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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of William B. Robertson,  
An incapacitated adult  
Fiduciary Number FI-2005-000074290

Commissioner's Report

In Re: Estate of Mildred L. Bailey,  
Deceased  
Fiduciary Number FI-2005-000074291

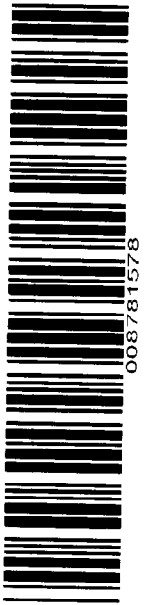
RECEIVED APR 21 2009

To the Honorable Judges of the Circuit Court of Fairfax County, Virginia:

At the request of James McConville, successor conservator for the Estate of William Robertson, curator for the Estate of Mildred L. Bailey, and successor trustee for The Robertson-Bailey Family Trust, the undersigned gave the notice required under Virginia Code § 26-29 setting the 11<sup>th</sup> day of November, 2008, at 10:00 a.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for receiving proof concerning objections to the accounts filed and fiduciary fees taken by Erin W. Anderson, the previous conservator and guardian for the above estates. Your commissioner received a letter on November 10, 2008, by which Ms. Anderson requested that the hearing be postponed in order to allow her an opportunity to retain counsel. Your commissioner denied the request and informed Ms. Anderson that she may raise her motion for a continuance at the hearing.

On the day of the hearing, the said James McConville appeared to substantiate his objections to Ms. Anderson's conduct and her accounts filed in this matter. Appearing with Mr. McConville was Terri Stipes, his legal assistant, Gregg Modesitt, who presented his analysis of the accounts, Karen Kirkbride, a part-time realtor for Weichert, and Ms. Kirkbride's husband. Erin W. Anderson appeared at the hearing but offered no testimony therein. Also at the hearing there appeared Judith York, who resided on the same floor and building as the wards, Ms. Elizabeth Powell, counsel for Liberty Mutual, and Kimberly Baucom, a representative of Adult Protective Services assigned to this case. No other person appeared at the hearing.

At the hearing Mr. McConville, Greg Modessit, Karen Kirkbride and Judith York offered testimony as to the matters at issue before your commissioner. Ms. Anderson invoked her Fifth Amendment privilege at the



hearing and did not testify as to any matter at issue. At the close of the hearing, your commissioner informed Ms. Anderson that the record would be left open in order to provide her with an opportunity to submit a written response to the issues raised at the hearing. On October 25, 2008, your commissioner received correspondence from Ms. Anderson which addresses the issues raised at the hearing. The record is now closed and your commissioner is prepared to make his report.

William Robertson and Mildred Bailey (referred to collectively in this report as “Wards”), a married couple, created The Robertson-Bailey Family Trust on June 4, 2003. Your commissioner finds that the Trust consisted of two Morgan Stanley Active Asset Accounts, a condominium in Fairfax County, and an interest in a Florida time-share. The trust named Mr. Robertson and Ms. Bailey as the initial co-trustees and co-beneficiaries. Upon the death of one, the survivor became the sole trustee. The Wards also reserved specific rights to amend, revoke or withdraw property from the trust in their capacity as settlors. The Trust designated Bank of America as the successor trustee in the event that the co-trustees became unable to serve. Your commissioner finds that Bank of America never qualified as successor trustee.<sup>1</sup>

This Court declared the Wards incompetent on January 28, 2005, and appointed Ms. Anderson the conservator of the estate of Mildred Bailey and the estate of William Robertson. The Court further appointed Ms. Anderson the guardian over the person of Mildred Bailey and the person of William Robertson. The Court required Ms. Anderson to post two bonds in the amount of \$1,000,000.00 each, with surety, for the faithful performance of her duties to each estate. Following her appointment, Ms. Anderson began marshalling the assets of the estates. Ms. Anderson had the authority to access several Bank of America accounts and she also created a conservatorship checking account with Bank of America for each of the wards.

Apparently, there had been some confusion as to which assets were owned by the Wards individually rather than the Trust. Ms. Anderson, through her correspondence, asserts that the previous guardians ad litem who were appointed for the Wards assured her that the Trust had not been

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<sup>1</sup> Since Ms. Anderson’s resignation, Bank of America has renounced their appointment and Mr. McConville has qualified as successor trustee.

funded. On the contrary, your commissioner finds that a vast majority of the Wards' assets were titled in the name of the Trust.<sup>2</sup> It is clear to your commissioner that Ms. Anderson elected to treat any assets owned by the Trust as part of the estates within her conservatorship. Your commissioner finds that Ms. Anderson was denied access to one of the Morgan Stanley trust accounts in light of her lack of authority. In order to withdraw such funds, Ms. Anderson prepared checks drawn against the account and had one of the incompetent wards personally sign the check against the trust account. The checks typically were payable to a conservator account at Bank of America, to Ms. Anderson personally or to providers of services.

