

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE PROFESSIONAL FIDUCIARIES BUREAU
STATE OF CALIFORNIA**

In the Matter of the Statement of Issues
Against:

MELODIE JO SCOTT,

Case No. A1-2008-01

OAH No. 2009030280

Respondent.

**DECISION PURSUANT TO ORDER OF COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT**

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on May 26 and 27, October 20, 21, 22, and October 29, 2009.

Deputy Attorney General Jonathan D. Cooper represented complainant.¹

Steven L. Simas and Hugh R. Slayton, Attorneys at Law, represented respondent Melodie Jo Scott, who was present. The record was left open for submission of closing briefs. Respondent's Closing Argument and Lodging of Non-California Authorities, was marked as a group Exhibit RRRR; complainant's Closing Argument was marked as Exhibit 65; and respondent's Reply Brief was marked as Exhibit SSSS. The record was closed and the matter submitted for decision on December 14, 2009.

The Proposed Decision of the Administrative Law Judge was submitted to the Director ("Director") of Consumer Affairs' designee, the Deputy Director of Legal Affairs ("Deputy Director"), on February 22, 2010. After due consideration thereof, the Deputy Director declined to adopt said Proposed Decision and on February 24, 2010 issued an Order of Nonadoption. On April 5, 2010, 2010, the Bureau received the complete transcript of the hearing and thereafter, on April 12, 2010, the Deputy Director issued an Order Fixing Date for Submission of Written Argument. On July 7, 2010, the Deputy Director issued an Order, pursuant to Government Code section 11517, delaying the issuance of its decision until August 13, 2010. Written arguments were received from

¹ Mellonie Yang was Chief of the Professional Fiduciaries Bureau when the Statement of Issues was filed. Gil DeLuna is the current Interim Chief.

Complainant and Respondent and the time for written argument in this matter expired, the entire record, including the transcript of said hearing, was read and considered pursuant to Government Code Section 11517, the Deputy Director decided to deny the application of Melodie Jo Scott for a Professional Fiduciary License.

Subsequently, Ms. Scott filed administrative and traditional writs of mandate with the Superior Court for Sacramento County. On or about January 14, 2011, the Superior Court issued a Peremptory Writ requiring the Director of the Department of Consumer Affairs to set aside its Decision after Nonadoption denying respondent's application for a professional fiduciary license and adopt the decision of the administrative law judge sequentially granting the respondent's application for a professional fiduciary license, revoking the license, staying the revocation and placing the license on probation for three years subject to specified terms and conditions. The Superior Court's Peremptory Writ ordering issuance of the license was stayed pending appeal by the Director to the Court of Appeal of the State of California, Third Appellate District. Respondent requested the Court of Appeal to lift the stay and order the Peremptory Writ to take effect during the pendency of the appeal. On May 5, 2011, the Court of Appeal granted respondent's Motion to Require Issuance of a Professional Fiduciary License under the terms and conditions imposed by the Administrative Law Judge in the proposed decision dated January 29, 2010. This order is to remain in effect pending the appeal and further order of the court.

ORDER

The Decision after Nonadoption denying respondent's application for a professional fiduciary license is hereby set aside. In accordance with the order of the Court of Appeal of the State of California in and for the Third Appellate District, the respondent shall be issued a professional fiduciary license subject to the terms and conditions imposed by the Administrative Law Judge in the proposed decision dated January 29, 2010.

This Order is effective immediately.

DATED: May 10, 2011



DOREATHEA JOHNSON
Deputy Director, Legal Affairs
Department of Consumer Affairs

BEFORE THE
DIRECTOR OF THE DEPARTMENT OF CONSUMER AFFAIRS
FOR THE PROFESSIONAL FIDUCIARIES BUREAU
STATE OF CALIFORNIA

In the Matter of the Statement of Issues
Against:

MELODIE JO SCOTT,

Respondent.

Case No. A1-2008-01

OAH No. 2009030280

PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on May 26 and 27, October 20, 21 and 22, and October 29, 2009.

Deputy Attorney General Jonathan D. Cooper represented complainant.¹

Steven L. Simas and Hugh R. Slayton, Attorneys at Law, represented respondent Melodie Jo Scott, who was present.

The record was left open for submission of closing briefs. Respondent's Closing Argument and Lodging of Non-California Authorities, was marked as a group Exhibit RRRR; complainant's Closing Argument was marked as Exhibit 65; and respondent's Reply Brief was marked as Exhibit SSSS. The record was closed and the matter submitted for decision on December 14, 2009.

