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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of Eugene M. Brown, Deceased
Fiduciary Number FI-2005-0075350

Commissioner's Report

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

At the request of Southy E. Walton, attorney for Susan E. Brown, who filed a claim against the above estate, the undersigned gave the notice required under Virginia Code § 64.1-171, setting the 24th day of September, 2007, at 3:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for receiving proof of debts and demands against the estate of Eugene Michael Brown. A copy of such notice is attached hereto as Exhibit 1. At the said time and place, Susan E. Brown, claimant, together with Southy E. Walton, her counsel, appeared to present evidence of her claim against the estate. John Forest, attorney for the estate, appeared on behalf of the estate. No other person appeared to offer proof of any debts or demands against the estate.

Susan E. Brown sought payment of certain statutory allowances as the decedent's surviving spouse, including the family allowance,¹ the exempt property allowance,² and the homestead allowance.³ Ms. Brown claimed a family allowance of \$18,000. Mr. Forest, on behalf of the estate objected to the amount, and proposed to transfer two motor vehicles to Ms. Brown in satisfaction of her claims. At the hearing, Ms. Brown requested that your commissioner fix an appropriate amount for the family allowance. Mr. Forest, on behalf of the estate, objected to your commissioner making such determination. Virginia Code § 64.1-151.4 states that with respect to the statutory allowances, "[t]he personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment or failure to act under this section may petition the circuit court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined." Thus, absent a referral from the Circuit Court, the sole remedy for one objecting to the amount to be paid as a family allowance is to petition the court for relief. Therefore, your commissioner declined to

¹ VA. CODE ANN. § 64.1-151.1.
² VA. CODE ANN. § 64.1-151.2.
³ VA. CODE ANN. § 64.1-151.3.

Fiduciary # FI-2005-0075350
Date 01/26/2009
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FAIRFAX COUNTY CIRCUIT COURT
TESTE JOHN T FREY

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determine the amount of the family allowance in the hearing on September 24, 2007.

Susan E. Brown filed a Petition for Determination of Family Allowance Claim with the Circuit Court. On or about October 12, 2007, the Court entered an order referring her petition to your commissioner for hearing and adjudication. At the request of Michael J. Holleran, counsel for the claimant, the undersigned gave the notice required under Virginia Code § 26-29, setting the 11th day of March, 2008, at 2:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for a hearing to determine the amounts of the family allowance, homestead allowance, and exempt property allowance to which Ms. Brown, the decedent's spouse, is entitled. By agreement, the hearing was continued until March 20, 2008, at 3:00 p.m.

At the hearing, Ms. Brown also objected to certain matters of administration of the estate, including the prices at which the decedent's vehicles were sold and the payment of certain creditors of the estate. At the said time and place, Susan E. Brown, claimant, along with Michael J. Holleran, counsel, appeared to represent her interests in her claims against the estate. John Forest, attorney for the estate, appeared on behalf of the estate. This report is intended to establish the validity and priority of the debts and demands against the estate; to determine the amount to which Ms. Brown is entitled for her statutory allowances; and to address the objections that Ms. Brown has raised concerning the administration of the estate.

The only claim filed with your commissioner in this estate was the claim of Harley-Davidson Financial Services in the amount of \$8,302.99. The claim represented the balance of a purchase money debt secured upon a 2004 Harley-Davidson FLHTCUI Ultra Classic motorcycle. The estate had substantial equity in the vehicle. In order to preserve the estate's equity, the executor continued payments on the loan. Between August 26, 2005 and October 4, 2006, the executor paid \$2,962.71 to Harley-Davidson Financial Services. On January 18, 2008, the executor sold the motorcycle for \$9,250, resulting in a payment to the estate of \$3,001.12 in net equity. On April 21, 2008, this office received a copy of a letter from Harley Davidson Financial Services indicating that the claim against the estate has been satisfied and released.

The estate provided your commissioner with the following list of creditors with claims against the estate:

Cox Cable	\$ 165.53
Everly Funeral Home	\$ 12,107.52
Fairfax Personal Property Tax (Harley)	\$ 254.51
Fairfax Personal Property Tax (Dodge)	\$ 313.25
Nadine Brendza (Funeral Expenses)	\$ 370.10
Verizon Wireless	\$ 396.39

The estate represented at the hearing that it does not dispute any of the above claims and that the executor has already paid and satisfied the same. Such payments may have been in derogation of the statutory priorities established in Virginia Code § 64.1-157 for insolvent estates.

The executor filed an inventory valuing the estate at \$52,367.82. The first and second interim accounts filed with this office reflect receipts of \$8,552.37. At the March 20, 2008 hearing, the estate represented that disposition of the three vehicles resulted in a loss on asset sales in the amount of \$16,453.88. Ms. Brown objected to such losses and contends that the executor did not properly handle the sale of the vehicles. Your commissioner will address each disposition in turn.

Sale of Harley Davidson Motorcycle:

The executor sold the decedent's Harley Davidson Motorcycle to Patriot Harley-Davidson for \$9,250.00. The estate received \$3001.12 in cash from the sale, which was the estate's equity in the motorcycle after deducting the balance of the loan on the motorcycle (\$6,159.88) as well as an inspection and appraisal fee (\$89.00). This sale price appears reasonable to your commissioner.

