of any enforceable consideration from Christopher Moorehouse sustains the Court's finding that this testimony is likewise not credible.

The mere fact of a purchase by an agent makes the sale prima facie voidable, Broughton supra at 117. The burden of showing that he acted in the utmost good faith is on the agent. Adams v. Herman, 234 P.2d 695, 698 (Cal App. 1951).

The principal, or his representative, may repudiate the sale and elect to have the property returned to him, or he may allow the transaction to stand and compel the agent to account for any profits he has realized therefrom. McKinney v. Christmas, 353 P.2d 373, 374-75 (Colo. 1960).

The contract to sell the house is void because the transaction constituted self-dealing between Dale Havard's agents. Berumann-Von Stauffenberg, acting as agent for Dale Havard, transferred the title to the Clayton Street property to Christopher Moorehouse without adequate consideration. Christopher Moorehouse served as agent for Dale Havard

for several months during which time he could have rectified the improper transaction, but instead, acted in furtherance of his own interest. As a condition for voiding the transaction, he required that Dale Havard pay him. Because Dale Havard was free to void any transaction tainted with self-dealing without consideration, the condition imposed by Christopher Moorehouse was not enforceable. The Court deems the transaction voided by Dale Havard during his lifetime.

In conducting the purported sale of 1470 Clayton, both Berumann-Von Stauffenberg and Moorehouse advanced their own interests at the expense of Dale Havard while they were serving as his agents. The Court rejects the argument that Dale Havard knew all of the facts, understood the transaction, or ratified the actions of his agents. The Court finds that the opposite is true.

Dale Havard did not know the facts. He believed that the value of the house was approximately \$20,000 because Berumann-Von Stauffenberg/Moorehouse had told him that the house next door had been sold for \$20,000.

His understanding of the transaction went to his desire to secure long term care for himself in his own home. The Court has carefully scrutinized all of the documentary evidence and has concluded that Dale Havard received no enforceable commitment for lifelong care in his own home. There was no contract and the terms of the sale were not recorded on the deed. Thus, the consideration that Dale Havard bargained for was not given. Because there was a failure of consideration, the purported "sale" to Christopher Moorehouse failed.

Dale Havard tried to undo the transaction in 1998 but Christopher Moorehouse, acting in his own self interest, then advised Dale Havard that the contract could not be undone without additional consideration to Christopher Moorehouse. The document signed by Dale Havard stating that he did not want to rescind the sale was the product of that misrepresentation. As set out above, the law is to the contrary. Dale Havard could absolutely repudiate the sale when he learned the facts. That is a risk taken by agents who breach their duty of loyalty and engage in self-dealing.

The Court HOLDS that the sale of the house at 1470 Clayton is void and the property must be restored to the estate.

IV.

UNDUE INFLUENCE IN PREPARATION AND EXECUTION OF 1997 WILLS

Petitioner alleges that the three wills prepared by Berumann-Von Stauffenberg/Moorehouse in 1997 and signed by Dale Havard were the product of undue influence and should be held void by the Court. The Court agrees.

The elements of undue influence include a testator susceptible to influence, *Mercado v. Trujillo*, 980 P.2d 824, 826 (Wy. 1999); the existence of a confidential relationship between the victim and the influencer(s), *Lesser v. Lesser*, 250 P.2d 130, 133 (Colo. 1952); use of the confidential relationship to secure a change in the testator's post death dispositive plans *Estate of Baker*, 131 Cal. App. 3d 471, 483 (2nd Dist. 1982), *Lesser v. Lesser*, 250 P.2d 130, 133 (Colo. 1952), *Gehm v. Brown*, 245 P.2d 865, 869 (Colo. 1952); and an unconscionable change in the post death dispositive plan, *In Re Estate of Reddaway*, 329 P.2d 886, 894 (Or. 1958); *Mercado*, supra at 826; *Burke v. Burke*, 801 SW2d 691 (Ky App 1990).

The Court has found overwhelming evidence that Dale Havard was susceptible to influence. The following factors are persuasive: Dale Havard was isolated by his medical and mental problems, his wheelchair and his incontinence. He was totally dependent on Berumann-Von Stauffenberg/Moorehouse. The Court finds that Dale Havard was essentially a private, isolated man whose few efforts near the end of his life to contact others were cut short by Berumann-Von Stauffenberg/Moorehouse's intervention.

The evidence also clearly established that Berumann-Von Stauffenberg and Moorehouse, as agents acting under powers of attorney, were in a fiduciary relationship to Dale Havard.

The mere existence of a confidential relationship between a testator and a devisee under his will does not automatically raise a presumption of undue influence. *Gehm v. Brown*, 245 P.2d 865, 869 (Colo. 1952). However, where the devisee has been actively concerned or involved with the preparation or execution of the testator's will, the presumption of undue influence arises. *Id.*

The presumption, without more would be insufficient in this case to sustain the burden of proof that remains on the Petitioner to void the wills. *Judkins v. Carpenter*, 537 P.2d 737, 738 (Colo. 1975). The Court finds that the Petitioner has sustained the burden of proof.

In addition to the presumption of undue influence, the Court finds that the agents were motivated. Dale Havard had a large, amply furnished house. He had bank accounts, investments, and retirement funds. He wasn't married and had no children. His agents concluded that, because they befriended Dale Havard, they were entitled to his property. They were persuaded that Dale Havard's heirs were not good people, and they should not get Dale's estate.

His agents had ample opportunity over an extensive period of time to subject the will of Dale Havard to their self interest. Dale was weak and afraid. He was easily manipulated. Dale Havard was so anxious that he not be placed in a nursing home that he was willing to believe them when they talked to him about the malevolent intentions of others and the possibilities that, without the agent's "protection," he would not be safe.

The agents translated their motivation and opportunities into undue influence and coercion. The influence and coercion were manifest in the documents that they presented to Dale Havard for signature, including the "wills." The Court finds that Berumann-Von Stauffenberg and Moorehouse used their confidential position to influence a change in Dale Havard's dispositive plan.

Finally, the Court has considered the merit of the wills. While not determinative, the merit of the plan is sometimes reviewed by a Court in determining whether undue influence played a role in the preparation of the will(s). In *Re Estate of Reddaway*, 329 P.2d 886, 892 (Or, 1958).

Here, the evidence from Berumann-Von Stauffenberg and Moorehouse established without doubt that they were paid for their services from Dale Havard's funds while Dale was alive. A portion of the consideration Christopher Moorehouse testified he paid "to" Dale Havard was the discharge of Dale Havard's final debt to Berumann-Von Stauffenberg for services rendered. Christopher Moorehouse further testified that he paid himself for the time he spent with Dale Havard while serving as his agent.

Consequently, by their own testimony, there were no unsatisfied debts or promises outstanding to Berumann-Von Stauffenberg or Moorehouse when Dale Havard died. There

was no reason for Dale Havard to change his dispositive plan in favor of his employees to the total exclusion of his family. The resultant disproportionate distribution to Berumann-Von Stauffenberg/Moorehouse is unnatural and unnecessary in light of the circumstances.

The Court concludes and FINDS that the three wills executed in 1997 by Dale Havard are void due to undue influence and coercion.

V.

Future Proceedings

The Court reserves the Petition for Adjudication of Intestacy, Determination of Heirs and Formal Appointment of Personal Representative for further proceedings.

September 8, 1999

C. Jean Stewart

Judge, Probate Court