FACTUAL FINDINGS

1. On April 9, 2008, the Professional Fiduciaries Bureau, Department of Consumer Affairs, received an application for a Professional Fiduciary License from respondent Melodie Jo Scott. Respondent signed the application on March 31, 2008, certifying under of penalty of perjury that all statements, answers, and representations made in the application were true and accurate.

¹ Mellonie Yang was Chief of the Professional Fiduciaries Bureau when the Statement of Issues was filed. Rick Wallinder is the current Interim Chief.

2. By letter dated August 7, 2008, the bureau informed respondent that her application was denied. Respondent filed a timely notice of defense.

Background

3. The Professional Fiduciaries Act (Bus. & Prof. Code, § 6500 et seq.) was enacted by the legislature effective January 1, 2007. In order to act or hold oneself out to the public as a professional fiduciary after January 1, 2009, a license issued by the bureau was required. (Bus. & Prof. Code, §§ 6502 & 6530; see also Prob. Code, § 2340 [a superior court may not appoint a person to carry out the duties of a professional fiduciary, or permit a person to continue those duties, unless that person holds a license issued by the bureau].)

4. A professional fiduciary is defined by the Act in Business and Professions Code section 6501, subdivision (f). It provides:

a person who acts as a conservator or guardian for two or more persons at the same time who are not related to the professional fiduciary or to each other by blood, adoption, marriage, or registered domestic partnership. "Professional fiduciary" also means a person who acts as a trustee, agent under durable power of attorney for health care, or agent under a durable power of attorney for finances, for more than three people or more than three families, or a combination of people and families that totals more than three, at the same time, who are not related to the professional fiduciary by blood, adoption, marriage, or registered domestic partnership.

5. Prior to the creation of the bureau, and commencing in January 2000, persons who acted as a private conservator or guardian were required to hold a registration obtained through application to the Statewide Registry of Private Conservators and Guardians, operated by the Department of Justice. (See former Prob. Code, §§ 2850 to 2586, & former Cal. Code Regs., tit. 11, §§ 313-319.) Some counties also required persons serving as private conservators and guardians in their county to file information with the county clerk. (See former Prob. Code, § 2340.)

First Cause for Denial (License Application)

6. In her application for licensure, respondent answered "no" to questions regarding whether she had ever "resigned" or "settled" as a fiduciary in a matter in which a "complaint" had been filed with the court. The application directed that if either question is answered in the affirmative, the applicant must provide requested information, including the case name, number, court location and date, a written statement of the issues and facts regarding the case, and copies of court orders.

7. The statement of issues alleges that respondent knowingly made a false statement of fact required to be revealed on the application (Bus. & Prof. Code, § 480, subd. (c)), and that she engaged in fraud or misrepresentation in applying for the license (Bus. & Prof. Code, § 6536, subd. (c)). It alleges that in two cases she settled a matter which involved complaints made to the court regarding her actions as a fiduciary; that in one case she resigned as conservator in a matter after complaints were made to the court regarding her actions as a fiduciary; and that in one case, she settled a matter and resigned as conservator after complaints were made against her to the court regarding her actions as a fiduciary.

8. The application form used by respondent was issued by the bureau in December 2007. The application did not define the term "complaint." The term "complaint" was not defined by bureau regulation at that time.

9. The term complaint had a meaning in the context of the operation of the Statewide Registry. Former Probate Code section 2850, subdivision (e), provided:

Each court clerk shall forward a copy of any complaint filed with that court, and found to be meritorious by that court, against a conservator or guardian in his or her capacity as a conservator or guardian for inclusion in the Statewide Registry. The Statewide Registry shall place any copies of those complaints in the file of that conservator or guardian.

In the regulations adopted by the Department of Justice for the Statewide Registry, it defined the term complaint by simply referencing former Probate Code section 2850, subdivision (e). (See former Cal. Code Regs., tit. 11, § 314, subd. (d).)

10. The bureau issued a new application form in March 2008. This application contained an asterisk next to the word "complaint," and defined the term as follows:

A complaint means a civil complaint, a petition, motion, objection, or other pleading filed with the court against the licensee alleging the licensee has not properly performed the duties of a fiduciary.

Applicants like respondent who had completed and submitted the earlier version of the application form were not notified that the bureau had re-issued the application with the term complaint defined.

