

STATE OF INDIANA            )                    IN THE JASPER SUPERIOR COURT  
  )SS:  
COUNTY OF JASPER         )                    37D01-0102-GU-048

IN RE: THE GUARDIANSHIP OF )  
MARTHA E. HAM, an ADULT     )  
\_\_\_\_\_ )

**GUARDIAN AD LITEM'S PRELIMINARY REPORT**

Comes now the Guardian Ad-Litem, John D. Potter, and hereby submits his Report in this matter to the Court which Report is as follows:

**I. BACKGROUND INFORMATION**

Martha Ham began having health problems and related problems managing her own affairs and health in 1996 shortly after the death of her husband, Don. Kyle Hamilton, Martha's only child, admits that she and her mother had a difficult relationship over the years and especially at that time which continued until the year 2000. Martha was hospitalized in December of 1996 and subsequently transferred to a long-term care facility, but she checked herself out in 1997. The current situation involving the guardianship and trust has its beginnings in the summer of 2000.

Kyle Hamilton reports she was driving cross country from her Los Angeles area home and stopped to see her mother who wanted Kyle's help to set up a pre-paid funeral. Arrangements were made with Jackson's Funeral Chapel with the help of Bill Jackson. Mr. Jackson suggested that Kyle and her mother look into some estate planning, perhaps a trust, and may have even referred them to Ned Tonner. Kyle and Martha met with Mr. Tonner who initially drafted what is commonly called a "living trust" or a revocable trust.

That initial trust document was never executed. After Kyle left Indiana, Martha and her sister, Mary Louise Kobek, ("Jigs") who had Power of Attorney over Martha, appeared at Ned's office and instructed him not to prepare the trust with Kyle Hamilton in charge. Kyle, following up with Mr. Tonner, learned in August of 2000 that Jigs and Martha had appeared at Mr. Tonner's office and had cancelled the trust. Jigs had also requested, according to Kyle, that a trust be established with Jigs as trustee. Kyle returned with her mother in the fall of 2000 and established the trust with Mr. Tonner

after meeting with him again. According to Kyle, she paid the bill for this trust which included time and charges for the trust Mr. Tonner started for Jigs. The trust was established with Kyle as trustee. The trust contained a permanency provision in the event that Martha became incapacitated.

Kyle reports that her mother seemed different at Thanksgiving of the year 2000. Kyle reports that Martha exhibited erratic behavior and demonstrated unclear thought processes. In January of 2001, Martha, in a blizzard, drove to her hair appointment at Anne's Beauty Bar and got stuck. Kyle called Mr. Tonner again for help. In fact, Mr. Tonner, picked up the car himself and drove it back to Martha's house and helped disable it so Martha could not drive it. Mr. Tonner reports that the driver's seat was urine stained. Mr. Tonner recommended guardianship and referred Kyle to Rich O'Brien, claiming he would have a conflict and would continue to represent Martha.

The guardianship was initiated originally over the person and estate of Martha Ham and an Order establishing such was entered on February 20, 2001. Kyle now claims that this was improper under Indiana law and was incorrectly done because the trust had a permanency provision as did her P.O.A. of September 11, 2000. The attorneys involved report that Kyle was unable to qualify for a bond and therefore the guardianship was changed to guardianship over the person only. Guardianship was established on March 7, 2001 over the person.

The problem remained as to how to care for Martha. Mr. Tonner suggested a personal injury client of his, Tonjua Grey. Ms. Grey was hired by employment contract on the 23<sup>rd</sup> day of April, 2001. The contract paid Ms. Grey the sum of \$37,500.00 for the calendar year. The contract was between Martha Ham by her legal guardian, Kyle Hamilton and Tonjua Grey. The contract was terminated on March 1, 2002 by notice from Mr. Riley on behalf of Kyle and the Guardianship. There are allegations that Ms. Grey did not spend the required time (up to 50 hours per week) with Martha and took care of other patients as well. Kyle also claims that property is missing from the home.

