

**CCS ENTRY FORM
JASPER CIRCUIT COURT
RENSSELAER, 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:

Motion to Dismiss.

GRANTED/DENIED.

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

Submitted by:

Jeffrey J. Shaw (#15265-46)
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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

STATE OF INDIANA)
) SS:
COUNTY OF JASPER)

IN THE JASPER CIRCUIT COURT

SITTING AT RENSSELAER, IN

STATE OF INDIANA,)

Plaintiff,)

vs.)

KYLE S. HAMILTON)

Defendant.)

CAUSE NO: 37CO1-0210-FC-507
 37CO1-0305-FC-201

MOTION TO DISMISS

Comes now the Defendant, KYLE S. HAMILTON, by and through counsel, Jeffrey J. Shaw, and now requests this Court dismiss all charges filed against Defendant and in support now alleges:

1. The State of Indiana, as a matter of law, cannot prove the criminal counts filed against Defendant, KYLE S. HAMILTON.

A. Facts

The set of facts that led to the filing of these charges against the Defendant is numerous and complex.

On September 11, 2000, the alleged dependent adult -- Martha Ham -- created through Attorney Ned Tonner the following documents: a pour-over will; a revocable trust containing most of her property; a recorded Power of Attorney; an appointment of health care representative and directions for care. Ham appointed her only daughter, the Defendant, KYLE S. HAMILTON, to all of the decision-making positions under these estate planning documents.

Defendant, KYLE S. HAMILTON, is still the only heir to any trust or estate of deceased adult, Ham. She will receive still any residual amounts of money remaining in the trust after payment

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 and still exist today.

2. 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.

3. The two exploitation counts filed against the Defendant allege mishandling of the Trust while she was trustee, before she was removed from that position.

4. 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.

A. Forgery Cannot Be Proven As a Matter of Law

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.

“Incompetence” does not equal “lack of authority.” Many incompetent persons still have authority to conduct their own financial transactions. Some incompetent people do, in fact, conduct their own financial affairs. Some do not. At no time did Judge McGraw order that Mrs. Ham was refrained from issuing checks, writing checks, cashing checks or otherwise performing financial tasks. He merely appointed a guardian to assist/complete all financial transactions (initially Hamilton; then Comingore). It is a misguided belief that incompetents cannot authorize or otherwise conduct any financial transaction and this simply isn't true in this case;

A forgery cannot occur when the signatory of the document did, in fact, sign the document. There is nothing false or artificial about the payee, payer or amount of the check itself;

Finally, there existed an actual durable Power of Attorney in this case. That document states

by its own express terms that the authority to conduct financial transactions survives any later findings of incompetency. Future incompetency is one of the primary reasons persons create this document! At no time did Judge McGraw revoke Ms. Hamilton's durable Power of Attorney and, in fact, its power still exists today. To suggest that anytime a person is found to be incompetent that any previously executed Power of Attorney is revoked, would be to set elder law on its head. There would be literally thousands of "criminals" running on our streets at the present time.

B. Fraud Upon a Financial Institution Cannot Be Proven As a Matter of Law

There are two reasons primarily why this charge cannot be proven.

Firstly, see above, a durable Power of Attorney existed at the time of the check cashing. Consequently, the transaction was completely valid and there can be no "fraud."

Secondly, the bank itself has issued a written opinion from its own legal department that it considers no "fraud" to have occurred. It is a very difficult situation to prove a victim doesn't realize his victimization to have occurred.

Finally, the bank manager, LaShaun Woods, admits in her statement that she asked Ms. Hamilton to provide the signature of Martha Ham and not the other way around! It doesn't matter if Ms. Hamilton believed or didn't believe that she had a valid Power of Attorney. The fact remains that a valid POA existed, thereby rendering the transaction lawful. The bank "invited" the actions the State of Indiana alleges to be criminal. That would be akin to a bank handing money to a customer and then charging robbery after the person leaves the bank. Ms. Hamilton was authorized to sign her own name; the name of Mrs. Ham; the word "cash" or any other payee the bank wanted at the time of the alleged offense due to the POA.

5. 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).

A. Exploitation Cannot Be Proven As a Matter of Law

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.

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 necessarily means that it is not possible as a matter of law to find Defendant guilty of "exploitation." 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.

Furthermore, the State of Indiana cannot prove that "improper" care of the dependent adult occurred. There is no witness, expert or law, that will testify that a nursing home by law provides "improper" care of any adult. There is no document or exhibit produced by the State of Indiana to demonstrate that Ham received any "improper" care after her transfer from Alternacare.

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.

Another reason exists for dismissing the "exploitation" charges as a matter of law: the statute defining the offense finds that a valid Power of Attorney granted in favor of the accused is a complete defense to the charge(s). The State of Indiana cannot dispute -- and has not disputed -- that a valid

Power of Attorney existed in favor of Defendant, KYLE S. HAMILTON, at the time of the alleged exploitation. The State of Indiana has produced no witnesses or exhibits to demonstrate the lack of a Power of Attorney in favor of Defendant over the financial affairs of Ham. In fact, the State of Indiana provided a copy of the Power of Attorney itself in its discovery.

Even should this Court find that the Power of Attorney did not exist, then the issue of legal standing comes into question. By alleging that the Trust was mishandled by Defendant, the State of Indiana has come to the conclusion that a dependent adult was exploited. This reasoning ignores the fact that a "trust" is its own legal entity – it is not a person; it is not Martha Ham.

The best evidence the State can produce is that a trust had missing funds; not that an adult was exploited. **The "trust" is the only possible victim of the State's alleged facts – not Martha Ham.** The trust is its own legal "person," if you will. It is impossible factually for Defendant to "exploit" a trust; she may be capable of being charged with "conversion" or "theft," but not exploitation of an endangered adult based upon the facts as alleged by the State.

6. For all of the foregoing reasons, a dismissal of the charges filed against Defendant is necessary as a matter of law.

WHEREFORE, Defendant, by counsel, respectfully requests that the above cause numbers be dismissed with prejudice and for all other relief.

Respectfully submitted,

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