The below described is SIGNED.

Dated: June 03, 2005

WILLIAM T. THURMAN
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re: **Constance Love Norman**, Debtor.	Bankruptcy Case Number 02-38450 [Chapter 13]
James E. Love, Successor Trustee of the Chaille M. Love 1989 Revocable Trust, and Chaille M. Love, by James E. Love, His Attorney in Fact, Plaintiffs, v. **Constance Love Norman**, Defendant.	Adversary Proceeding Number 03P-2092 Judge William T. Thurman

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MEMORANDUM DECISION GRANTING JUDGMENT IN FAVOR OF PLAINTIFF

This matter came on for trial before the Honorable William T. Thurman, Bankruptcy Judge, in his courtroom in room 376, United States Courthouse, 350 South Main Street, Salt Lake City, Utah. The trial began on December 1, 2004, continued on through December 3, 2004, and concluded on February 18, 2005. Closing argument was conducted on April 14, 2005.

Plaintiffs were represented by H. Lee Horner and Brett P. Johnson. Defendant appeared *pro se*. The Court, having heard and considered all evidence received during the course of the trial, having observed the appearance and demeanor of the witnesses and evaluated their credibility, and being fully advised, now makes the following Memorandum Decision, which will constitute its Findings of Fact and Conclusions of Law.[1]

JURISDICTION AND VENUE

The Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157(a) and 1334(b). Venue is proper before this Court pursuant to 28 U.S.C. § 1409(a). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

BACKGROUND

The parties to this proceeding are all related. Dr. Chaille M. Love ("**Dr. Love**") is the father of James E. Love ("**James,**" who is the Plaintiff), David Love ("**David**"), Christopher Love ("**Christopher**") and Defendant Constance Love Norman ("**Defendant**"). James E. Love is the successor trustee of the Chaille M. Love 1989 Revocable Trust, and also is attorney-in-fact for Dr. Chaille M. Love (in such representative capacities, "**Plaintiff**").[2]

This proceeding was initiated by the Plaintiff alleging that his sister, the Defendant, committed various acts with respect to property of Dr. Love that creates claims against the Defendant for non-dischargeability pursuant to 11 U.S.C. §§ 523(a)(2)(A), 523(a)(4) and

[1] As required by Rule 7052 of the Bankruptcy Rules.

[2] See discussion of his position infra.

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523(a)(6). Dr. Love was over the age of 80 at the time of all acts of Defendant relevant to this matter.

The Plaintiff asserts that the Defendant importuned upon Dr. Love and engaged in a systematic method of expending all of his assets without proper authority or accountability. The Plaintiff asserts that the damages total approximately $1.4 million from: 1) the loss of cash, accounts, or marketable securities owned by Dr. Love and improperly expended by the Defendant; 2) interest on the amounts expended; 3) the loss of a home in Sacramento; and 4) the improper sale of land in Louisiana.

The Defendant denies any improper conduct. She asserts that at all times she was acting in the best interest of Dr. Love and pursuant to authority granted to her under either a power of attorney or the Third and Fourth Amended Trust, which is discussed infra. Her defense rests primarily on the propriety of her conduct while assuming the position as the agent or trustee for Dr. Love.

In order to understand the claims of the parties, a review of Dr. Love's estate planning documents is required. On July 24, 1989, Dr. Love created the Chaille M. Love 1989 Trust (the "Trust").[3] The Trust held ownership of Dr. Love's Sacramento Residence and his investment accounts with Merrill Lynch and other brokerage houses. The Trust did not grant the trustee authority to encumber trust property and mandated investment of trust assets only in "investment grade" or virtually risk-free investments. Dr. Love never amended these terms nor authorized a departure from these restrictions. It was Dr. Love's custom not to invade the principal of his investment accounts prior to Defendant becoming his fiduciary.

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[3] Exhibit 1.

Dr. Love appointed himself as trustee and designated Wells Fargo Bank as a successor trustee in the event that Dr. Love was unable to act as trustee. Article Eleven of the Trust provided a mechanism for appointing a successor trustee in the case of emergency or incapacity. On February 7, 1997, Dr. Love executed a Second Amendment to the Trust, revising Article Eleven to state that Dr. Love could be deemed incapacitated only upon certification by two doctors who were authorized to practice medicine in the State of California at the time of the certification.

On June 14, 1998, the Defendant convinced Dr. Love sign a power of attorney that appointed the Defendant as Dr. Love's attorney-in-fact under a springing power of attorney ("Power of Attorney").[4] The Power of Attorney provided that it would not spring into effect unless and until Dr. Love was certified by two physicians, under penalty of perjury, of being incapable of managing his business affairs. Upon it being activated, the Power of Attorney specifically granted the Defendant: 1) the right to manage, control, lease, sublease and otherwise act concerning any real property that the principal (Dr. Love) may own; 2) the right to purchase real property on the principal's behalf; 3) the right to mortgage, pledge, or otherwise encumber such property; 4) the right to purchase, sell, invest, reinvest, and generally deal with all stocks, bonds, etc. owned by the principal; 5) the right to prepare and file all tax returns; 6) the right to deposit and draw on any checking, savings, or other accounts of the principal; and 7) the right to use credit cards of the principal.[5] Paragraph 4 of the Power of Attorney restricts the Defendant

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[4] This was after the Defendant relocated Dr. Love from his long-time home in Sacramento to Utah.

[5] Listed at paragraph 3.

from using the principal's assets for her own legal obligations, including support of the Defendant's dependents.

On the same day that the Power of Attorney was signed, the Third Amendment to the Trust was made by Dr. Love. It identifies the Defendant as successor Trustee if Wells Fargo no longer acts as Trustee. No written evidence was offered or received indicating that Dr. Love resigned as Trustee or that he intended to substitute anyone for himself as Trustee until November 26, 2000.

On March 29, 1999, the Defendant, acting as successor trustee, executed the Fourth Amendment to the Trust, which modified the requirements of Article Eleven.[6] As modified, Article Eleven requires only that the two physicians who certify Dr. Love's incapacity be authorized to practice medicine in the United States. There was no requirement that the certification be made under penalty of perjury in this amendment.

On November 26, 2000, Dr. Love effected a new power of attorney that revoked all prior powers of attorney and prohibited the Defendant from acting as agent.[7] It appoints James E. Love a attorney-in-fact and designates David A. Love as successor. It authorizes the attorney-in-fact to act for all intents and purposes generally for Dr. Love. In addition to the new power of attorney, Dr. Love effected a Fifth Amendment to the Trust on November 26, 2000, which appoints James as Trustee and David as Successor Trustee of the Trust.

[6] The Fourth Amendment is signed by the Defendant as "agent for Chaille M. Love Settlor." She also signed as "Successor Trustee."

[7] Dr. Love signed the new power of attorney and amended the Trust after he was returned home to Sacramento and relieved from the control of the Defendant.

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FINDINGS OF FACT

Dr. Love has lived in Sacramento near David and James most of his adult life. In May of 1998, Defendant moved Dr. Love from his Sacramento, California residence (the "Sacramento Residence") to her home in Syracuse, Utah. Defendant did so without discussing the matter with other family members, and at a time when the rest of the family was known by the Defendant to be in Zephyr Cove, Nevada at a 25th anniversary celebration for David. After the move, the Defendant represented to her siblings that Dr. Love's relocation was merely a "visit" and, later, was an "extended stay" that was in the best interests of Dr. Love.

At the time of his relocation to Utah in 1998, Dr. Love's monthly income was approximately $4,000 from pensions and social security, and approximately $5,000 from interest income generated from funds on deposit. His monthly expenses were approximately $4,000 to $5,000. Dr. Love also held the following assets: (1) cash and cash equivalents in the amount of approximately $777,386 held and deposited with various stock brokerages or banks;[8] (2) the Sacramento Residence, then worth approximately $200,000; and (3) vacant land in DeRidder, Louisiana worth approximately $30,000 (the "Louisiana Land").

Dr. Love lived much of his frugal, modest life in Sacramento.[9] He had paid off his residence many years prior to 1998 and maintained it free and clear of liens. Over the years, Dr.

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[8] The deposit institutions include: Merrill Lynch (Exhibit 3), Sutro & Co. (Exhibit 4), Fidelity (Exhibit 5), Charles Schwab (Exhibit 17), Wells Fargo Bank (Exhibit 20) and Paine Webber (Exhibit 21). The Court has calculated the balances in these accounts as of the end of June, 1998 from these exhibits for the total set forth above.

[9] Dr. Love was 87 in 1999. See letter of letter Gerald Rothstein, M.D., attached to Exhibit 28.

Love consistently informed his children of his firm aversion to credit in general, and to mortgaging one's residence in particular.

On many occasions, Dr. Love described his investment philosophy to his children—an investment philosophy grounded in a theory of "take no risk" and sacrifice higher return for safety of principal. Dr. Love also made known a strenuous aversion to speculative or risky investments. Article Eight of the Trust bore out this conservative investment approach. It states:

> To carry out the provisions of the trusts created by this instrument, the trustee shall have the following powers besides those now or later conferred by law: . . . To invest and reinvest all or any part of the trust estate in any common or preferred stocks, and bonds listed on the New York Stock Exchange, deposit accounts insured by the FDIC, and direct obligations of the U.S. government and the State of California such as persons of reasonable prudence would acquire on their own account.[10]

Dr. Love kept various items at the Sacramento Residence stored in boxes in his living room area and had housekeeping assistance from time to time from David, Patricia Love, and people he hired. In May of 1998, this home was somewhat cluttered with boxes and other items throughout the house.

A fire had occurred some time previously in the kitchen of the home, scarring cabinetry and other items. Dr. Love did not repair or replace the damaged property following the fire. It was still in a state of damage and disrepair in May 1998.

While the Sacramento Residence was equipped with central heat and air conditioning, it was Dr. Love's habit and custom to use space heaters and small portable fans to heat and cool the residence. These appliances were usually connected with extension cords and kept in close

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[10] Exhibit 1.

proximity to where he was because Dr. Love considered it wasteful to heat parts of the house that were not occupied.

Defendant had visited Dr. Love at his residence from time to time over the years and was aware of his manner of housekeeping and heating/cooling philosophies, which he was still adhering to at the time Defendant effected his removal from the Sacramento Residence to Utah.

David has lived his entire life in Sacramento County, California. David and his wife Patricia had previously invited Dr. Love to their residence for family birthdays, anniversary celebrations, holidays, and informal get-togethers with family members and friends. At most such gatherings, Dr. Love's grandchildren, family, friends, and neighbors also were present, and Dr. Love was observed to enjoy being around his family members and friends at such gatherings.

After his 1998 relocation to Defendant's rented quarters in Utah, Dr. Love continued to manage his own financial affairs for a brief period; for example, he wrote checks to various vendors for services and to Defendant for short term loans with specific repayment dates noted on the checks. However, the checks were filled in by the Defendant and Dr. Love merely signed as the maker.

Following the move to Utah, the Defendant became a signatory on all of Dr. Love's bank accounts. The evidence shows that following the move to Utah, Dr. Love relinquished control over his decision-making to the Defendant.

James and David both visited Dr. Love at Defendant's Utah residence shortly after the move in 1998 and each observed a substantial decline in Dr. Love's mental and physical state from what they had both observed in Sacramento immediately before the move. They witnessed the Defendant exercising undue control over Dr. Love at times, but did not voice concerns to

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Defendant out of a concern that there would be retaliation against their father by Defendant. During David's visit with him in Utah, David observed that Dr. Love appeared lethargic. They were unaware of any dissipation of Dr. Loves assets by the Defendant at that time.

Dr. Love's personal needs (hygiene, food, clothing, etc.) appeared to be properly managed by the Defendant at the time of David's visit. The Defendant hired professional care givers to address Dr. Love's physical needs.

In 1999, Defendant unilaterally decided to move herself and her father to Idaho. Defendant used Dr. Love's funds in the Trust to purchase a large single family residence in New Meadows, Idaho which is a rural area near McCall, Idaho (the "McCall House") and an adjacent lot with a manufactured house located thereon (the "Manufactured House"). Defendant and her husband moved into the McCall House, which they used as their primary residence.[11] Defendant moved Dr. Love into the Manufactured House. Aside from some contact with various care givers, Dr. Love lived there alone. Dr. Love had no family members in McCall, Idaho except for the Defendant, and was in fact isolated from all other family members while living in the Manufactured House. In fact, the Defendant monitored all of Dr. Love's incoming and outgoing phone calls in Idaho.

The purchase price for the McCall House was $384,800 as per the Real Estate Purchase and Sale Agreement dated April 28, 1999.[12] The home was acquired with a loan from Washington Mutual Bank (the "WAMU Loan") in the form of a first trust deed dated June 4,

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[11] Although funds of the Trust were used for this purchase, title to the McCall House was placed in the name of Dr. Love only.

[12] Exhibit 18.

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1999 for $216,000.[13] It is unclear from where the remainder of the money for the purchase of the McCall House came. The Defendant signed Dr. Love's name to the WAMU Loan without identifying herself as his attorney-in-fact. A second loan was taken against this property on November 8, 1999 in the amount of $146,000 in favor of Old Kent Mortgage Company, wherein the Defendant signed Dr. Love's name as attorney-in-fact on the loan documents.[14] On December 30, 1999, the Defendant signed for Dr. Love as "POA" and obtained another loan against this property for $10,000 in favor of H.S. Properties, LLC.[15] A few weeks later, Defendant obtained another $10,000 loan on the McCall House in favor of H. S. Properties, LLC on January 26, 2000.[16] Washington Mutual commenced foreclosure on the McCall House when the Defendant failed to pay the loan according to its terms. Washington Mutual issued a notice of default under its trust deed on August 1, 2000 and the McCall house was eventually foreclosed upon.

On July 19, 1999 the Defendant pledged Dr. Love's previously unencumbered Sacramento Residence as collateral for a loan made by Freemont Investment and Loan (the "Freemont Loan") in the amount of $100,000. The Defendant signed Love's name without

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[13] Exhibit 23.

[14] Exhibit 25. Exhibit 24 is a Special Power of Attorney dated September 23, 1999 signed by the Defendant, but using Dr. Love's name without identifying herself as agent or as attorney in fact. In effect, by this document, she appoints herself as attorney in fact for Dr. Love. L. Dale McAllister notarized the signature of the Defendant but the document states that it was Dr. Love who appeared before McAllister in signing the document. Prior to closing on the Old Kent Loan, the Defendant did not advise anyone that she had signed Exhibit 24. She testified that she didn't remember much about this document, which the Court does not find credible, noting the Defendant's prior experience in the lending business.

[15] Exhibit 26.

[16] Exhibit 27.

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identifying herself as agent, attorney-in-fact, or trustee. The Defendant's business acquaintance, L. Dale McAllister, notarized the signature of Dr. Love knowing that, in actuality, Defendant had signed Dr. Love's name.[17] In connection with the Freemont Loan, the Defendant signed Dr. Love's name on a Uniform Residential Loan Application dated July 3, 1999 (the "Loan Application").[18] The Loan Application represents that Dr. Love had $71,000 in liquid assets and owned a 1999 Lincoln Navigator, a 1999 Dodge Ram Diesel, real estate worth $825,000 (comprised of $225,000 for the Sacramento home, $325,000 for the Idaho residence and $150,000 for the Louisiana property), gold bullion coins worth $125,000, and household goods worth $150,000. The Loan Application also represents that Dr. Love earned monthly income at that time of $4,000 from his retirement and $8,500 from investment income.

Several statements made by the Defendant on the Loan Application were misleading. For example, there is no evidence that Dr. Love had $8,500 of investment income as of July 3, 1999. Rather, the evidence is that Dr. Love received only approximately $5,000 of monthly investment income prior to his relocation to Utah and before significant funds of the Trust were spent by the Defendant. In addition, the Loan Application represents that Dr. Love lived in the Sacramento Residence. In fact, he was residing in the Manufactured House in Idaho at that time. Finally, as discussed below, the two vehicles were leased, not owned by Dr. Love. Defendant claims to have signed these documents at the behest and instruction of Dr. Love, although nothing in the documents indicate such.

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[17] McAllister owned the Utah residence in which the Defendant previously resided. The Defendant had earlier issued significant checks from Dr. Love's Barnes Banking checking account to McAllister with notations of "for mortgage." See discussion infra.

[18] Exhibit 6.

The Loan Application contained false information. The Defendant has had experience as a mortgage loan officer and has previously worked with the Federal Savings & Loan Investment Corporation ("FSLIC") and is familiar with loan transactions. The Defendant was familiar with the necessity of being accurate on loan applications. Based upon this transaction alone, the Court finds that: 1) Defendant was reckless with the truth; 2) Defendant was not properly exercising fiduciary care over Dr. Love's assets; and 3) Defendant lacked credibility in her testimony before the court.

On November 5, 1999, the Defendant borrowed $72,000 from Jack R. Conn, a private lender, (the "Conn Loan)" for a short term and pledged the Sacramento Home as collateral.[19] The Defendant netted $61,500 from this loan. The Conn Loan was in second position behind the Freemont Loan. The Defendant obtained it purportedly under the authority of the springing Power of Attorney, promising to repay Mr. Conn $75,000 plus 18% annual interest within six months.[20]

The Defendant testified that she needed the money from the Freemont and Conn loans to pay for the construction on the McCall House. The Court finds that such was not warranted or authorized. The springing power of attorney used by Defendant for both loans had not sprung into effect by its own terms in that there were not two medical declarations under penalty of perjury attesting to Dr. Love's incapacity. While there were two doctor letters, they were not sworn declarations.

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[19] Exhibit 7.

[20] The evidence is that, with the points and stated interest rate on the note, the annualized interest was approximately 127%.

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In another series of transactions, the Defendant established an account with an options and commodity brokerage by the name of Monex during her control over Dr. Love.

Although the Trust does not grant any successor trustee the power to amend any terms of the trust, the Defendant executed, as successor trustee, the Fourth Amendment to the Trust on March 29, 1999[21] granting the trustee the power to buy risky investments such as options, futures, etc. (the "Monex Amendment"). Article Eight, paragraph A was substantially modified by allowing broader powers of investment. Monex required this change before it would engage in transactions with the Defendant or Dr. Love.

Following the Monex Amendment, the Defendant transferred substantial funds to Monex from Dr. Love's Merrill Lynch account. The Defendant directed Monex to deliver to her Utah residence $100,000 in gold Canadian Maple Leaf coins, which she thereafter dissipated. Defendant's explanation regarding what has happened to the coins was unsatisfactory. The Court notes, however, that the Defendant made three trips to Switzerland after she relocated Dr. Love to Utah. Defendant testified that the trips were in the nature of vacations. The Defendant largely used Dr. Love's funds to pay for these trips.[22]

Exhibit 29 contains trading records of precious metals in Dr. Love's Monex Account with the Defendant identified as trustee. The account was opened by the Defendant in September, 1998. On November 4, 1998, Monex delivered the above coins to the Defendant. By July 1999, the account was depleted. At all times, the Monex Account was under the control of the Defendant.

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[21] Exhibit 1.

[22] See discussion on checks and bank withdrawals, infra.

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After relocating Dr. Love to Utah in June 1998, Defendant signed Dr. Love's name to two automobile leases: one for a new 1999 Lincoln Navigator, acquired for her own use, and the other for a new 1999 Dodge diesel pickup, acquired for the use of Gail Kenneth Norman, her husband. These are the same two vehicles that the Defendant represented were owned by Dr. Love with values of $55,000 and $40,000 respectively in connection with the Loan Application to Freemont.[23] The evidence shows that a check dated 12/9/98 from Dr. Love's Barnes Banking Co. account was issued in the amount of $7,963 to Layton Hills Dodge for "Truck Down payment."[24] The signature on the check is illegible but appears to be that of Dr. Love. Exhibit 10-56 contains a copy of a check issued to First Security Bank as a "Truck lease" payment for $800 with the lease account number listed on the check. The Court finds that the truck was leased and not purchased.

Dr. Love did not lease automobiles when he managed his own finances. The evidence shows that his custom and habit was to purchase used or economy vehicles for cash at a price less than retail. While in Sacramento, Dr. Love acquired a full size 1989 Cadillac at a fire sale price from a desperate seller. Dr. Love instructed family members that it was not to be driven except on rare, special occasions due to its poor gas mileage compared with the compact four cylinder car he had acquired for daily use.

David visited Dr. Love in Idaho in the summer of 2000 and observed his physical deterioration to have become more pronounced after his move to the Manufactured House. After learning that Dr. Love's caregivers in Idaho were not getting paid and were walking off the job

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[23] Exhibit 6.

[24] Exhibit 10-36.

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as a result, and that his health was suffering, James and David sought counsel and filed adult guardianship proceedings in Idaho to wrest Dr. Love away from the control and influence of the Defendant.

Thereafter, Dr. Love was returned to the Sacramento area where his mental and physical health immediately improved. After returning to Sacramento, Dr. Love stated that he felt like, "his old self," in a discussion with David. Dr. Love engaged a Sacramento attorney, Tony J. Stathos, to assist him with his financial matters. He directed Mr. Stathos to remove the Defendant from any assumed fiduciary capacity. A Fifth Amendment to the Trust, dated November 26, 2000 signed by Dr. Love, appoints James as trustee.[25] A Durable Power of Attorney also dated November 26, 2000 and signed by Dr. Love appoints James as agent.[26]

By the time of his return to Sacramento in 2000, Dr. Love had no cash or real property resources. His bank and investment accounts had been depleted completely by the Defendant, and his only source of income was his retired professor pension and social security. Dr. Love was left completely without cash or cash equivalent resources for use in maintaining his standard of living, or to be used in the case of a health or other emergency.[27]

Exhibit 10 contains copies of over 500 checks written on Dr. Love's Barnes Banking Co. account. In many instances, the checks contain what appears to be the signature of Dr. Love. This exhibit is illustrative of the Defendant's misuse of Dr. Love's assets.
Commencing March 3, 1999, the Defendant began signing her name as the maker on the checks.

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[25] Exhibit 9.

[26] Exhibit 8.

[27] There is evidence that the Sacramento Home was sold and netted $13,500 for Dr. Love.

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Many of the checks were issued in favor of the Defendant including descriptions such as "gifts," "loan," "trip," "travel expenses," "Connie's attorney," "cash," and "Connie Norman, chair & TV." One check identified at Exhibit 10-51 was issued to L. Dale McAllister for $10,800 on February 19, 1999 without any stated purpose.[28] Subsequent checks were also issued to Mr. McAllister, i.e. $3,200 on March 10, 1999 without a stated purpose, $3,000 on March 15, 1999 with "Mortgage payment" noted, $3,241 on March 29, 1999, $3,743.48 on May 7, 1999 with "April Mortgage" noted, $2,180 on June 4, 1999 with "Mgt. Payment/June" noted, and on July 15, 1999, for $2,500 with "repayment" noted. This is the same person who notarized Dr. Love's signature on many documents wherein the Defendant was actually the signatory yet no remarks were made that the signer was signing as agent or under authority of a power of attorney. Mr. McAllister owned the home in Layton, Utah where the Defendant resided from June, 1998 through June, 1999. There was no evidence given as to any rental rate or leased amount for the Defendant's use of the premises. Defendant had no mortgage with Mr. McAllister on the Layton, Utah residence.

Additional checks from the Barnes Banking Co. account[29] reflect further use by the Defendant of Dr. Love's money. A check was issued to "Cash" for $8,100.00 with the notation "USAA Credit Card."[30] In a series of checks, the Defendant signed checks to "Cash" for $2,000 dated 3/11/99 with the notation "Preparation," "Cash" for $2,500 dated 3/12/99 without any

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[28] The Defendant testified that this payment to McAllister "was stupid" on her part and that he never repaid it.

[29] All contained in Exhibit 10.

[30] The Defendant testified that this was for "dad's USAA credit card." Inadequate evidence was presented as to why Dr. Love needed such a credit card or what purchases were made with this card.

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notation of purpose , $1,000 to Alison Norman dated 3/15/99 with the notation "Travel/Ireland," $3,000 for"Cash" dated 3/15/99 with the notation, "Travel Expense/Ecuador,[31]" $2,000 for "Cash" dated 3/15/99 with the notation, "Preparation," $2,000 for "Cash" dated 3/17/99 without notation of purpose, $2,000 for "Cash" dated 3/18/99 without notation of purpose, $800 to Tiffany Norman dated 3/23/99 with the notation "Ireland," and "Cash" for $2,000 dated 3/29/99 with the notation "Prep." As to the checks for "Preparation," the Defendant testified that these were for moving to Idaho, however, she gave no details regarding the expenditures. No adequate reason was given by the Defendant for other disbursements. They were not for the benefit of Dr. Love.

Many checks were issued to Heather Lawrence[32] by the Defendant out of Dr. Love's accounts, several with no indication as to their purpose. One check to Heather Lawrence was issued for $100 dated 4/25/99 states the purpose as "Hair." In addition, numerous other family members are identified in Exhibit 10 as receiving transfers from Dr. Love's account at Barnes Banking, including Tiffany Norman, Gale Norman, Alison Norman, Ken Norman, Terri Norman,[33] Nadalea Norman and Barbara K. Love. Of particular interest are the checks issued to religious entities of which Dr. Love had no apparent connection. They include a check to "Glory of Zion" in the amount of $450 for an "Apostolic Conference for Ken & Constance Norman,

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[31] The Defendant testified that this was for "Marcella" and that it was a "stupid" expenditure. She also testified that Marcella has now disappeared. Inadequate information was given as to who Marcella was or the need for this payment.

[32] The Defendant's daughter.

[33] The Defendant testified that this was for rent and that Terri Norman could not pay her rent that month.

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Terrie Norman, and Kurt Norman"[34]; to "On Wings of Eagles" in the amount of $300 for a "gift"[35]; to "Chuck Flynn" in the amount of $5,000 for "Prophetic Trumpet"[36]; and to "Prophetic Trumpet" in the amount of $1,000 with the notation "gift."[37] There is no credible evidence as to these being authorized by Dr. Love and no credible evidence to support any claim that they were for the benefit of Dr. Love. The Defendant testified that with respect to some of the checks issued to family members of the Defendant, Dr. Love "just wanted to do it" for the recipient. The Court finds this evidence not credible.

The Defendant has exhibited a pattern of personal financial mismanagement spanning many years. In many instances, she used Dr. Love's funds for her own personal use as well as for her's and her family's legal obligations and support without permission. There is no credible evidence that the Defendant was acting at Dr. Love's direction or in his best interests when she (i) encumbered the Sacramento Residence, (ii) sold the Louisiana Land, (iii) bought then mortgaged the McCall House and (iv) dissipated Dr. Love's cash and cash equivalents.

There is no credible evidence that Dr. Love resigned as trustee of the Trust prior to the Defendant purporting to act as the successor trustee. The Defendant has not satisfactorily explained why she was paying the telephone bills of her business associates with Dr. Love's funds or why she paid mortgage payments on the Syracuse residence for the owner with Dr. Love's funds.

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[34] Exhibit 10-54.

[35] Exhibit 10-80.

[36] Exhibit 10-84.

[37] Exhibit 10-95.

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The Court finds that Defendant signed Dr. Love's name numerous times without identifying herself in any capacity then prevailed upon Dale McAllister to notarize those signatures as if they were made by Dr. Love. In many of these notarized documents it is not recited that they are signed by the Defendant at the direction of Dr. Love.

Many of the checks issued on the Barnes Banking Co. account to the Defendant contained in Exhibit 10 reflect that were for loans to the Defendant. The Defendant testified that all loans were repaid. Dr. Love was never scheduled as a creditor in the Defendant's bankruptcy case, nor was he given notice of Defendant's bankruptcy or that his claims against Defendant may be discharged in bankruptcy.[38]

The evidence indicates that, starting with Dr. Love's move to the Defendant's Utah residence and continuing until his return to Sacramento, the Defendant used her fiduciary capacity to deplete and/or dissipate all of Dr. Love's assets.[39] The Louisiana Land was sold by her for cash, most of the equity was borrowed out of the Sacramento Residence, most of the equity in the McCall House was borrowed against, and all of Dr. Love's brokerage accounts were depleted.

The Court finds clear and convincing evidence from the above facts that the Defendant had a fiduciary duty to Dr. Love and breached that duty by expending virtually all of his assets.

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[38] David Love was scheduled as a disputed creditor with a claim of $900,000 in his individual capacity. James Love is also listed as a disputed creditor with a claim of $9,000,000 in his individual capacity.

[39] Although the Court finds that the Defendant did not have the authority under either the June 14, 1998 Power of Attorney or the Third Amended Trust Deed, she still acted as a fiduciary and assumed that role in relation to Dr. Love.

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In the space of two years, the Defendant dissipated approximately $1 million leaving Dr. Love with nothing but a small netted equity out of the Sacramento Home and his monthly pension.

