

**CCS ENTRY FORM
JASPER CIRCUIT COURT
RENSELAER, INDIANA**

CASE NUMBER: 37C01-0305-FC-201
37C01-0210-FC-507

CAPTION: STATE OF INDIANA v KYLE S. HAMILTON

The activity of the Court should be summarized as follows on the Chronological Case Summary (CCS):

Jeffrey J. Shaw, (#15265-46) files:

Verified Motion to Continue Trial by Jury of January 13, 2004.

GRANTED/DENIED.

Hearing set for _____, 2004 at _____ a.m.

Submitted by:

Jeffrey J. Shaw (#15265-46)
1005 ½ Calumet Avenue
Valparaiso, IN 46383
PHONE: (219) 465-0959

Opposing Counsel:

Jasper County Prosecutor's Office
128 N. Cullen Street, Rensselaer, IN 47978

*******(TO BE DESIGNATED BY THE COURT)*******

This CCS Entry Form shall be:

- Placed in case file;
- Discard after entry on the CCS;
- Mailed to all counsel by: _____ Counsel _____ Clerk
- There is no attached order; or
The attached order shall be placed in the RJO: Yes No

DATE: _____

APPROVED: _____

JUDGE, JASPER CIRCUIT COURT

of all bills.

In a certain sense of the word, the State of Indiana has alleged four counts of criminal conduct by the Defendant for "stealing" (forgery, fraud and exploitation) monies that rightfully belong to her alone in this world.

On February 20, 2001, Jasper Superior Court No. 1 determined Martha Ham was incapacitated and appointed Defendant, KYLE S. HAMILTON, guardian over Martha Ham's person (not estate because a valid Power of Attorney in Hamilton's favor already existed).

On March 20, 2002, Attorney John Potter was appointed Guardian Ad Litem by agreement of the parties.

On August 13, 2002, Attorney Richard Comingore was appointed "successor guardian" over the person of Martha Ham (not estate as a valid Power of Attorney still existed in favor of Defendant). He was ordered to file necessary actions to remove Defendant, KYLE S. HAMILTON, as trustee under the Trust and to investigate whether any criminal conversions had taken place.

On August 15, 2002 Comingore filed an action and sought his appointment as "successor trustee," and on August 23, 2002 (without proper notice or due process to Defendant) this was approved.

On February 1, 2003, Martha Ham, the alleged dependent adult died.

On February 6, 2003, Comingore petitioned to open the estate of Ham. He requested Potter be appointed interim personal representative. Now Comingore and Potter had dual roles.

Comingore, as successor trustee, sought approval and authority to pay bills and marshal assets on behalf of the trust. A legal proceeding under Cause No. 37D01-0208-TR-0310 and a guardianship proceeding under Cause No. 37D01-0102-GU-048 were initiated.

Both cause numbers and cases continue to the present day.

4. The charges against Defendant, KYLE S. HAMILTON, include four counts of alleged criminal conduct: Forgery, Class C Felony; Fraud Upon a Financial Institution, Class D Felony; Exploitation of a Dependent Adult, Class D Felony; and Financial Exploitation of a Dependent Adult, Class D Felony.

5. The two exploitation counts filed against the Defendant allege mishandling of the Trust while she was trustee before she was removed from that position by the Jasper Superior Court.

6. The remaining counts, forgery and fraud, filed against the Defendant are based upon a single financial transaction involving the cashing of a \$1600 check signed by Ham to Defendant on or about September, 2002. Defendant, KYLE S. HAMILTON, asserts that the transaction was lawful and valid due to the Power of Attorney granted in her favor, which was still in existence at the time of the alleged offense. This Power of Attorney gave Defendant complete authority to handle financial transactions on behalf of her mother, Ham. Furthermore, Ham still had authority to conduct financial transactions herself, such as signing a check to her daughter to cover travel and other expenses (which she did here). The State of Indiana confuses this issue with "incompetence," because Ham was found to be incompetent at a hearing just prior to the transaction. The State of Indiana believes that "incompetency" somehow renders an adult incapable of conducting her own financial transactions – even though the law says otherwise; no Order by any Court denied Ham the ability to sign checks; and the Power of Attorney granted in favor of Defendant by its express terms survived any later finding of incompetency.

7. The exploitation counts are reasoned upon the State of Indiana's assertion that a lack of funds in the Trust resulted in Ham, the dependent adult, not receiving "proper" medical care (see Exhibit A, letter from Kathryn O'Neall to defense counsel).

8. Consequently, a valid defense to this charge could include the fact that a surplus of

funds in the trust existed at the time of the alleged mishandling or a surplus still exists at the present time. Unfortunately, the trust is involved at the present time in litigation.

9. On or about November 13, 2003, Comingore, as successor trustee, filed an Intermediate Accounting of the trust, which revealed a surplus of funds of nearly \$68,000.00. This fact, if true, could result in a finding of not guilty on behalf of the Defendant. In other words, the State has alleged a "lack of funds" resulted in "improper" care on behalf of Ham; but the Trust's successor trustee asserts funds do exist.

10. Unfortunately, the accounting performed by Comingore was intermediate in nature – not final or permanent. Defendant could be exonerated by a final accounting in this matter and partially bases her continuance request upon this fact. Defendant, KYLE S. HAMILTON, requests this Court continue her trial by jury until as such time as the exculpatory evidence can be ascertained officially.

11. Furthermore, the State of Indiana alleges that Defendant, KYLE S. HAMILTON, "refused" to pay medical bills by creditor Jasper Hospital Alternacare, which resulted in the dependent adult being moved from that facility to a Medicaid/Medicare nursing home. The State of Indiana has not produced any evidence of requests for payment and refusals of payment of this bill.

In fact, it is believed that the request for payment of this bill came under the time of Comingore's trusteeship – not Defendant's – and that the bill was paid by a mortgage on Ham's real estate contained in the Trust by Comingore himself.

11. Even should this Court find that the final accounting is unnecessary for purposes of the continuance request, counsel for the Defendant asserts that certain discovery – depositions – have not occurred due to the exceptional circumstances surrounding this case. In short, depositions of attorneys are needed, which are much more difficult to coordinate than depositions of lay persons.

Defendant, KYLE S. HAMILTON, needs the testimony of Attorneys Comingore, Tonner and Potter to establish her defenses of valid Power of Attorney; surplus of funds in the trust; timing of the requests/refusals to pay the Jasper Hospital Alternacare bill, etc.

The deposition of Judge Philip McGraw may also be necessary. Chief Deputy Prosecutor Kathryn O'Neill told defense counsel that the criminal case against Defendant, KYLE S. HAMILTON, was "referred" to her office by his Honor. A deposition of Judge McGraw may reveal facts unknown to the defense as for the justification of this referral, if it truly happened in this manner.

12. Discussions are underway with the Prosecutor's Office to schedule the depositions of all attorneys and his Honor in this matter, but so far have been unsuccessful. Furthermore, the litigation involving the Trust continues at the present time.

13. For all of the foregoing reasons, a continuance of the jury trials is necessary. A denial of such a continuance request would result in severe prejudice to the Defendant and may render it impossible to assert certain defenses to the charges levied against her.

WHEREFORE, Defendant, by counsel, respectfully requests that the above cause numbers be continued for purposes of all hearings, including trials by jury and for all other relief.

Respectfully submitted,

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I affirm under the penalties for perjury that the foregoing assertions are true to the best of my belief.

Jeffrey J. Shaw, #15265-46