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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of Helen E. Berne,
Deceased
Fiduciary Number FI-2001-0067875

Commissioner's Report
of Debts and Demands

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

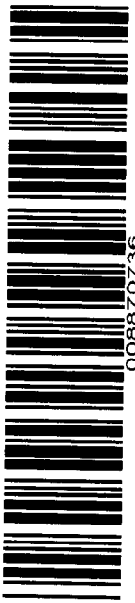
At the request of Lynda Wiseman and Donna Richards, beneficiaries of the above named estate, the undersigned gave the notice required under Virginia Code § 26-29 setting the 29th day of December, 2009, at 1:00 p.m. at the office of your Commissioner in Fairfax, Virginia, as the time and place for receiving proof concerning objections to the account filed for the estate of Helen E. Berne.

At said time and place, Lynda Wiseman and Donna Richards appeared to present objections to the account filed. William Berne, executor, appeared in support of the account he had filed. Ms. Wiseman and Ms. Richards raised sixteen specific objections to the accounts. Upon hearing their objections, Mr. Berne requested a continuance in order to retain an attorney and prepare a response to the beneficiaries' objections. Your Commissioner granted a two-week continuance.

The hearing was reconvened on January 5, 2010 at 3:30 p.m. At said time Mr. Berne appeared, along with counsel, B.G. Stephenson. Lynda Wiseman and Donna Richards were also present. When asked to respond to the beneficiaries' objections, Mr. Stephenson stated that he was not aware of the specific objections. He asked that the beneficiaries restate their objections and that the hearing then be continued in order for him to confer with Mr. Berne and prepare a response. The beneficiaries objected to a further continuance. Your commissioner denied Mr. Stephenson's request that the hearing be continued, and stated that Mr. Berne would have until January 25, 2010 to submit a written response to the beneficiaries' objections. Mr. Berne submitted said response on January 25, 2010, and Ms. Wiseman submitted responses thereto on February 2, 2010.

Personal Property

Article I of Ms. Berne's will, entitled "Specific Bequests," directs that all of her tangible personal property is to be split between her children,



of Pages 13
WILL BK 00887 PG 0736
Fiduciary # FI-2001-0067875
Date 04/22/2010
Estate BERNE, HELEN E
Recorded in
FAIRFAX COUNTY CIRCUIT COURT
TESTE JOHN T. FREY

William Berne, Lynda Wiseman and Donna Richards, “in shares considered by the Executor to be approximately equal in value.” Article II of the will, entitled “Deposition of Residuary Estate,” directs that the residue of the estate is to be split equally among her children. The executor filed a first and final account on June 1, 2004 which showed distributions of personal property to the beneficiaries in the following amounts:

William Berne	\$1,705.00
Donna Richards	\$70,300.00
Lynda Wiseman	\$74,700.00

At the hearing the beneficiaries objected to the valuation of personal property distributions and stated that the value of the personal property they each received was no more \$5,000.00, consisting of household furnishings, a painting, some china and silverplate, jewelry and two handbags. They requested an explanation from the executor as to how he had arrived at the designated values. The inventory which the executor filed states no value for the decedent's tangible personal property other than \$7,000 for a 1992 Cadillac. In his written response the executor provided an itemized list of the personal property omitted from the inventory that was distributed to each of the beneficiaries, which reflected distribution of miscellaneous household furnishings, tools, clothing, and jewelry. The executor assigns values to these items, but provides no explanation of the valuation he provides. In the instant case, the fiduciary omitted from his approved inventory what he claims to be tangible personal property with a value of \$146,705. This represents almost fifty percent of the reported value of the estate, and consists principally of household furnishings and the decedent's clothing and jewelry. In your commissioner's experience, the reported values far exceed appraisals of similar personalty in other estates. Absent a competent and professional appraisal of these items of personal property, your commissioner is of the opinion that the fiduciary has not carried his burden to demonstrate the accuracy of such valuation.

More importantly, under the terms of the decedent's will, the decedent's personal property was not a part of the residuary estate. Article I directs that the personal property be split among the children in approximately equal shares. The amount of personal property distributed to the each of the beneficiaries is therefore immaterial in determining each beneficiary's share of the residue. Your commissioner is of the opinion that the executor has the discretion to distribute to himself a lesser share of such personal property, if

he so desires; however, such lesser distribution does not affect the distribution of the residuary estate among the three heirs.

The account further reflected cash distributions from the residuary estate in the following amounts:

William Berne	\$165,933.85
Donna Richards	\$63,727.87
Lynda Wiseman	\$67,797.48

At the hearing the beneficiaries objected to the disproportionate cash distributions. Article II of the decedent's will states that the residue of the estate is to be divided equally among the children. The value of the personal property received by each of the beneficiaries is irrelevant in determining each beneficiary's share of the residue. The executor's disproportionate cash distribution in favor of himself was, therefore, in error.

Overdraft Charges

The estate checking account statements show seven \$30.00 overdraft charges. The beneficiaries objected to the executor's classification of these charges as administrative expenses of the estate. In his written response the executor acknowledges that the \$210.00 in overdraft charges were not appropriate administrative expenses, and should be deducted from his share of the residuary estate.

Home Equity Line

The decedent had a home equity line of credit through Mellon Bank which she opened on August 22, 1995. The executor made a \$7,000 draw on the line on October 26, 2001, approximately two weeks following the decedent's death. Bank records confirm that this money was placed in the estate checking account on the same day. While your commissioner believes that the executor lacked the authority to make the \$7,000 draw on the home equity line, as the bank records show that the money was directly placed into the estate account, the executor will only be held personally responsible for these funds to the extent that he failed to adequately account for them as outflows from the estate checking account.

Wayne Jones Receivables

The executor filed a first account with your commissioner on September 26, 2003, which listed two cash deposits into the estate checking account in the amount of \$64,738.15. The deposits were described as "Loans Receivable" from M. Wayne Jones. The first deposit of \$37,137.88 was made on August 13, 2002. The second deposit of \$27,600.27 was made on September 13, 2002.

The executor filed an amended first account on June 1, 2004. The above described deposits were not listed on the amended account. At the hearing before your commissioner, the beneficiaries asked the executor to explain why the deposits did not show up on the amended account. In his written response, the executor stated that prior to the decedent's death, he learned that the decedent had loaned Mr. Jones \$64,700.00. The executor further stated that Mr. Jones is now deceased, but that prior to his passing, Mr. Jones told him that he had repaid \$18,000 of the loan during the decedent's lifetime and that he planned to repay the remainder of the loan upon the sale of his home. The executor stated that it is his understanding that Mr. Jones passed away prior to selling his home and that the remainder of the loan was never repaid, and should now be written off as an uncollectable debt.

Upon examination, your commissioner reports that deposits in the amounts in question are listed on the amended account as "Capital Gain Income" received from the sale of the decedent's SBC and Bellsouth stocks. Based upon the investment account statements that the executor submitted along with the account, your commissioner notes that the decedent's SBC Communications stocks were sold on August 7, 2002 for \$37,737.05. The date and amount of this transaction appears to correlate with the \$37,137.88 deposit into the estate checking account on August 13, 2002. The account statement further shows that the decedent's Bellsouth stocks were sold on September 10, 2002 for \$30,600.27. The date and amount of this transaction appears to correlate with the \$27,600.27 deposit that was made on September 13, 2002. The brokerage reports show gross proceeds of sale and do not reflect commissions or other expenses of sale. Further, additional stock sales which the brokerage firm reports also appear among the estate account deposits in similar fashion. Based upon the foregoing, your commissioner is of the opinion that the deposits reported in the first account are in fact the net proceeds of sale from the liquidation of the decedent's

stocks and not payments toward the loans receivable from M. Wayne Jones. Your commissioner so finds. Absent further proof that the executor received funds from Mr. Jones, it appears that all deposits listed in the original account have been accounted for in the amended account.

Western Union Transfers

At the hearing before your commissioner, the beneficiaries asked the executor to explain the nature of two Western Union Transfers in the amount of \$1,000 and \$700, respectively, which were listed as distributions to Ms. Wiseman. In his response the executor indicated that, at Ms. Wiseman's request, these funds had been wired to Ms. Wiseman's daughter in Florida. In her response, Ms. Wiseman acknowledged that her daughter had received these funds. As such, your commissioner finds that said amounts were properly shown as distributions to Ms. Wiseman.

Loans payable to the executor

On May 20, 2002 the executor wrote a check to himself in the amount of \$500.00 which he described as "Loans payable." In light of the potential for abuse, it is the policy of this office to treat all claims made against the estate by the personal representative as disputed. As such, an executor may not reimburse himself for loans he made to the decedent or the estate absent corroborating evidence of said loan. Upon review of the estate checking account, your commissioner notes two deposits made during the administration of the estate which are described as "Loans from WPB." The first was on January 25, 2002 in the amount of \$50.00. The second was on February 5, 2002 in the amount of \$307.80. Your commissioner finds that said deposits are sufficient proof that the executor lent the estate \$357.80. Your commissioner finds that the executor has failed to provide any evidence that would corroborate the remaining \$142.20. Said amount should therefore be treated as a distribution to the executor.

Pension Overpayment

On February 18, 2002 the executor received a letter from AT&T requesting reimbursement in the amount of \$1,480.56 in connection with two pension checks AT&T issued to the decedent following her death for the months of January and February 2002. On March 8, 2002 the executor issued a check in the amount of \$1,480.56 to AT&T. Ordinarily,

reimbursements of this nature are not questioned; however, upon review of the estate checking account your commissioner is unable to find any deposits which correlate with the dates and amounts of the pension checks. Deposits into the estate account for both January and February 2002 are fully accounted for and do not include any pension funds. The amended account reports the pension receipts net of the refund, but the pension receipts shown on the detailed statement do not include any payments from AT&T. As the executor has failed to account for the inflow of the mistakenly issued pension checks, it is the opinion of your commissioner that the repayment of these funds from the estate account was not proper. As the burden of proving the transaction's legitimacy rests with the executor, the amount of said transactions should be treated as a distribution to Mr. Berne.

Credit Card Expenditures

The amended account reflects numerous payments to credit card companies during the two years following the decedent's death. A review of the vouchers submitted along with the account make it clear that these payments were not made to pay off the cards' balances at the time of the decedent's death, but were made to pay for charges made to the decedent's personal credit cards after her date of death. Your commissioner reports that credit card statements in the amount of \$24,851.50 were paid subsequent to the decedent's death.

The executor asserts that \$1,044.00 of the credit card charges were for Christmas presents for the decedent's grandchildren which were purchased at the agreement of the all of the beneficiaries and were given to the grandchildren the Christmas following the decedent's death. The account filed by the executor shows credit card purchases for gifts in the amount of \$1,127.08. In her written response, Ms. Wiseman states that there was no agreement among the beneficiaries in regards to these gifts. The executor did not provide any corroborating evidence regarding the agreement, nor did he explain why the amount listed in the account does not match the amount in his explanation. As the burden of proving the transactions' legitimacy rests with the executor, the amount of said transactions should be treated as a distribution to Mr. Berne.

As to the remainder of the purchases, the executor admits that he continued to use the decedent's credit cards after her death, as he believed he had the authority to do so as executor. An executor's powers are limited to

those granted to him in a will. In the case at hand, the decedent's will incorporates the powers enumerated in Virginia Code §64.1-57. Section 64.1-57 authorizes an executor to borrow money for estate purposes; however, said borrowing must be done in the name of the estate, not the name of the decedent, and the benefit of these expenses to the estate must be verifiable. In this case neither element is present. The executor has admitted the credit cards were in the decedent's name, personally, and that the cards were used for the personal benefit of the executor and the other beneficiaries.

The executor asserts that the beneficiaries were aware of his use of the decedent's credit cards and that they benefitted from said use on multiple occasions. The executor cites examples of times where he asserts the cards were used to pay for dinner for himself and the beneficiaries. Your commissioner of the opinion that the beneficiaries' knowledge, or lack thereof, regarding the executor's use of the credit cards is of little consequence. As executor, he alone is charged with the safekeeping and proper distribution of the decedent's assets.

The decedent passed away on October 8, 2001. Based on the above analysis, the use of the estate funds to pay credit card charges incurred after that date was inappropriate. The total of said expenditures in the amount of \$24,851.50 must be viewed as a distribution to the executor. The executor may seek reimbursement for those expenditures which the executor can demonstrate to the satisfaction of your commissioner were expended for proper estate administration purposes.

ATM Withdrawals

At the hearing before your commissioner the executor was asked to explain the nature of \$5,440.42 in ATM withdrawals and debit card purchases which were reflected in the estate checking account. In his written response the executor states that said withdrawals should be treated as a distribution in his favor.

Insufficiently Documented Transactions

At the hearing before your commissioner the executor was asked to explain the nature of numerous checks that he had written to either himself or cash, as well as numerous checks for expenses which were not supported by vouchers. Your commissioner reports that the records which the executor

provided show cash disbursements to him, either shown as distributions or otherwise unsupported by vouchers, in the amount of \$180,073.51. This exceeds the reported distribution to the fiduciary by \$14,139.66.

The executor stated that he had supplied all of the necessary vouchers at the time he filed the account. He further stated that a flood in his basement had destroyed all of the estate administration documentation which he had retained for himself, and he, therefore, had no way to supply any additional vouchers beyond those previously submitted.

Following the hearing, the executor's attorney requested a copy of all documents that had been submitted by the executor during the pendency of the estate. Your commissioner provided counsel for the fiduciary with copies of all items that had been filed with your commissioner. In his written response to the beneficiaries' objections, counsel for the executor states that the materials he received from your commissioner were incomplete. To the extent that counsel's assertion is correct, your commissioner finds that the fiduciary failed to provide complete records to your commissioner. Based upon the executor's failure to provide adequate supporting vouchers as required by law, the expenses described below cannot be approved as legitimate estate expenses and must be treated as distributions to Mr. Berne.

(a) Probate Expenses

The amended account shows the executor wrote two checks to himself in May of 2002 for unspecified "probate expenses." The first check, written on May 7, 2002, was for \$15,000. The second check, written on May 20, 2002, was for \$7,000. Based upon a review of the account, these expenditures appear to be payments to the fiduciary for executor's fees. Your commissioner notes that the executor has taken fiduciary fees in the total amount of \$29,000 in connection with the administration of the estate. Such amount is within the guideline amounts which this Court has approved for administration of estates of the size of the above estate. Therefore, your commissioner is of the opinion that such fee may be allowed; provided that the fiduciary otherwise addresses the improper distributions set forth in this report.

(b) Funeral Expenses

The amended account shows that the executor wrote four checks to himself for unspecified "funeral expenses" in the following amounts:

October 9, 2001	\$500.00
October 12, 2001	\$391.00
October 13, 2001	\$1,000.00
October 17, 2001	\$900.00

This is in addition to properly documented funeral expenses in the amount of \$5,750.13. The executor did not provide any supporting vouchers detailing the nature of the expenses for which he was reimbursing himself. As the burden of proving the transactions' legitimacy rests with the executor, the amount of said checks should be treated as a distribution to Mr. Berne.

(c) Automobile Expenses

The amended account shows that the executor wrote a check to himself on May 28, 2002 in the amount of \$2,000 for his "time and travel" related to selling the vehicle of the decedent. While reasonable travel expenses related to estate administration may be allowed, the executor did not provide any supporting vouchers for the expenses he incurred. Additionally, an executor is not customarily reimbursed for the time he spends handling specific estate activities, as the amount of time necessary to complete routine estate activities is factored into the compensation which the fiduciary is entitled to under the guidelines which this Court has established. The executor has not provided any details that would support a claim for fiduciary compensation above the amount allowed under the guidelines. As such, the \$2,000 should be treated as a distribution to Mr. Berne.

In addition to the above payment to himself, the executor identified \$4,306.74 in additional cancelled checks generally made payable to the fiduciary personally which he asserts were in reimbursement for charges incurred preparing the automobile for sale; however the executor only provided receipts for \$103.50 of such expenditures. The executor provided checks payable to third parties showing the notation as relating to the 1992 Cadillac in the amount of \$2,349.81, which your commissioner believes to be appropriate. As the burden of proving the transactions' legitimacy rests

with the executor, the remaining amount of the unsupported checks, \$1,853.43, should be treated as a distribution to Mr. Berne.

(d) Home Repair Expenses

The itemized list of expenditures which the executor provided along with the amended account shows payments for home repair expenses totaling \$50,606.53. Of the thirty-five checks the executor wrote for home repair related expenses, sixteen are payable to third parties or are supported by vouchers. The remaining checks were written to either cash or the executor personally. The total amount of insufficiently supported expenses related to home repair is \$44,035.00. Of this amount, \$34,500.00 is reflected as a payment to Mr. Berne for his labor in preparing the home for sale. The invoice he provide in support of said payment states that he spent 1,200 man hours working on home renovation projects.

At the hearing before your commissioner, the beneficiaries stated that they had all worked on preparing the home for sale and had never discussed being compensated for their labor. The amended account shows that Ms. Wiseman was paid \$250.00 for her labor. No payment is shown to Ms. Richards. As stated above, an executor is not customarily reimbursed for the time he spends handling specific estate activities, as the amount of time necessary to complete routine estate activities is factored into the compensation which the fiduciary is entitled to under the guidelines established by this Court. As the executor had power of sale, the value of the home is reflected in the amount of fiduciary compensation to which he is entitled under the guidelines. The executor has not presented any details that demonstrate that his work on the home was atypical of the type of work customarily performed by executors who are preparing a home for sale. As such, your commissioner finds that the \$44,035.00 that he paid himself should be treated as a distribution to Mr. Berne. Along the same line, the \$250.00 that was given to Ms. Wiseman for her labor should be treated as a distribution in her favor.

(e) Legal Fees

The amended account shows two checks written to B.G. Stephenson on March 12, 2002, in the amount of \$4,200 and \$10,000, respectively. Said checks are supported by invoices from the Law Offices of B.G. Stephenson, Ltd., dated November 1, 2001 and March 1, 2002. The November invoice

states that \$4,200 is due as a “retainer fee in connection with the administration of the Estate of Helen E. Berne. The March invoice states that \$10,000 is due for “legal services rendered and expenses incurred in connection with the administration of the Estate of Helen E. Berne.” No further details regarding the services provided or number of hours expended is provided.

At the hearing before your commissioner the beneficiaries asked for itemized bills describing the services that were provided in connection with the invoices. In his response the executor states that the \$4,200 fee reflects “different levels of legal services, such as general estate matters, guidance, foreclosure prevention and settlement of pre-existing judgments against the decedent’s beneficiaries.” This statement is accompanied by a break-down of the charges as follows:

4 hours @ \$150/hr = \$600
6 hours @ \$300/hr = \$1,800
4 hours @ \$400/hr = \$1,600
Real estate closing = \$200

The executor’s response goes on to state that the \$10,000 fee was not for services rendered in connection with the estate, but was to satisfy an outstanding bill of Ms. Wiseman’s in connection with services rendered by Mr. Stephenson’s during her divorce in 1982. He concludes by stating that the \$10,000 should be treated as a distribution to Ms. Wiseman. In her response, Ms. Wiseman states that Mr. Stephenson did handle her divorce, but that he was paid in full in 1982. She further states that she was never notified of an outstanding balance or any claim against her. Your commissioner finds that any claim which Mr. Stephenson wishes to assert against Ms. Wiseman is not properly a matter of the administration of this estate. Mr. Stephenson is free to pursue his claim against Ms. Wiseman in court; however, your commissioner finds that the \$10,000 payment to him in satisfaction of the asserted balance due from Ms. Wiseman will be treated as a distribution to Mr. Berne.

Regarding the \$4,200 fee, your commissioner is of the opinion that the executor has provided information regarding the legal services provided by Mr. Stephenson, albeit summary in description and scant in detail. Nevertheless, it appears likely that Mr. Stephenson did perform legal services on behalf of the estate, based upon his representations in the

fiduciary's response. Therefore, your commissioner is of the opinion that the \$4,200 fee should be allowed as an administrative expense of the estate.

Conclusion

Upon review of the account filed, your commissioner finds that the executor has distributed the sum of \$271,846.64 in unsupported payments to himself, including \$179,042.53 in direct payments to himself or cash otherwise unsupported by vouchers. In addition, the fiduciary is chargeable with the following amounts, as more particularly set forth in this report: overdraft charges of \$210.00, net loans to the fiduciary of \$142.20, improper reimbursement of AT&T in the amount of \$1,480.56, credit card charges of \$24,851.50, ATM charges of \$5,440.42, funeral expenses of \$2,791.00, automobile expenses of \$3,853.43, home improvement payments in the amount of \$44,035, and legal expenses of \$10,000.00. The fiduciary disbursed \$113,900 to the two remaining beneficiaries. The expenses of this report are \$3,500, which has not yet been paid. Therefore, the net distributable estate was \$382,246.64, of which each beneficiary is entitled to the sum of \$127,415.55.

The fiduciary distributed to Ms. Wiseman in the amount of \$ 63,600.00, and distributed to Ms. Richards in the amount of \$52,000.00. Ms. Wiseman is also chargeable with the sum of \$250.00 as set forth above. Therefore, the fiduciary is directed to pay from his personal funds to the other remaining residuary beneficiaries the following amounts:

Lynda Wiseman	\$63,565.55
Donna Richards	\$75,415.55

The executor is further directed to provide proof of such payments to your commissioner in order to permit the closure of this estate.

Respectfully submitted this 31st day of March, 2010.

John H. Rust, Jr., Commissioner of Accounts
19th Judicial Circuit

Commissioner's Fee for this Report \$3,500

CERTIFICATE OF SERVICE

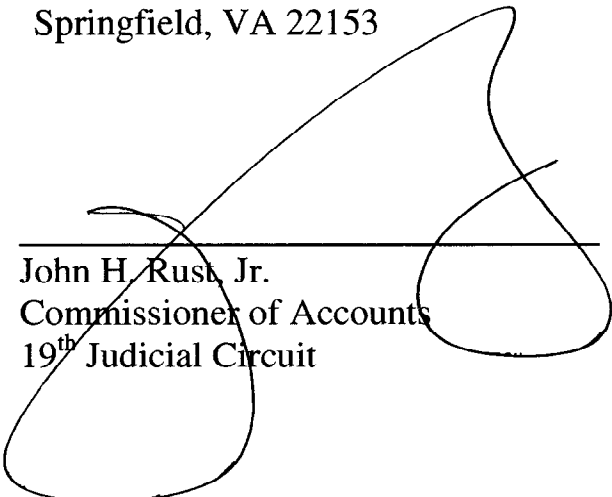
I hereby certify that on this 31st day of March, 2010, a true and correct copy of the above Commissioner's Report was mailed, first-class mail, postage prepaid, to the following persons at the addresses shown below:

Lynda Wiseman
607 Casey Place
Fredericksburg, VA 22407

Donna Richards
4 Reston Dr.
Fredericksburg, VA 22046

B.G. Stephenson
4157 Chain Bridge Rd.
Fairfax, VA 22030

William Berne
9104 Fishermans Lane
Springfield, VA 22153



John H. Rust, Jr.
Commissioner of Accounts
19th Judicial Circuit

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

4-22-10
Date

By: 

Deputy Clerk