11. In May 2008 the bureau adopted in regulatory form the requirements for disclosure in an application for licensure as a professional fiduciary. The regulation, which is set forth in California Code of Regulations, title 16, section 4422, defines in subdivision (c) the term "complaint." It provides:

As used in this section "complaint" means a civil complaint, a petition, motion, objection, or other pleading filed with the court against the licensee alleging the licensee has not properly performed the duties of a fiduciary.

12. Respondent testified that when she completed the December 2007 version of the application, she answered the questions in the negative because she had never resigned or settled a matter in a case in which a complaint which had been found to be meritorious by a court and which had been reported to the Statewide Registry. Respondent had never been reported to the Statewide Registry by any court for any reason. Respondent was not aware that the bureau was using a different definition of the term complaint. Had she known that the bureau was expanding the definition from that used in the Statewide Registry process, she would have answered the questions differently. And, had she been given the opportunity to supplement her application after the bureau had defined the term, she would have done that as well. Respondent's testimony in this regard was found to be credible and persuasive.

13. Much evidence was presented regarding whether there was a common understanding in the trade of the word "complaint" at the time respondent completed her application. It was not established that the term had only the meaning now attributed to it by the bureau. Because there was not a common understanding of the term, the bureau, as established through the testimony of its then Chief, Mellonie Yang, decided to define the term by regulation, which was proposed in the end of February 2008, and not adopted until two months after respondent filed her application.

14. Under the circumstances presented here, respondent's interpretation of the application form cannot be found to be unreasonable. As such, it is not necessary to decide whether respondent had an obligation to disclose the four cases the bureau charges her with failing to disclose. Assuming for purposes of argument that she did have an obligation to disclose them, it is concluded that her failure to do so does not amount to fraud or a knowing failure to disclose.

Second Cause for Denial (Unprofessional Conduct)

15. The statement of issues alleges that respondent acted unprofessionally on December 11, 2008, by driving her vehicle in violation of Vehicle Code sections 23152, subdivision (a) (driving while under the influence of alcohol/drugs), and 23152, subdivision (b) (driving with a blood alcohol level in excess of the legal limit of 0.08 percent).

16. The evidence established that respondent drove her vehicle after having an unknown number of glasses of wine at a restaurant. Respondent fully admits to being intoxicated and to driving while intoxicated. Respondent was arrested and charged with driving under the influence; her blood alcohol level was 0.18 percent. Respondent has not yet been criminally convicted.

17. Respondent regrets her conduct and is embarrassed by it. She attended a four-month class on alcohol awareness through Jackson-Bibby Awareness Group. The class focused on the effects of drinking alcohol and driving, and she has a heightened awareness of the risks and pitfalls of drinking and driving. She now has a plan in place so that she does not drive a vehicle after drinking alcohol. She concedes that she exercised poor judgment by driving while intoxicated.

18. At the time that she drove her vehicle while intoxicated, respondent was not at work as a professional fiduciary. She had taken the day off in order to deal with personal matters relating to a close family member, and she had made arrangements for her clients to be served by a case manager. It was a stressful day for respondent, and she did not eat the entire day.

19. Daniel Stubbs testified that a professional fiduciary is required to be available to address an emergency with a client at any hour, and for that reason, it is always unprofessional conduct to drink alcohol to excess. This testimony is found unpersuasive. It was not established that respondent has an alcohol abuse problem in her private life that affects or could affect her fitness to be a professional fiduciary. This is the first time that she has been arrested for driving under the influence of alcohol. While it gives one pause to see a 0.18 percent blood alcohol level, there was no expert evidence presented to interpret the meaning of such a high blood alcohol level with respect to alcohol abuse.

Third Cause for Denial (Unlicensed Practice)

20. The evidence establishes that respondent continued to act as a professional fiduciary after January 1, 2009, in both Riverside and San Bernardino counties. Although respondent did not take on any new clients, she continued to act as a professional fiduciary in more matters than allowed by law. It was not established that she so acted to flaunt the authority of the bureau or to harm the public.

21. Respondent was caught off guard when the bureau denied her application, a license she fully expected to obtain. She decided to keep two conservatorships, and to step down from all the others. Respondent mistakenly believed that she could retain two conservatorships and three trusteeships without licensure.

