

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 Receiver: 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>	
CUSTODIAN’S REPLY TO MARY WARREN’S OBJECTION TO CUSTODIAN’S COMBINED FOURTH AND FIFTH REPORT	

Waverton Group, LLC, as custodian for the Colorado Humane Society, by and through its attorneys, Fairfield and Woods, P.C, hereby responds to Defendant Mary C. Warren’s Objection to Custodian’s Combined Fourth and fifth Reports, and Response in Opposition to Custodian’s Motion to Approve Report (the “Objection”) and as grounds therefor states as follows:

The Objection requests this Court to Deny portions of the custodian’s Combined Fourth and Fifth Reports, and in so doing, reject the most fundamental aspects of the Custodianship Action. Each objection, discussed more fully below, is without merit.

I. THE CUSTODIAN'S REQUEST FOR PROPOSAL HAS ALREADY BEEN APPROVED BY THE COURT, AND RIGHTFULLY SO.

In terms of overall significance to the Colorado Humane Society, the Custodian's Request for Proposal is clearly the most significant undertaking of the custodian. It is through the Custodian's Request for Proposal that the custodian will be able to rehabilitate the Colorado Humane Society, restore it to the public service to which it is committed, and terminate this custodianship.

The fatal flaw in the Objection is conceptual. In order to succeed, the Objection must assume that Mrs. Warren has some possessory interest in the Colorado Humane Society. That is simply not the case. As a nonprofit corporation, the Colorado Humane Society has issued no shares of stock to evidence a possessory interest in the corporation itself. Therefore, Mrs. Warren's claimed right to resume control of the Colorado Humane Society cannot be based upon a possessory interest in the corporation itself.

In fact, Mrs. Warren's only right (if it may be called a right) would be a right to continued employment as the Executive Director at the Colorado Humane Society. That must fail, as well (at least in the short term). It was by Order of this Court (the Order Appointing Custodian) that this Court removed Mrs. Warren from employment at the Colorado Humane Society, and Mrs. Warren consented to that action. After a new board is constituted, Ms. Warren is free to apply for a position as Executive Director, or any other position she wants. But that has nothing to do with the Custodian's Request for Proposal and desire to reconstitute a proper, functioning board.

By reason of the foregoing, there is no reason for the Court to hold the Custodianship Estate open pending the final outcome of the litigation between the State

of Colorado and the Individual Defendants. Even assuming that the Individual Defendants succeed in defeating all claims against them, they still have no right to resume control of the Colorado Humane Society. The decision to rehire Mrs. Warren as the Executive Director would nevertheless be a decision of the Board of Directors of the Colorado Humane Society, and due to the mismanagement of Mrs. Warren, there was not a valid Board of Directors for months before the custodian was appointed.

Paragraph 19 of the Custodian's Third Report, which was approved by Order of this Court, reads as follows:

19. Custodian's Request for Proposal. The custodian intends to rehabilitate the Colorado Humane Society by means of a Custodian's Request for Proposal. The custodian will prepare its proposed Custodian's Request for Proposal, and submit it to this Court under a motion for approval, thereby allowing interested parties and concerned citizens to comment and object.

In its Combined Fourth and Fifth Report, the custodian advised the Court that it would not submit the Custodian's Request for Proposal for approval and its reasons for not doing so. The custodian's reasons are sound, and the Fourth and Fifth Report should be approved.

Pendente lite receivers (in this case, custodians) are appointed during the pendency of litigation, that part of the Objection is correct, at least as far as it goes. *Pendente lite* custodians are not restricted to the ministerial tasks of making regular monthly reports to the Court. *Pendente lite* custodians may be authorized to take any action to resolve the issues of the estate, including a judicial sale of the entire company. Professor Clark, in his seminal treatise on receivers, writes:

§ 486 Power of *pendente lite* receiver to sell property

An ordinary chancery or pendente lite receiver is clothed with no estate in the property, but is a mere custodian of it for the court. If a sale of such property may be deemed necessary for the benefit of the parties concerned, the receiver as an officer of the court may be ordered by the court to sell the property. He may, when properly authorized to sell as an officer of the court, sell real estate or personal estate.