When Ms. Anderson began her work in this matter, the Wards resided at Manor Care, an assisted living home, located at 550 South Carlin Springs Road, Arlington, Virginia. Sometime in October of 2005, Ms. Anderson arranged and then moved the Wards to Goodwin House Bailey's Crossroads, another assisted living home, which is located at 3440 South Jefferson Street, Falls Church, Virginia. Ms. Bailey passed away on September 20, 2006, but Mr. Robertson remained at Goodwin House for the remainder of Ms. Anderson's appointment. Mr. Robertson died on March 23, 2009.

Ms. Anderson filed an inventory for each of the wards. The inventories contained duplicate assets and each includes the total assets of the incapacitated couple. Ms. Anderson reported the total inventory value for assets of the joint estate as \$1,292,606.83.<sup>3</sup> On part 1 of each inventory, Ms. Anderson reported that there was initially \$115,105.91 in assets under her supervision and control. Upon a review of the accounts filed in this matter, your commissioner finds that Ms. Anderson reported as to the assets within the trust as well as the assets under her control and that for reporting purposes she treated the two estates as one joint-estate.

Ms. Anderson retained the services of Needham, Mitnick and Pollack, PLC, who filed joint-accounts for the estates of William B. Robertson and Mildred L. Bailey. These accounts, unapproved by your commissioner, replace those filed earlier by Ms. Anderson and appear to reflect the assets of the estates during the period of Ms. Anderson's control.<sup>4</sup>

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<sup>2</sup> The Wards owned \$115,105.91 at the time of their incapacity. The Trust, on the other hand, held title to over a million dollars in assets.

<sup>3</sup> The inventory filed for William B. Robertson has been approved this office.

<sup>4</sup> The joint accounts include the assets of the Robertson-Bailey Family Trust. Though Ms. Anderson did not have authority over this trust, she treated its asset as part of the estates. Needham, Mitnick & Pollack,

By order of this Court, entered in the above-referenced matter on the March 28, 2008, the Circuit Court of Fairfax County accepted Ms. Anderson's resignation and removed her as guardian of the person of William B. Robertson and as conservator of the estates of William B. Robertson and Mildred L. Bailey. Pursuant to that order, Ms. Anderson remains liable on her bond until such time as she files, and your commissioner approves, an inventory and all required accounts for the estates of William B. Robertson and Mildred L. Bailey which make a proper account for the assets of the estates during the period of her control as conservator. Ms. Anderson further remains liable on the bond until she restores to the estates any fiduciary fees taken in excess of those allowed by your commissioner.

From the extent of commingling that has occurred in these estates, it is difficult to ascertain the assets in each estate. Therefore, for purposes of this report, your commissioner will treat the two estates as one joint estate.

### ***Conservator's Authority to Withdraw Assets of the Trust***

The order appointing Ms. Anderson as guardian and conservator grants her "all powers, liabilities and duties set out in Virginia Code §§ 37.1-137.3 and 37.1-137.4." Virginia Code § 37.1-137.4 provides a conservator with "the powers set forth in Virginia Code § 64.1-57." Those powers may be exercised without prior court approval.

Generally, most courts find that a conservator lacks the authority to revoke or withdraw assets from a trust created by his Ward.<sup>5</sup> However, courts have relaxed the rule when the conservator revoked or withdrew trust funds necessary for the care and maintenance of the ward.<sup>6</sup> In a recent Virginia Circuit opinion, the Court held that "if a trust agreement is to limit the authority of a conservator appointed to manage the estate of the grantor, it must do so by express terms."<sup>7</sup> In that case, the Court concluded that a conservator may, without court approval, exercise his ward's power to

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PLC thus included in the accounts all of the assets over which Ms. Anderson exerted control during the conservatorship.

<sup>5</sup> See, *Guardian's authority, without seeking court approval, to exercise ward's right to revoke trust*, 53 A.L.R.4th 1297 (1987); See also, 39 AM. JUR. 2d *Guardian and Ward* § 117.

<sup>6</sup> *Id.*; See, *Newman v. Newman*, 42 Ill.App.2d 203, 191 N.E.2d 614 (1963); *In re Rasmussen's Estate*, 147 Misc. 564, 264 N.Y.S. 231 (1933).

<sup>7</sup> *In Re Rudwick*, 2002 WL 31730757, 17 VLW 725 (Arlington Cir. Ct. 2002).

revoke a trust absent contrary language or intent in the trust instrument. In its decision, the Court underscored Virginia's tradition of instilling great authority in conservators<sup>8</sup> and the statutory requirement that "a conservator take care and preserve the estate of the incapacitated person and manage it to the best advantage."<sup>9</sup> Further, the Court found that Virginia Code § 64.1-57 broadly authorizes a conservator to "step into [the ward's] shoes and 'do as he might or could do with respect to [his] own property.'"<sup>10</sup> Thus, it appears that in Virginia if an incompetent ward may revoke or withdraw assets from his trust, his conservator may, in the proper circumstances, do the same on his behalf.