22. Respondent also continued to act as a professional fiduciary in a large number of other matters until she was finally released from those obligations by the probate court. The process started with a meeting with Probate Court Judge Welch on December 8, 2008, to decide how to handle the appointment of successors to respondent in the numerous cases she had. In each case, the court issued an order to show cause re vacancy in the office, and sent notices to the private professional fiduciaries of the opportunity to petition to be the successor conservator. The court set a date for a hearing on the appointment of successor conservators in each case. For some of the cases, there were competing professional fiduciaries that were interested. In other cases, there were not. Respondent continued to

fulfill obligations to ensure that no harm was done to the beneficiary and the assets. Once respondent's resignation was accepted by the court, she was still required to file final accountings through the date of the appointment of the successor trustee, and then to be followed by a discharge hearing and order by the court. These proceedings took time.

Other Matters

23. Respondent has been a professional private fiduciary since 1982. She has acted as a Conservator, a Guardian, and an Agent under Durable Power of Attorney. She has expertise in asset recovery, with a focus on locating missing assets of elderly clients. Since 1993, respondent has operated under the business name of Conservatorship and Resources for the Elderly, Inc., in Redlands, California. The types of client she has represented over the years are the mentally ill, indigent, and victims of elder abuse. She has taken on many cases pro bono.

24. Respondent has a bachelor's degree from the University of Redlands. Respondent has been a member of the Professional Fiduciary Association of California (PFAC) for over 12 years. She was the president of PFAC in 1999, and its member of the year in 2004. She has served on its Ethics Committee, which developed the first ethical standards for fiduciaries in California. She has many other noteworthy professional and educational achievements. The evidence establishes that respondent has worked for many years to professionalize the industry and to develop ethical and professional standards.

25. Respondent presented evidence from two attorneys who practice with her. Attorney David Horspool has had a probate practice for some 25 years. He is a certified specialist in estate planning, trusts and probate law. He has known respondent for 26 years, and has worked with her on hundreds of cases. In his opinion, respondent has a reputation for truthfulness and honesty. She is not always well-liked, as she can be too direct and too truthful. He believes that her standard of practice is professional and that she is passionate about her cases.

26. James Church is an attorney who specializes in the areas of probate, guardianship, conservatorship, trust administration, and estates in the Redlands area. He has known and worked with respondent for more than ten years, and they have worked together in over 20 cases. She has a reputation for truthfulness and honesty. In Church's view, respondent is competent, professional and compassionate.

27. Joan Elizabeth Roberts is the owner and director of Visiting Angels of Riverside, a large home care agency that provides non-medical care for seniors in Riverside and San Bernardino Counties. In her opinion, respondent is the "best of the best" as a conservator.

28. Not everyone thinks highly of respondent as a fiduciary. The bureau introduced declarations from three family members, Steven L. Price, Sr., Gina Rilke, and

Joseph Quattrochi, Jr., who were not happy with respondent as a fiduciary and who do not think that respondent is ethical or honest as a fiduciary.

LEGAL CONCLUSIONS

First Cause for Denial

1. Pursuant to Business and Professions Code section 480, subdivision (c), an application for licensure as a professional fiduciary may be denied if the applicant has knowingly made a false statement of fact required to be revealed in the application for licensure.

Pursuant to Business and Professions Code section and 6536, subdivision (c), an application for licensure as a professional fiduciary may be denied if the applicant has engaged in fraud or misrepresentation in applying for a license.

By reason of the matters set forth in Factual Findings 6 to 14, cause for denial under these sections was not established. In order to find cause for denial, it must be shown that respondent knew what the bureau meant by the term "complaint filed with the court," and respondent's testimony established that she did not. The term complaint did not have an ordinary meaning in the trade, as evidenced by the need to define the term by regulation and on the revised application form the bureau released. There is no question that the term "complaint" as currently defined by bureau regulation is different than how the term was used in the State Registry process which preceded the creation of the bureau. Respondent may be faulted for rushing through her application; but on this record, she cannot be found to have knowingly made a false statement of fact or to have engaged in fraud in the attempt to obtain a license.

Second Cause for Denial

2. Pursuant to Business and Professions Code section 480, subdivision (a)(3), an application for licensure as a professional fiduciary may be denied if the applicant has done an act which if done by a licentiate would be grounds for license suspension or revocation. Pursuant to Business and Professions Code section 6584, a license issued under the Act may be suspended or revoked for "unprofessional conduct in, or related to, the practice of a professional fiduciary." Unprofessional conduct under the Act "includes, but is not limited to, acts contrary to the professional standards concerning any provision of law substantially related to the duties of a professional fiduciary."