During the care of Martha, Ms. Grey reports problem with Kyle paying the daily bills on time. There is evidence of late payment on an insurance policy, condominium association dues, Home Health Care and Hospice, doctor's bills and TV Cable. The only service discontinued at any time was the television cable which, by all accounts, was shut

off for less than one day. Tonjua Grey does contend that the long distance phone service was shut off at some point; however, that has not been confirmed. Kyle contends that part of the problem with bills was that Tonjua Grey did not forward them timely. Kyle also reported that she paid bills in lump sum fashion-sometimes in advance.

It appears that the distance between Los Angeles and Rensselaer contributed to the hassles with the bills. Kyle was not here to monitor and pay the bills on a day-to-day or even a month-to-month basis. Ms. Grey would forward bills to California as they came or as they piled up. It was not the ideal situation for management of the daily financial needs of Martha Ham. The Court should also take special note to weigh the information from and the testimony of Tonjua Grey and of Kyle Hamilton concerning each other and their actions. Tonjua Grey has lost a \$37,500 per year job caring for Martha and she was the primary "whistleblower" in this matter. Neither person has any good reason to be objective about the other.

On the other hand, some of the information provided by Tonjua Grey has been corroborated in part. Ms. Grey reports that she sought Mr. Tonner's help and assistance in January and February of 2002 because of medical problems Martha Ham was having. Apparently, Martha Ham's doctor recommended a bone density test and a foot specialist consultation. Tonjua Grey reports that Kyle Hamilton told her not to take her mother for the bone density test but to set up the foot doctor consult. Documentation provided to me shows that Martha's doctor at the Crown Point Clinic did prescribe a bone density test on January 17, 2002. Tonjua Grey's journal log indicates a phone call with Kyle Hamilton reportedly telling Tonjua not to take Martha to the bone density specialist. Tonjua Grey then reports that she went to Ned Tonner for assistance on behalf of Martha Ham.

In February of 2002, Mr. Tonner, on behalf of Martha Ham, filed a request to terminate Kyle as guardian and requesting the presence of the ward and seeking to restrain the spending authority of Kyle Hamilton. Mr. Tonner, through the help of Tonjua Grey learned of certain problems with the untimely payment of bills and other problems. Mr. Tonner filed his motion and set forward his allegations and information and requested that the ward be present in Court. My conversations with Martha Ham and the nursing staff in the Alternacare ward at Jasper County Hospital lead me to believe that Martha does not have much of an idea that this Court case is proceeding. She likes

where she lives and enjoys talking with her daughter. It is my impression that Martha Ham did not really understand the conversation with me fully but instead "pretended" to follow along by concurring or nodding. This was confirmed with the floor nurses who indicated that Martha often appears to know what is going on but does not really follow along. Also, she may have some memory problems. It would not be in her best interest to appear in Court. It is at least questionable that she could give accurate, competent testimony (despite the fact she is legally incompetent) and her appearance and the testimony would likely upset her.

The most troubling aspect of this ongoing guardianship can be found in the role Kyle Hamilton plays as the trustee of Martha Ham's trust. As guardian over Martha Ham and trustee over her trust, Kyle Hamilton sits as trustee and beneficiary with no checks or balances on her power. This is problematic because my investigation has learned that Kyle Hamilton has mismanaged the trust funds and violated her fiduciary as trustee. Kyle Hamilton reports that she has used some of Martha's trustee funds to add on to her home to make a handicap accessible room with the intention of moving Martha to live with her and her husband in the Los Angeles area. She did not give an exact figure spend but estimated \$20,000 has been spent on this project. She also purchased a digital camera with trust funds to attend a family reunion.

More troubling is the "unconventional" investment Kyle Hamilton has made with a substantial portion of Martha's trust funds. She and her husband have used the money to remodel and landscape their "unique" back yard of 6500 sq. ft. Kyle Hamilton reports that she plans to market her back yard as a picture garden available to movie studios, television studios, and to photographers at \$1000.00 per day. Kyle and her husband are involved in the acting business and are currently obligated to a play, *Harvey*, until July of 2002. To date, no one has booked or used the garden; however, the garden was completed last fall and there was one booking that cancelled. This "investment" was made in her own property which is owned in the name of her husband. There is no named ownership interest in the property in the name of the trust or as Kyle Hamilton as trustee. In fact, Kyle Hamilton has nothing in her own name because of repeated problems with a stalker and Kyle Hamilton is not her real name. Kyle could not give an estimate as to how much money has been spent on the yard but reports that it is to be

featured in an upcoming issue of *Better Homes and Gardens*. The Court should note that although Kyle's actions may be a conversion of trust funds for personal use that if her "investment" works, a lot of money could be made.