Ms. Bailey and Mr. Robertson are the settlors and the initial co-trustees of The Robertson-Bailey Family Trust. They are also the sole beneficiaries of the Trust during their lives. No one qualified as successor trustee during the period in which Ms. Anderson's served as conservator and guardians for the wards. Article II of the trust instrument reserves certain rights to the settlors which may be exercised without the consent of the trustee. Section (c) of that Article provides that the settlors have the right to "revoke or vacate this Trust in whole or in part, or to withdraw any of the Trust property from the operation of this Trust at any time during the [Settlors'] lifetimes." A withdrawal of property under Section (c) required notice to the trustee of the intention of the settlors (or of the surviving settler). Though this Court declared the Wards incompetent, neither ward formally resigned or was removed as trustee. Moreover, the trust explicitly requires that the settlor be competent as a prerequisite to relinquishing any power expressly reserved to the settlor in the trust.<sup>11</sup> It also empowers an attorney-in-fact to act to relinquish such powers if the settlors are incompetent. Thus, the trust itself appears to reserve the power to revoke or withdraw from the trust to the settlors, even in incompetence.

Your commissioner finds that Ms. Anderson assumed control of a portion of the trust assets without qualifying as trustee and that other transfers and withdrawals from trust accounts were endorsed by one of the Wards.<sup>12</sup> While it appears to your commissioner that Virginia law broadly grants a conservator all of the rights and powers of the ward, and while there

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<sup>8</sup> See, *Ware v. Ware's Adm'r*, 69 Va. (28 Gratt.) 670, 1877 WL 6226 (1877).

<sup>9</sup> *Id.* (citing, Virginia Code § 64.1-137.3).

<sup>10</sup> *Id.* (citing, Virginia Code § 64.1-57 (n)).

<sup>11</sup> The Robertson-Bailey Family Trust, Article II (F) (2).

<sup>12</sup> Your commissioner does observe that Check # 353, payable to Goodwin House in the amount of \$22,216.00 is endorsed by Ms. Anderson in her capacity as guardian for the wards.

is language in the trust instrument that would support the incompetent wards' continued retention of discretionary power to revoke or withdraw funds from the trust, your commissioner finds that the methods employed by Ms. Anderson in obtaining access and control of the trust assets were inconsistent with proper fiduciary administration and represented an expansion of her fiduciary responsibilities not otherwise sanctioned by the Court. Nevertheless, while Ms. Anderson chose a precarious course in the handling of her duties, your commissioner finds no indication that Ms. Anderson managed and expended the assets of the trust for any reason other than for the benefit of the Wards with the exception of her taking of excess fiduciary fees. Your commissioner notes that Ms. Anderson had no prior experience in fiduciary matters. Therefore, your commissioner is of the opinion that Ms. Anderson should not be required to reimburse the trust for withdrawals attributable to proper expenses of the conservatorship and that she should not otherwise be liable for her role in the withdrawal and sale of trust assets, which, in her discretion, were necessary for the preservation of her wards' estates.

### *Purchase of Lincoln LS*

Mr. McConville raised an issue at the hearing as to Ms. Anderson's judgment in purchasing a 2004 Lincoln LS. Mr. McConville also objected to the decision by Ms. Anderson to title the vehicle in her own name. It is undisputed that the Wards leased the car prior to Ms. Anderson's appointment.<sup>13</sup> By her correspondence, Ms. Anderson states that she decided to purchase the vehicle in July, 2006 in order to assist her responsibilities as guardian in getting Mr. Robertson and Ms. Bailey to and from their doctor appointments. Ms. Anderson contends that she purchased the Lincoln because the couple was comfortable riding in their "own" vehicle and that the Wards' condition necessitated a large, easy to enter, motor vehicle. Ms. Anderson concedes that the car was titled in both her name and Mr. Robertson's name. Ms. Anderson maintains that Mr. Robertson did not have a valid driver's license and that she joined the title in order to obtain automotive insurance.

Pursuant to Virginia Code § 37.2-1023, a conservator shall have all of the powers set forth in Virginia Code § 64.1-57. Section (p) of § 64.1-57 authorizes a conservator, in his sole discretion, to expend income or

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<sup>13</sup> Ms. Anderson asserts that the Wards pre-paid the entirety of the lease term.

principal of the estate for the education, maintenance, support, or benefit of a ward. Virginia Code § 64.1-57(o) authorizes a conservator to hold property of an estate in his own name. Your commissioner finds that Ms. Anderson purchased the Lincoln LS for the benefit of her wards. Ms. Anderson's decisions to purchase and self-title the Lincoln LS are clearly authorized by the Virginia Code and your commissioner will not second guess the wisdom of her decision.