2 Ralph Ewing Clark, *Clark on Receivers*, § 486 (3d Ed. 1959)

As it is wholly possible that the litigation between the State of Colorado and the Individual Defendants could last for years, it is unreasonable for the Individual Defendants to insist that a Court-appointed custodian remain in place during that time to run a charitable institution.

II. THE COURT SHOULD ALLOW THE CUSTODIAN TO HIRE AGENTS

The custodian has appointed a Board of Advisors to assist the custodian in many aspects of the operations of the Colorado Humane Society. This includes veterinarians to assist the custodian in connection with animal health issues and euthanasia determinations. It includes people familiar with the operation of nonprofit animal welfare organizations. The Board of Advisors has no authority whatsoever over the decisions made by the custodian.

The Order Appointing Custodian, at paragraph 14, reads as follows:

Liability of the Custodian: The Custodian shall enjoy the limited judicial immunity usually applicable to custodians. All who are acting, or have acted, on behalf of the Custodian at the request of the Custodian are protected and privileged with the same limited judicial immunity usually applicable to custodians. In order to avail the agents of the Custodian with these protections and privileges, the Custodian should file a notice of agency with this Court.

In their capacity as Advisors to the custodian, the Board of Advisors is precisely the group contemplated by paragraph 14 of the Order Appointing Custodian. The challenge to the limited judicial immunity that should be granted to the Advisors, who are

dedicating their time and resources at no charge to the custodian, is meant as nothing less than a veiled threat of suit by the Individual Defendants. These tactics of intimidation are consistent with the tactics that the Individual Defendants routinely used in the conduct of the business of the Colorado Humane Society when they were in charge and have engaged in since the appointment of the Custodian (as previously reported to the Court). They should promptly be dispensed with by an Order specifically finding that the Advisors are agents as contemplated in paragraph 14 of the Order Appointing Custodian.

III. AN INFORMATIONAL SECTION IS APPROPRIATE

It is difficult to respond to the Objection as it relates to the Informational Section of the custodian's Reports for two reasons: First, there has been nothing in the Informational Section that Mrs. Warren has found objectionable. The Objection is in the abstract. Second, the argument made by Mrs. Warren is backwards and tends to support the notion of an Informational Section.

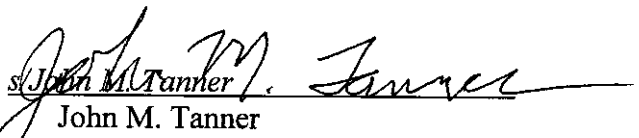
There is no effort on the part of the custodian to avoid this Court's exclusive oversight of the Custodianship Estate. There is no effort on the part of the custodian to make findings of fact or law on behalf of the Court. That is precisely the point of the Informational Section—it enables the custodian to give notice of its determinations without suggesting that the findings are those of the Court. Once the matter reported is at issue, the adverse party is unrestrained in its ability to oppose the custodian's determination without having to litigate it in advance.

The Informational Section is actually for the benefit of adverse parties, who are rarely advised in other cases of the legal theory being utilized by an adversary. It is specifically designed to allow adverse parties to avoid having to object to a reported item,

while at the same time the adverse parties (and the court) what the Custodian is contemplating and why. Why Mrs. Warren, or anyone else, would object to being told the other side's legal theories is mystifying.

Respectfully submitted this 1st day of June, 2009.

FAIRFIELD AND WOODS, P.C.

By: 
John M. Tanner
ATTORNEYS FOR RECEIVER

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 1st day of June, 2009, addressed to the following:

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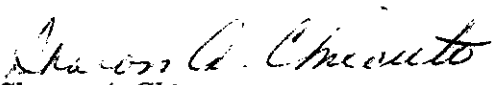
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