Finally, Kyle Hamilton was concerned about the delay that the Court proceedings were causing her because expenses were piling up for her mother whom she wants to move to California. Kyle did mention that she was afraid of running short on "liquid" funds to care for Martha. This concerns me greatly. According to all reports there should have been about \$200,000 to \$225,000 in cash at the start of the trust in the fall of 2000 and the condo in Rensselaer. The condo remains. The cash, according to Kyle, has been used to care for Martha by paying Tonjua Grey for one year (\$37,500.00) and for her other expenses, etc. The remaining monies are invested in barks in Rensselaer, Dalton, Illinois, and in Los Angeles. There should not be, in my opinion.

## II. CONCLUSIONS AND RECOMMENDATIONS

A. The conflict of Kyle Hamilton serving as a trustee who has violated her fiduciary duty and serving as the beneficiary of that trust in her role as the Guardian over the Person of Martha Ham must be resolved by this Court. Martha Ham, in my opinion, is without the necessary faculties to protect her own interests as either ward or trust beneficiary. This Court does not appear to have any jurisdiction over the trust at this time; however, it does have the power to appoint a new guardian who could take the necessary actions, if any, regarding the trust.

B. Mr. Tonner should carefully evaluate his continued position in representing Martha Ham, the ward, in this cause. Mr. Tonner has represented Martha Ham, her trustee and guardian and Tonjua Grey. All are integrally involved in this matter. Moreover, my conversations with Kyle Hamilton indicate that Mr. Tonner is very likely to be a witness in any heated proceeding. He has helped Marta Ham at Kyle's request on several occasions. It is likely that Mr. Tonner would have a conflict arise during the testimony. He should probably withdraw at this time.

C. An immediate accounting should be made of the liquid funds available to care for Martha Ham. I have requested bank statements and other documents from Kyle Hamilton through her attorney and am reserving any final opinion until I review those

documents. This Court needs to know what monies are available to care for the person of Marta Ham.

D. The condominium in Rensselaer needs to be listed with a realtor for sale in order to liquidize that asset. It does not appear likely that Martha should or could return home to live on her own.

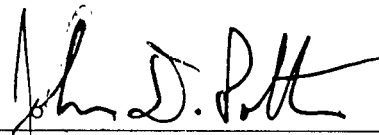
E. The new guardian should be over the person and property of Martha Ham.

F. The Court should set all motions for hearing as soon as possible in order to decide as quickly as possible as to what is needed for Martha Ham's best interests.

G. Martha should continue to have contact with Kyle Hamilton-she seems to enjoy her phone conversations with her daughter a great deal.

H. Eventually, a medical opinion needs to be made regarding Martha's condition and what would be the best recommendation for her long-term care and residency. Dr. Sheets should be contacted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Potter", written over a horizontal line.

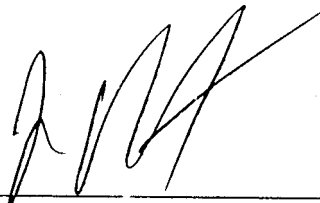
John D. Potter  
Guardian Ad Litem  
219 West Harrison Street  
Suite Five  
Rensselaer, Indiana 47978  
(219) 866-3033  
(219) 866-4611 FAX  
Atty. No. 19528-37

**CERTIFICATE OF SERVICE**

I hereby certify that on the **19<sup>th</sup>** day of **April** 2002, service of a true and complete copy of the above and foregoing pleading or paper was made upon all interested parties of record as listed below by depositing the same in the United States Mail in an envelope properly addressed and with sufficient first-class postage affixed.

**Michael Riley**  
**Attorney at Law**  
**122 W. Washington Street**  
**Rensselaer, In 47978**

**Ned J. Tonner**  
**Attorney at Law**  
**203 N. Cullen Street**  
**Rensselaer, IN 47978**



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**John D. Potter**

John D. Potter  
219 W. Harrison Street  
Suite 5  
Rensselaer, IN 47978  
219-866-3033  
Atty. #19528-37