Mr. McConville also raised concern as whether Ms. Anderson used the vehicle for her personal use and whether Ms. Anderson should be responsible for damages to the front-end of the vehicle which he alleges occurred during the time the vehicle was in her possession. Your commissioner finds that Ms. Anderson put approximately 7,000 miles on the vehicle between the date of its purchase and Mr. McConville's acceptance of its possession, a period of almost two years. No evidence was presented to your commissioner that Ms. Anderson used the vehicle for any purpose other than for the benefit of the Wards or that anyone besides Ms. Anderson drove the vehicle. Based on the forgoing, your commissioner does not find that Ms. Anderson's use of the vehicle for 7,000 miles over a two year period is unreasonable in the circumstances of this case.

Your commissioner finds that the vehicle had damage to its front-end when Mr. McConville took possession. However, there was no evidence presented to your commissioner how such damage occurred. There certainly was not evidence that Ms. Anderson caused the damage in a reckless or negligent manner or that such damage occurred when the vehicle was used outside the scope of the vehicle's intended purpose. Typically, wear and tear of a vehicle utilized solely for the benefit of a ward is the responsibility of the ward's estate. Therefore, your commissioner is of the opinion that Ms. Anderson should not be liable for the vehicle's depreciation or condition.

### ***Failure to Sell/ Rent Condominium***

Mr. McConville raised issue as to Ms. Anderson's failure to sell or rent the wards' condominium, located in the Skyline House Condominiums. Mr. McConville takes particular issue with the fact that there were mortgage payments and condo fees accruing throughout the conservatorship for an empty condominium. All parties before your commissioner agree that the trust owned the condominium; however, Mr. McConville asserts that Ms.

Anderson breached her fiduciary duty by failing to “force the issue with Bank of America as named trustee.”<sup>14</sup> It is also undisputed that Ms. Anderson authorized rehabilitation work on the condominium and attempted to sell the same in the first months of 2007. Ms. Karen Kirkbride, a realtor for Weichert, testified at the hearing that Weichert’s attorney opined that a broker could not transfer title in the condominium because Ms. Anderson did not have authority to sell the property. Thereafter, Weichert refused to list the condominium for sale. Your commissioner finds that Ms. Anderson attempted to sell the condominium for the preservation of the wards’ estates but was unable to for lack of authority. While it may have been prudent for Ms. Anderson to have “forced” the issue on Bank of America, your commissioner is of the opinion that Ms. Anderson should not be liable for the management and preservation of assets beyond her control.

### *Treatment of the Wards’ Florida Time-share*

Mr. McConville raised issue as to Ms. Anderson’s decision to transfer the Wards’ interest in a Florida time-share to the Plantation Beach Club Owners’ Association. Ms. Anderson asserts that she first became aware of the time-share when the Association sent her notice of a special assessment. Apparently, the Association sustained considerable damage from hurricanes in 2004 and 2005 which resulted in the time-share being unavailable for the entirety of the 2006 season. Ms. Anderson explains that she felt it would be unprofitable for the estate to retain the time-share in light of the special assessment, the condo fees and the costs of a private sale to a third party. At the time of her decision, the Trust owed \$2,700.00 to the Association in unpaid assessments. Mr. Robertson, in his capacity of Trustee, signed a deed dated January 19, 2007, which transferred the trust’s interest in the time-share to the Association in exchange for a release of liability from assessments due. While your commissioner does not find that the ward had the capacity to sign the deed, the Association accepted title and the property has been subsequently sold to a bona fide purchaser. To the extent that Ms. Anderson, as conservator, had authority to manage the time-share, your commissioner is of the opinion that it was within her discretion to sell or transfer the time-share for the benefit of her wards.

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<sup>14</sup> Letter from James McConville, successor conservator for the Estate of William Robertson, curator for the Estate of Mildred L. Bailey, and successor trustee for The Robertson-Bailey Family Trust, p. 5 (December 9, 2008) (On file with your commissioner).



### ***Delinquent Payment Charges and Avoidable Bank Fees***

Your commissioner observes that Ms. Anderson was consistently delinquent in the payment of her wards' expenses. The estate incurred substantial fees as a result of her failure to disburse timely monies for the wards' condominium's mortgage, condominium fees and Goodwin House bill. Your commissioner also finds substantial bank fees were assessed against conservatorship bank accounts as a result of Ms. Anderson's failure to appropriately manage the same. Your commissioner finds that Ms. Anderson had access and control over sufficient funds to satisfy the debts of the Wards.

Virginia Code § 37.2-1022(b) sets forth:

[T]he conservator shall take care of and preserve the estate of the incapacitated person and manage it to the best advantage. The conservator shall apply the income from the estate, or so much as may be necessary, to the payment of the debts of the incapacitated person, including payment of reasonable compensation to himself and to any guardian appointed, and to the maintenance of the person and of his legal dependents, if any, and, to the extent that the income is not sufficient, he shall so apply the corpus of the estate.