By reason of the matters set forth in Factual Findings 15 to 19, cause for denial under these sections was not established. There is no question that abuse of alcohol may constitute unprofessional conduct by a professional fiduciary. And there is no requirement, as respondent argues, that alcohol abuse be established by a criminal conviction. But respondent's single act of driving while intoxicated, under the circumstances presented here,

does not establish that she has a problem with alcohol in her private life. (Cf. *In re Kelley*, (1990) 52 Cal.3d 487, 495 [two DUI convictions within a short period of time may indicate alcohol abuse].) Nor does it in and of itself establish a basis for finding unprofessional conduct in, or related to, the practice of a professional fiduciary. Cause for denial pursuant to Business and Professions Code section 480, subdivision (a)(3), read together with section 6584, was not established.

Third Cause for Denial

3. Pursuant to Business and Professions Code section 6584, subdivision (h), an application for licensure as a professional fiduciary may be denied if the applicant acts as a professional fiduciary without having a license to so act. A professional fiduciary license is required in order for a person to act as a conservator for two or more people or for three or more trusts. (Bus. & Prof. Code, § 6501, subd. (f).) The Professional Fiduciaries Act became effective January 1, 2009. As set forth in Factual Findings 20 to 22, respondent continued to act as a professional fiduciary after January 1, 2009, notwithstanding that she did not have a license to do so. Cause for denial exists pursuant to Business and Professions Code section 6584, subdivision (h).

Licensing Considerations

4. As set forth in Business and Professions Code section 6516, the protection of the public is the highest priority of the bureau in exercising its licensing functions. "Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (*Ibid.*) Although it is true that respondent continued to act as a professional fiduciary after the law required her to have a license, the extenuating circumstances are such that her conduct does not demonstrate a serious breach of professional integrity. The public will be adequately protected by the following order, which allows respondent to obtain a professional fiduciary license on a probationary basis.

ORDER

The application of Melodie Jo Scott for a Professional Fiduciary License is granted. Upon successful completion of all licensing requirements, a Professional Fiduciary License shall be issued to respondent. The license shall immediately be revoked, the order of revocation stayed, and respondent shall be placed on probation for three (3) years subject to the following terms and conditions:

1. OBEY ALL LAWS: Respondent shall obey all federal, state and local laws, and all rules and regulations governing the practice of a professional fiduciary in California.

A full and detailed account of any and all violations of law shall be reported by respondent to the bureau in writing within 72 hours of occurrence. If respondent is under criminal court orders, including probation or parole, and the order is violated, this shall be deemed a violation of these probation conditions, and may result in the filing of an accusation and/or petition to revoke probation.

2. **COMPLY WITH PROBATION:** Respondent shall fully comply with the terms and conditions of probation imposed by the bureau and shall cooperate with representatives of the bureau or its designee in its monitoring and investigation of respondent's compliance with probation terms and conditions.
3. **SUBMIT WRITTEN REPORTS:** During the period of probation, respondent shall submit written quarterly reports, under penalty of perjury, as required by the bureau. These reports shall contain statements relative to respondent's compliance with all the conditions of probation, and other information as required by the bureau.
4. **TOLLING OF PROBATION:** In the event respondent should leave California to reside or practice outside of the state, respondent must notify the bureau in writing of the dates of departure and return. Periods of non-California residency or practice outside the state shall not apply to reduction of the probationary period. No obligation imposed as a condition of probation shall be suspended or otherwise affected by such period of out-of-state residency or practice except with the written permission of the bureau.
5. **MAINTAIN VALID LICENSE:** Respondent shall, at all times, maintain an active current license with the bureau including any period of suspension or period in which probation is tolled.
6. **LICENSE SURRENDER:** During respondent's term of probation, if she ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the conditions of probation, respondent may surrender her license to the bureau. The bureau reserves the right to evaluate respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances, without further hearing. Upon formal acceptance of the tendered license respondent will no longer be subject to the conditions of probation.

Surrender of respondent's license shall be considered a disciplinary action and shall become a part of respondent's license history with the bureau.

7. VIOLATION OF PROBATION: If respondent violates the conditions of her probation, the bureau, after giving respondent notice and an opportunity to be heard, may set aside the stay order and impose the stayed revocation of respondent's license.

If during the period of probation, an accusation or petition to revoke probation has been filed against respondent's license or the Attorney General's Office has been requested to prepare an accusation or petition to revoke probation against respondent's license, the probationary period shall automatically be extended and shall not expire until the accusation or petition has been acted upon by the bureau.

8. COMPLETION OF PROBATION: Upon successful completion of probation, respondent's license shall be fully restored.

DATED: January 29, 2010



MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings