

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac Street Centennial, CO 80112	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p style="text-align: center;">Case Number: 2008cv2659</p> <p style="text-align: center;">Division: 202</p>
<p>Plaintiff: STATE OF COLORADO, ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL</p> <p>v.</p> <p>Defendants: COLORADO HUMANE SOCIETY & S.P.C.A, INC.; MARY C. WARREN, an individual; ROBERT WARREN, an individual; and STEPHENIE L. GARDNER, an individual</p>	
<p>Attorney for Custodian: John M. Tanner, #16233 Fairfield and Woods, P.C. 1700 Lincoln Street, Suite 2400 Denver, CO 80203 Phone: 303.830.2400 Fax: 303.830.1033 Email: jtanner@fwlaw.com</p>	
<p style="text-align: center;">CUSTODIAN'S MOTIONS TO: (A) SEVER AND BIFURCATE CUSTODIANSHIP ISSUES FROM OTHER ISSUES AND (B) HAVE A STATUS CONFERENCE</p>	

Waverton Group, LLC, as custodian for the Colorado Humane Society (“CHS”), by and through its attorneys, Fairfield and Woods, P.C, and pursuant to C.R.C.P. 20 and 42, hereby moves this Court to sever the Custodianship Action from the Plaintiff/Defendant Action in this matter and as grounds therefor states as follows:

1. This case was brought by the State of Colorado for consumer fraud. The issues in this case can be divided into two broad categories: (1) The State of Colorado suing Mary C. Warren, Robert Warren, and Stephenie L. Gardner (the “Individual Defendants”) for sanctions for their conduct; and (2) the State of Colorado seeking the appointment of a custodian for the Colorado Humane Society.

2. The goals of the parties from the two parts of this action are completely different, and in some ways inconsistent. The custodian's job is to rehabilitate the Colorado Humane Society, return it to private management, and terminate the custodial aspects of this case as rapidly as possible.

3. Meanwhile the State of Colorado seeks sanctions against the defendants for their conduct prior to the appointment of the custodian. This is standard Plaintiff/Defendant litigation, and will likely take considerably longer than the Custodianship Action.

4. Often, the operation of a custodianship (which is simply a specialized type of receivership) must be handled differently than regular Plaintiff/Defendant litigation. The leading treatise on receivers, 1 Ralph Ewing Clark, *Clark on Receivers*, § 36(a) [3rd Ed. 1959] provides that a receiver is not merely an agent of the court, but an actual arm of the court. Receivers (and custodians) regularly need the court's attention in short order so that the custodianship can maintain its velocity and allow the rehabilitation of the company in custodianship. There is rarely an actual trial held in a receivership or a custodianship proceeding. Rather, numerous, limited issues are determined by the court, only few of which require a hearing, and even those tend to be short.

5. On the other hand, Plaintiff/Defendant actions often go months or sometimes years without the Court being involved. They, of course, culminate in a trial unless settled.

6. The custodian believes that the custodianship aspect of this case can be resolved much quicker and much sooner if it severed from the Plaintiff/Defendant aspects of this case. The custodian hereby requests the court to sever the custodianship action,

and give it a new case number *sub no. In re the Custodianship of the Colorado Humane Society & S.P.C.A., Inc.*

7. There are two Rules that apply to the custodian's request to sever the Custodianship Action from the Plaintiff/Defendant case:

a. C.R.C.P. 20(b), Permissive Joinder of Parties provides:

(b) Separate Trials.

The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

b. C.R.C.P. 42(b), Consolidation; Separate Trials provides:

(b) Separate Trials. The court in furtherance of convenience, or to avoid prejudice, or when separate trials will be conducive to expedition or economy may order a separate trial of any separate issue or of any number of claims, cross claims, counterclaims, third-party claims, or issues.

8. "We will, of course, permit wide discretion in the application of Rules 20(b) and 42(b) by a trial judge when he finds that the necessary prerequisites to separate trials laid down by those rules exist." *Sutterfield v. District Court of County of Arapahoe*, 165 Colo. 225, 438 P.2d 236, 231 (Colo. 1968). *See also Prudential Property & Casualty Ins. Co. v. District Court of Seventeenth Judicial Dist.*, 617 P.2d 556, 558 ("Similarly, a court may order the separate trial of any separate issue or claim in order to avoid prejudice, or in the furtherance of convenience, or when conducive to the expeditious or economical determination of an issue or claim. C.R.C.P. 42(b). (Colo. 1980)").

9. In this case, the findings that are prerequisites to severance are simple:

(a) The standard litigation of the Plaintiff/Defendant Action will only just be commencing by the time the Custodianship Action is completed;

(b) The Custodianship Estate is an undertaking of the Court and should receive abbreviated procedures whenever possible whereas the Plaintiff/Defendant Action enjoys no such priority;

(c) No party to this action will be prejudiced by the severance; and

(d) The severance will serve judicial economy by expediting the Custodianship Action, thereby increasing the likelihood that the Colorado Humane Society will survive.¹

10. The custodian also hereby requests a short (an estimated one hour at any time, including early in the morning, late in the day, or during a lunch break) Status Conference for two reasons. First, the custodian believes that the Court will benefit from such a Status Conference by having an opportunity to directly question a representative of Waverton Group, LLC, the custodian. Second, there is an issue as to whether the State's Motion for Order to Show Cause should run to the severed Custodianship Action or remain in the Plaintiff/Defendant Action.

11. Pursuant to Rule 121, undersigned counsel has consulted with the State of Colorado and the Individual Defendants in this matter. The state consents but the individual defendants object. The primary objection appears to be a metaphysical one—

¹ There is a third Rule that might apply to this situation. C.R.C.P. 20(b) and 42(b) would appear to apply more to parties whereas C.R.C.P. 21 would appear to apply more to claims. C.R.C.P. 21 reads:

C.R.C.P. 21, Misjoinder and Nonjoinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

(Emphasis added.)

Regardless of whether the severance is one of claims or parties, the law is substantially the same.

they are concerned that if their dispute with the state is resolved before the custodianship is terminated, it will leave a custodian without an underlying case. The custodian believes that this objection is without merit. First, in all likelihood the custodianship will be wrapped up long before the disputes between the plaintiff and defendants are resolved. Second, even if it is not, the court can always consolidate the cases back together at that time.

12. For the court's convenience, a proposed Order is submitted herewith.

WHEREFORE, Waverton Group, LLC, as custodian, prays that this Court enter an Order severing the custodianship in this case from the standard Plaintiff/Defendant Action, schedule a Status Conference in the near future, and grant it such other and further relief as the court deems just and proper.

Respectfully submitted this 26th day of May, 2009.

FAIRFIELD AND WOODS, P.C.

By: *s/John M. Tanner*
John M. Tanner

ATTORNEYS FOR
CUSTODIAN

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was served via Lexis/Nexis, by placing a copy in the United States Mail, postage prepaid, or via email, this 26th day of May, 2009, addressed to the following:

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