Generally, your commissioner does not recommend surcharging a fiduciary for late fees and penalties when mistakes are made which are isolated or reasonably justified. In the instant case, however, your commissioner finds a consistent pattern of mismanagement and a lack of attention by the fiduciary in the fulfillment of her duties as conservator. Therefore, under the facts and circumstances of this particular matter, your commissioner is of the opinion that a surcharge for delinquency fees is appropriate. Your commissioner finds that \$1,405.27<sup>15</sup> in late payment penalties were assessed against the assets of the Wards' estates while under Ms. Anderson's management. Your commissioner further finds that the estate incurred \$906.32 in bank fees against accounts under the supervision and management of Ms. Anderson. Therefore, your commissioner is of the opinion that Ms. Anderson's fiduciary fee should be reduced in the amount

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<sup>15</sup> This amount includes late charges incurred for delinquent payments made on the Skyline condominium's mortgage and late penalties incurred for failing to timely pay condominium fees.

of \$2,311.59, which is the total of such fees and penalties charged to the estates.

### ***Penalties and Interest on 2006 Income Tax Return***

Ms. Anderson did not timely file 2006 income tax returns for the Wards. The 2006 income tax returns were filed late which resulted in \$2,187.55 in interest and penalties. Ms. Anderson asserts that she relied upon a Certified Public Accountant's advice that 2006 returns would be unnecessary. Courts generally hold that when a fiduciary violates a tax law provision which results in the assessment of a penalty or interest, that, in the absence of some showing of proper excuse, or of extenuating circumstances, the fiduciary is personally liable to the estate which he represents for such penalty, interest, and/or additional tax.<sup>16</sup>

Virginia Code § 58.1-341 (f) makes a fiduciary responsible for the filing of her ward's tax return; however, Virginia Code § 64.1-57 (k) grants a fiduciary the authority:

To employ and compensate, out of the principal or the income or both as to the fiduciary shall seem proper, agents, accountants, brokers, attorneys-in-fact, attorneys-at-law, tax specialists, licensed real estate brokers, licensed salesmen and other assistants and advisors deemed by the fiduciary needful for the proper administration of the trust or estate, and to do so without liability for any neglect, omission, misconduct, or default of any such agent or professional representative provided he was selected and retained with reasonable care.

The Supreme Court of Virginia held that Virginia Code § 64.1-57 "shield[s] certain fiduciaries from liability for the actions of the agents they select to aid them in the administration of their duties."<sup>17</sup> Nevertheless, the Court stressed that the statute does not insulate a fiduciary from being accountable for his own negligent conduct. The Supreme Court of Pennsylvania said that where a fiduciary acted upon the advice of counsel, such reliance was a

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<sup>16</sup> See, *Liability of executor, administrator, trustee, or his counsel, for interest, penalty, or extra taxes assessed against estate because of tax law violations*, 47 A.L.R.3d 507.

<sup>17</sup> *Roberts v. Roberts*, 260 Va. 660, 668; 536 S.E.2d 714, 719 (2000).

factor to be considered in determining good faith but it was not a blanket of immunity in all circumstances.<sup>18</sup>

Your commissioner finds that Ms. Anderson sought advice from a tax specialist. Ms. Anderson acknowledges that she misunderstood the specialist's advice and, in her correspondence to your commissioner, explains that "upon realization of my misunderstanding I submitted all materials for both the 2006 and 2007 returns."<sup>19</sup> Thus, your commissioner concludes that the tardiness of the returns was not the fault of the specialist but of the fiduciary. Therefore, your commissioner is of the opinion that Ms. Anderson's fiduciary compensation should be reduced by the amount of \$2,187.55, which is the sum of penalties and interest that resulted from her failure to timely file 2006 income tax returns.

### *Conservatorship and Guardianship Fees*

Mr. McConville objects to the fiduciary fees taken by Ms. Anderson while she served as guardian and as conservator for the wards. The joint accounts, submitted by Needham, Mitnick and Pollack, indicate that Ms. Anderson paid herself \$298,798.00 from the assets of the estates as compensation for her services as conservator and as guardian. Furthermore, through her correspondence, Ms. Anderson attributes a cash withdrawal on February 15, 2008 in the amount of \$4,000.00 to the payment of her fee. Your commissioner is in receipt of two checks, in the total amount of \$7,500.00, which Ms. Anderson wrote to herself as compensation for her fiduciary services in March, 2008. Thus, your commissioner finds that Ms. Anderson's took a total fee of \$310,298.00. Under the conservatorship fee guidelines that this Court has established, a conservator is entitled to a fee of \$47,890.86 when administrating an estate this size.<sup>20</sup>

In defense of her fee, Ms. Anderson asserts that "it was clear to all from the beginning that I expected to be paid my hourly rate."<sup>21</sup> Ms. Anderson further submits an affidavit by Dennis Dean Kirk, an attorney,

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<sup>18</sup> *In Re Lohm Estate*, 440 Pa 268, 269 A2d 451, 47 ALR3d 499 (1970).

<sup>19</sup> Letter from Erin W. Anderson, former guardian and conservator for the estate of Mildred L. Bailey and William B. Robertson, p. 4 (November 24, 2008) (On file with your commissioner).

<sup>20</sup> For purposes of calculating Ms. Anderson's fee, your commissioner will consider the Robertson-Bailey Family Trust as part of the estate's assets. Ms. Anderson assumed responsibility for the supervision and control over the assets of the trust and she administered them throughout the conservatorship.

<sup>21</sup> Letter from Erin W. Anderson, former guardian and conservator for the estate of Mildred L. Bailey and William B. Robertson, p. 6 (November 24, 2008) (On file with your commissioner).

who explains that the Wards desired an attorney to handle their affairs. Mr. Kirk indicates that he recommended Ms. Anderson for the job and that the Wards agreed to her rate of \$200.00 per hour. Neither a written agreement nor a court order approving such a compensation arrangement has been presented to your commissioner.

Absent unusual circumstances or an agreement to the contrary, your commissioner will not approve a fiduciary's compensation that is above the fee guidelines provided by the Circuit Court. Furthermore, your commissioner finds that Ms. Anderson, in her capacity of conservator, was delinquent in filing accounts, assumed control of trust assets without the proper authority and commingled the funds of the two separate estates. Throughout the conservatorship, Ms. Anderson failed to timely respond to inquiries from this office about discrepancies in the accounts. In addition, your commissioner finds that Ms. Anderson did not timely disburse funds for the payment of the Wards' expenses. In your commissioner's opinion, Ms. Anderson should receive no more than \$47,890.86, which is the maximum Ms. Anderson is entitled to as the Wards' conservator under the fiduciary fee schedule. Furthermore, Ms. Anderson's fees as conservator should be reduced in the amount of \$4,499.14, which is the sum of tax penalties, bank fees and delinquency assessments inappropriately charged to the estate. Therefore, your commissioner will allow Ms. Anderson compensation for her services as conservator in the total amount of \$43,391.72.

Ms. Anderson also served as guardian over the person of William B. Robertson until her resignation and as guardian over the person of Mildred L. Bailey until Ms. Bailey passed away. Virginia Code § 26-30 allows a "reasonable compensation" to a fiduciary for services rendered in the administration of a guardianship; however, there is no specific definition of "reasonable compensation." Your commissioner will approve a commission that is reasonable in light of the time spent by a fiduciary and the difficulties present in a particular case. In the case of guardianship services, there is no particular skill or professional training indicated for such services. Rather, most guardianship services are providing assistance to the ward in the activities of daily living. Your commissioner finds that Ms. Anderson's service as guardian over the two wards consisted primarily of providing living necessities, transportation and companionship. Therefore, compensation for such services is based upon a rate appropriate for unskilled responsible labor. Based upon the evidence and testimony presented to your

commissioner at the hearing, he is of the opinion that a reasonable rate of compensation for Ms. Anderson's guardian services is an hourly rate of \$30.00 dollars per hour.

Ms. Anderson submitted to your commissioner time ledgers which are incomplete, are not verifiable and offer little guidance in ascertaining the exact number of hours of service which she may have rendered. Ms. York testified that the Wards and their families complained to her that they had difficulty contacting Ms. Anderson. Furthermore, Ms. York testified that she occasionally took the Wards to doctor appointments when Ms. Anderson could not be reached. Your commissioner reviewed the inadequate records supplied by Ms. Anderson, and sought to determine the usual hours expended in a normal month. Based upon that review, your commissioner is of the opinion that Ms. Anderson provided approximately twenty hours each month in typical guardianship services. Ms. Anderson provided such service for three years, two months and nine days from January 19, 2005<sup>22</sup> until her resignation, or approximately 766 hours. Therefore, in your commissioner's opinion, Ms. Anderson is entitled to a fee in the amount of \$22,980.00 for her role as guardian in this matter.

### ***Summary and Calculation of Appropriate Surcharge***

Your commissioner is of the opinion that Ms. Anderson is entitled to a total fiduciary fee for her services as conservator and guardian in the total amount of \$66,371.72, after deduction for the aforesaid penalties, delinquency fees and interest. Ms. Anderson collected \$310,298.00 in fiduciary compensation. Therefore, Ms. Anderson is directed to reimburse the Wards' estates in the amount of \$243,926.28.<sup>23</sup>

### ***Financial Discrepancies***

At the hearing, Mr. McConville, along with Mr. Modesitt, brought to your commissioner's attention several discrepancies in the accounts covering the period of Ms. Anderson's appointment. Your commissioner observes that there is a lack of vouchers and supporting documentation for many transactions. Your commissioner asked for an explanation and proof of five specific financial transactions.

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<sup>22</sup> Ms. Anderson began her work in this matter approximately a week prior to her appointment.

<sup>23</sup> Ms. Anderson shall not be released from her bond until this office has approved all accounts covering the period of her service.

*Morgan Stanley Check # 364*

Mr. Roberston endorsed a check in the amount of \$4,000.00, dated October 20, 2006, payable from a Morgan Stanley account to himself. Ms. Anderson submitted a copy of the front and back of the cancelled check and in her correspondence she explains that she deposited this check as part of a \$5,386.90 deposit into a Bank of America account on November 20, 2006. Your commissioner has reviewed the cancelled check and the third account filed by the fiduciary and is satisfied that the funds were deposited into a Bank of America conservatorship account.

*Bank of America Check # 1152*

On April 12, 2007, Ms. Anderson endorsed a check from the William B. Robertson Guardianship account to Bank of America in the amount of \$4,150.00. Ms. Anderson submits that the bank then issued her a cashier's check which she used to pay the Wards' condominium mortgage. Ms. Anderson has provided your commissioner with a copy of the History of Account for the mortgage. From that record, there appears to be a \$4,150.00 credit to the mortgage account on April 18, 2007. Your commissioner is satisfied that Ms. Anderson used the Bank of America cashier's check to make mortgage payments.

*Bank of America Check # 504*

On July 24, 2007, Ms. Anderson endorsed a check from the William B. Robertson Guardianship account to Bank of America in the amount of \$4,100.00. Ms. Anderson submits that the bank then issued her a cashier's check which she used to pay the Wards' condominium mortgage. Ms. Anderson has provided your commissioner with a copy of the History of Account for the mortgage. From that record, there appears to be a \$4,100.00 credit to the mortgage account on August 2, 2007. Your commissioner is satisfied that Ms. Anderson used the Bank of America cashier's check to make mortgage payments.

*February 15, 2008 Cash Withdrawal*

Your commissioner notes in the fourth account a withdrawal of \$4,000.00 on February 15, 2008 from a conservator account without a

corresponding description. Ms. Anderson concedes that this draw reflects a fee withdrawal which is properly attributed to her fiduciary compensation. This amount has been included in the surcharge above.

#### *Unidentified Credit Card Payment*

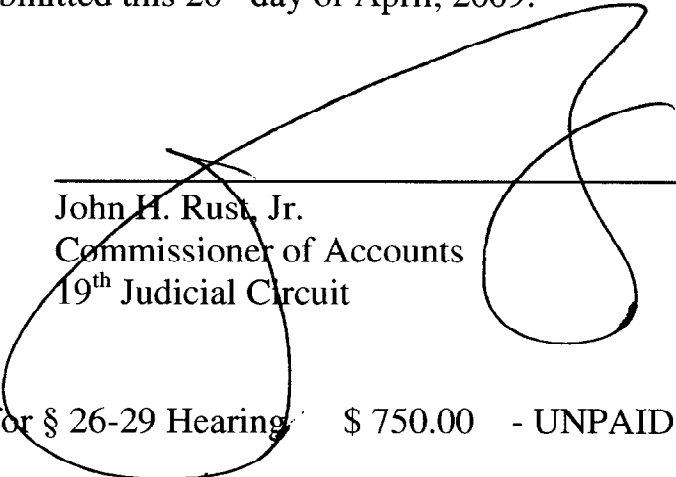
Your commissioner notes that the fourth account shows a \$300.00 payment from the William B. Robertson Guardianship account to a "credit card." Ms. Anderson states that she personally paid a settlement in satisfaction of Mildred Bailey's outstanding credit card bill in this amount. Ms. Anderson acknowledges that she made the \$300 payment to her personal credit card for reimbursement of that expense. In support of this expense, Ms. Anderson submitted to your commissioner a document from Creditors Financial Group which shows that Ms. Bailey had outstanding balance of \$606.48 on her Bank of America credit account. There is a handwritten notation on that document which says, in its entirety, "Settled/ \$300/ Jalissa." There is no other payment of such amount from the wards' assets shown in the fourth account in satisfaction of Ms. Bailey's credit card obligation. Your commissioner is not aware of any additional claim for payment of such credit card balance. In the absence of any evidence to the contrary, your commissioner accepts Ms. Anderson's representations as to the use of such funds.