The Court finds that the loss and diminution of Dr. Love's assets in the aggregate amount of $992,086.00[40] was proximately caused by the Defendant's breaches of fiduciary duty, conversion, and defalcation.[41]

PENDING SANCTIONS MOTION

This trial was originally scheduled to take place beginning on September 28, 2004.[42] One month prior to trial, however, Defendant filed a Motion to Re-Open Discovery, arguing at the hearing that she needed more time to depose her father in this matter. At the same time, Defendant filed a Motion to Remove Counsel, arguing that both local counsel, Snell & Wilmer, and Mr. Horner should have been disqualified and had violated her privacy. At the hearings held on September 21, 2004, the Court denied the Defendants Motion to Remove Counsel but granted her Motion to Re-Open Discovery so that she could depose her father.[43] The Motion to Re-Open Discovery was granted based on the specific representations of the Defendant that she intended on taking additional discovery and that she had been delayed by the Plaintiff in doing so.

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[40] As calculated above in footnote 10 less the $15,300 received for the Sacramento Home.

[41] There is evidence that the Defendant signed many checks for Dr. Love's maintenance, however, those were covered by Dr. Love's retirement income. Accordingly, no offset is given to the damages for those costs.

[42] The Complaint was filed on February 21, 2003.

[43] That ruling was memorialized in a Memorandum Decision dated October 7, 2004.

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On November 23, 2004, the court conducted a scheduling conference in this proceeding. The Plaintiff appeared through counsel. The Defendant did not attend. Counsel for the Plaintiff represented that the Defendant did not contact him and conducted no discovery during the 60 days that the Court had allowed her to take her father's deposition. At that time, Plaintiff requested sanctions be imposed against the Defendant in the amount of attorneys fees incurred by Plaintiff's counsel for responding to the Motion to Remove Counsel and the Motion to Re-Open Discovery. The Court ordered the Plaintiff to file a motion requesting fees and costs and deferred consideration of that to be considered at trial.

The Court concludes that the Defendant's Motion to Remove Counsel and the Motion to Re-Open Discovery were made for an improper purpose. She elected not to take any further discovery after the Court continued the trial and gave her approximately two months to do so. She also elected to file the disqualification motion on the eve of trial, which could have been filed much earlier to avoid the delay it caused.

The Court concludes that the Defendant should be sanctioned for attorneys fees incurred by the Plaintiff in preparing for the Motion to Remove Counsel and the Motion to Re-Open Discovery. The only fees and costs supported by any evidence is that filed by affidavit by local counsel for the Plaintiff, Snell & Wilmer. The fees and costs asserted in the affidavit of Brett Johnson are itemized in the amount of $5,066. Mr. Johnson's affidavit also that Mr. Horner's fees were in the "approximate" amount of $5,000. There is no itemization from Mr. Horner. The Court finds that the itemized fees of Snell & Wilmer are reasonable and should be assessed as a sanction against the Defendant pursuant to Rule 9011 and § 105 of the Bankruptcy Code. There is no evidence of the calculations by Mr. Horner, and accordingly, the Court is unable to

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find that his requested fees are actual or reasonable. Accordingly, fees in favor of the Plaintiff should be allowed in the amount of $5,066.

ANALYSIS

Section 523(a)(2)(a) states:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
> for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--
> false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . .

Plaintiff's claim for damages based on Defendant's use of false pretenses, false representations, or actual fraud pursuant to 11 U.S.C. § 523(a)(2)(a) cannot be sustained in that there is no evidence that Defendant lied to her father to obtain money or property from him. As such, there has been no evidence that Dr. Love justifiably relied on any false pretenses, false representations, or actual fraud made by the Defendant.[44] Accordingly, the debts cannot be held nondischargeable under this section of the Bankruptcy Code.

Section 523(a)(4) states:

"A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny . . ."

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--for fraud or defalcation while acting in a fiduciary

[44] See generally Field v. Mans, 516 U.S. 59 (1995).

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capacity, embezzlement, or larceny.[45] The Tenth Circuit has narrowly construed the phrase "fiduciary capacity" in § 523(a)(4).[46] The Court in In re Young found that while the existence of a fiduciary relationship is determined under federal law, state law is relevant to the inquiry.

Under Tenth Circuit case law, to find that a fiduciary relationship existed under § 523(a)(4), the court must find that the money or property on which the debt at issue was based was entrusted to the debtor.[47] Further, the fiduciary relationship must be shown to exist prior to the creation of the debt in controversy.[48] In Utah, a fiduciary or confidential relationship will be found when one party, having gained the trust and confidence of another exercises extraordinary influence over the other party.[49] In this case, it is clear that Dr. Love entrusted his assets with the Defendant, for whatever reason. It is also clear that after obtaining access to these assets, the Defendant defalcated them.

Furthermore, even if the Court did not find that the Defendant was acting in a fiduciary capacity, the Defendant's debts to the Plaintiff would not be dischargeable due to her embezzlement of Dr. Love's property. Under 523(a)(4), embezzlement will have occurred when there is a fraudulent appropriation of property by a person to whom such property has been

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[45] 11 U.S.C. § 524(a)(4) (2005).

[46] In re Young, 91 F.3d 1367, 1371-72 (10th Cir. 1996).

[47] In re Young, 91 F.3d at 1371-72.

[48] Id.

[49] Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985).

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entrusted, or into whose hands it has lawfully come, and it requires fraud in fact, involving moral turpitude or intentional wrong, rather than implied or constructive fraud.[50]

Accordingly, as an alternative theory of recovery, the Court concludes that the Defendant embezzled the assets of Dr. Love. Embezzlement under § 523(a)(4) is the fraudulent appropriation of property of another by one to whom such property has been entrusted or into whose hands it has lawfully come.[51] Clearly, the Defendant took control over her father's property, which he had trusted her to take care of for him.

Section 523(a)(6) states:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
> for willful and malicious injury by the debtor to another entity or to the property of another entity . . .

The word "willful" in § 523(a)(6) modifies the word "injury" indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.[52] Negligent or reckless acts do not suffice to establish that a resulting injury is "willful and malicious".[53] The Tenth Circuit has stated that "[a] court must not overlook

[50] Cousatte v. Lucas, 300 B.R. 526 (10th Cir. BAP 2003).

[51] In re Wallace, 840 F.2d 762 (10th Cir. 1988).

[52] Kawaauhau v. Geiger, 118 S. Ct. 974 (1998).

[53] Id.

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the criticality of the terms “willful” act and “malicious injury” in § 523(a)(6).”[54] Without proof of both, an objection to discharge under that section must fail.[55] The term “malicious” requires proof that the debtor either intend the resulting injury or intentionally take action that is substantially certain to cause the injury.[56] Nondischargeability under § 523(a)(6) requires proof of an intent to do harm, not just an intentional act.[57] Unless a debt is the result of a willful and malicious act intended to do injury to a person, the debt is discharged.[58] Plaintiff has not carried his burden in proving all required elements under this theory of recovery.

CONCLUSIONS OF LAW

Plaintiff has standing to bring this action by virtue of his status as attorney-in-fact. Plaintiff has met his burden in proving the Defendant’s liability for damages based on fraud or defalcation while acting in a fiduciary capacity pursuant to 11 U.S.C. § 523(a)(4). This conclusion is reached notwithstanding the fact that the Defendant was not a fiduciary under the Power or Attorney or the Trust as discussed below. While not a fiduciary pursuant to any written document, Defendant acted as though she were one. She took absolute control over all expenditures from Dr. Love’s accounts from and after the time she moved him to Utah in June of 1998 through August, 2000. She made decisions about his health and welfare and in her sole

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[54] Panalis v. Moore, 357 F.3d 1125 (10th Cir. 2004).

[55] Id.

[56] Id.

[57] Id.

[58] Id.

discretion made all decisions about where he should live and how his money should be spent. Although the decisions she made were not always in his best interest, she acted in a fiduciary relationship with Dr. Love. She thought she was a fiduciary. She signed his name as a fiduciary. Accordingly, § 523(a)(4) liability has been established.[59]

Plaintiff's claim for non-dischargeability based on the willful and malicious acts on the part of the Defendant pursuant to § 523(a)(6) cannot be sustained. Both elements of the statute must be present to find the debt non-dischargeable. While the Court found that the Defendant acted willfully to take Dr. Love's money and property, there was no evidence that she did so with t he intent to injure Dr. Love. To the contrary, the evidence shows that the Defendant did not care how her actions affected her father, she only cared about herself.

Accordingly, the court finds and concludes that Plaintiff is entitled to judgment against Defendant in the amount of $992,886.00 representing the total cash, securities and land of Dr. Love improperly disposed of by the Defendant, plus pre-judgment interest at Utah's legal rate of 10% per annum on that amount commencing July 1, 1998,[60] plus post-judgment interest at the federal judgment rate.

The Court further finds and concludes that the Debt is excepted from discharge for the reasons stated above. A money judgment and judgment of non-dischargeability should be entered in favor of Plaintiff and against Defendant. Plaintiff also is entitled to recover his costs in this proceeding pursuant to Bankruptcy Rule 7054.

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[59] Von Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985).

[60] This date is selected based on several factors: 1) The Defendant's assumption of control over Dr. Love and his assets began in June, 1998 with the move to Utah, 2) the account balances on the various exhibits have ending dates as of the end of June, 1998 and 3) as to the two parcels of land, the Plaintiff was effectively deprived of their use and value as of that date.

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Counsel for the Plaintiff is directed to prepare a separate judgment consistent with these findings and conclusions for the Court's consideration.

________________________________END OF DOCUMENT________________________________

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Service of the foregoing **MEMORANDUM DECISION GRANTING JUDGMENT IN FAVOR OF PLAINTIFF** will be effected through the Bankruptcy Noticing Center to each party listed below.

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