#### *Expenses Not Sufficiently Documented*

An audit conducted on the joint-accounts filed in this matter has revealed several transactions of which there is insufficient documentation. A list of these items is attached hereto as Exhibit 1. Some of these expenses are described in the accounts as reimbursements to Ms. Anderson for the payment of appropriate estate expenses; other expenses on the list are payable to Bank of America for a cashier's checks or are payable to cash; and a few expenses lack any description at all. In addition, there are transactions occurring in March 2008 not listed in Ms. Anderson's account. Your commissioner observes no vouchers, cancelled checks, cashier checks or other documentation supporting reimbursement of these expenses has been provided nor is there any evidence that Ms. Anderson incurred their cost out of pocket. Therefore, your commissioner will grant Ms. Anderson thirty days from the date of this report to submit appropriate supporting documentation for each entry on Exhibit 1 that demonstrates the propriety of each transaction and satisfies your commissioner that the funds were used

for their described purpose. In the absence of the provision of such satisfactory documentation, your commissioner is of the opinion that Ms. Anderson should be further surcharged for such amounts, up to a total of \$66,080.82.

Respectfully submitted this 20<sup>th</sup> day of April, 2009.

  
\_\_\_\_\_  
John H. Rust, Jr.  
Commissioner of Accounts  
19<sup>th</sup> Judicial Circuit

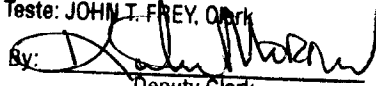
Commissioner's Fee for § 26-29 Hearing: \$ 750.00 - UNPAID

cc: James McConville, Esquire  
Kimberly Baucom, Esquire  
Erin Anderson, Esquire  
Judith York, Guardian  
Liberty Mutual  
c/o: Elizabeth Powell

I, JOHN T. FREY, Clerk of the Circuit Court of Fairfax County, Virginia, do hereby certify that the foregoing Account or Report has been filed in my office for more than fifteen days, and that no exceptions have been filed thereto, and the same is now recorded pursuant to the provisions of §§26-33 and 26-35 of the Code of Virginia, as amended.

Teste: JOHN T. FREY, Clerk

1/13/10  
' Date

By:   
Deputy Clerk



**Expenses Without Sufficient Documentation**

	Date	Bank Account	Check no.	Amount	Per check Memo/description
2nd accounting	9/13/2005	BOA acct# 2488		\$16,000.00	counter debit
	10/29/2005	BOA acct# 4151		\$2,000.00	place holder??
	6/9/2005	BOA acct# 5044	1016	\$2,000.00	Payable to BOA for cashiers check
	9/8/2005	BOA acct# 5044	1024	\$2,000.00	Payable to BOA for cashiers check
	1/19/2005	BOA acct# 5044	1036	\$474.52	payable to Cash for GMAC Mortgage
	1/13/2006	BOA acct# 5044	1047	\$967.82	Payable to BOA for cashiers check
	5/4/2006	BOA acct# 5044	1073	\$1,962.11	cashiers check for GMAC
	6/9/2005	BOA acct# 5125	1015	\$2,000.00	cashiers check for GMAC
	9/8/2005	BOA acct# 5125	1023	\$2,000.00	cashiers check for GMAC
	1/19/2005	BOA acct# 5125	1035	\$474.32	payable to Cash for GMAC
3rd accounting	1/13/2005	BOA acct# 5125	1045	\$967.81	payable to Erin Anderson-for GMAC-half
	5/4/2006	BOA acct# 5125	1071	\$1,962.10	Payable to BOA for cashiers check
	9/30/2005	BOA acct# 7310		\$2,999.97	no bank statement in file/ no explanation of expense
				<u>\$35,808.65</u>	
	7/21/2006	BOA acct# 5044	1082	\$975.32	payable to Cash for mortgage
	7/20/2006	BOA acct# 5125	1079	\$975.31	payable to Cash for mortgage
4th accounting	9/15/2006	Morgan Stanley# 4271	362	\$12,500.00	payable to Erin Anderson for hospital
	2/26/2007	BOA acct# 5044	1096	\$3,720.00	payable to Erin Anderson for bond reimb.
	9/12/2006	BOA acct# 5125	1085	\$202.77	payable to Erin Anderson; no explanation
	10/3/2006	BOA acct# 5125	1090	\$1,000.00	payable to Erin for deposit to Bill
				<u>\$19,373.40</u>	
	5/29/2007	BOA acct# 3847		\$98.95	No description
	5/29/2007	BOA acct# 3847		\$10.00	No description
	2/26/2008	BOA acct# 3847	526	\$461.98	Reimbursement to J. York-television
	7/24/2007	BOA acct# 3847	501	\$5,000.00	payable to Erin Anderson for GMAC
	10/25/2007	BOA acct# 3847	516	\$3,000.00	payable to Erin Anderson for GMAC
10/5/2007	BOA acct# 3847	511	\$356.84	payable to Erin Anderson for property tax	
3/14/2008	BOA acct# 3847	533	\$1,530.67	The Carlton Compant; Not listed in account	
3/24/2008	BOA acct# 3847	537	\$62.48	For Belt; Not listed in account	
3/21/2008	BOA acct# 3847	536	\$377.85	Sears; Not listed in account	
			<u>\$10,898.77</u>		

Total: \$66,080.82