Sale of Dodge Dakota:

By letter dated May 21, 2008, Ms. Brown submitted that the decedent's Dodge Dakota had a Kelly Blue Book value of \$14,050 in fair condition. Ms. Brown requests that your commissioner find the executor liable for the difference in the vehicle's market value and the price actually achieved on behalf of the estate. In August of 2005, the executor represents that her nephew, Timothy Brown, offered to purchase the Dodge Dakota at its then listed Kelly Blue Book value of \$14,445. Timothy Brown has submitted a notarized affidavit, signed July 24, 2008, to your commissioner

representing the same. The executor testified Ms. Brown refused to give her possession of the decedent's vehicles for approximately two years. As a result, Ms. Brown appears to bear some responsibility for the diminution in the value of the vehicle during that two-year period.

The executor, who resides in Ohio, obtained possession of the decedent's vehicles in December 2007 and contacted John Forest, Sr., father of the estate's attorney, about storing the vehicles at his residence. John Forest, Sr. stored the Dodge Dakota for 13 days, subsequently offering to purchase it from the estate for \$9,500.00. Mr. Forest purchased the vehicle on December 28, 2007 for said amount. The estate further represents that Mr. Forest stored the decedent's Harley motorcycle for 14 days and the decedent's Dodge Shadow for 27 days, saving the estate storage expenses. The estate estimated storage charges at a commercial facility to be \$2,350. In light of these savings, the savings for the estate in both advertising and transportation costs, the additional expenses the executor likely would have incurred if she had to contract with a third party to sell the vehicle on the open market, and particularly in light of the delay in turning over the vehicle to the executor, your commissioner does not find the sales price so unreasonable as to warrant imposition of personal liability upon the executor.

Donation of Dodge Shadow:

In November, 2005, the Dodge Shadow had a Kelly Blue Book value of \$1,150.00. Unable to find a buyer, the executor made the vehicle available for donation on January 10, 2008. In light of the delay in obtaining the vehicle, its limited inventory value, and the expense of maintaining and storing such a vehicle, your commissioner does not find such a disposition unreasonable under the circumstances.

Based upon the foregoing, your commissioner finds that the losses on asset sales of \$16,453.88 that the executor reports are reasonable and appropriate. Therefore, your commissioner finds that the estate had net assets of \$44,466.31 available for payment of administrative expenses, allowances and claims.

Immediately after the decedent's death, Navy Federal Credit Union offset certain amounts against the decedent's bank account at Navy Federal Credit Union, further reducing the estate assets. The credit union offset \$5,880.93 to pay-off the decedent's outstanding loan balance on July 21,

2005, ten days after qualification, after application of credit life insurance proceeds to the decedent's loan balance. Credit union loans usually create a security interest in the borrower's share account with the credit union and Ms. Brown does not contest the propriety of this offset. In addition, Navy Federal offset \$964.37 to pay the decedent's Visa account statement prior to qualification of the fiduciary. Navy Federal also offset \$71.96 for the same Visa account on July 13, 2005, two days after the fiduciary's qualification. Ms. Brown does contest the propriety of such expenditures from an insolvent estate.

The debt on the decedent's Visa card is a priority 9 debt under Virginia Code § 64.1-157; however, your commissioner will not find the executor personally liable for the automatic transfer on July 7, 2005, as the executor had not yet qualified as the fiduciary for the estate. However, once a fiduciary qualifies in an estate, she will be personally liable for overpayments to claimants with inferior debts notwithstanding the fact that such payments were made automatically.⁴ Therefore, the automated payment to Visa in the amount of \$71.96 on July 21, 2005, was an improper payment for which the executor is personally liable. Based upon the foregoing, your commissioner finds that \$6,845.30 of the credit union offsets were proper and are not the responsibility of the executor. Therefore, the estate had a net amount of \$37,621.01 available to pay the administrative expenses, allowances and claims against the estate of the decedent.

Pursuant to the estate's first and second interim account, filed with your commissioner on November 16, 2006 and December 21, 2007, respectively, the executor reported \$30,856.44 in expenditures. Upon review of said accounts, your commissioner finds that \$10,175.89 of such expenses may be considered administrative expenses, consisting of attorney's fees of \$3,707.00, payments to preserve assets of the estate in the amount of \$2,962.71, bond costs of \$2,573.00, filing and qualification fees of \$790.20, bank fees of \$39.99, and fiduciary travel costs of \$102.99. The payments to preserve assets were the monthly payments on the decedent's Harley Davidson motorcycle, in which the estate had significant equity. "One of the foremost duties of an executor is to preserve the value of estate property during administration." *Friedberg v. Hague Park Apartments Ltd. Partnership*, 61 Va. Cir. 589, 2001 WL 34157592 at *6 (Norfolk, 2001); *See generally* 31 AM. JUR. 2d *Executors and Administrators* § 497. Your

⁴ *In re Estate of Wisemiller*, WL 3420623 (Fairfax Cir. Ct. 2006)

commissioner is satisfied that these payments, in the aggregate amount of \$2,962.71, were proper administrative expenses of the estate, expended in an effort to preserve an asset and maximize the value of the estate for its beneficiaries and creditors. In addition to such administrative expenses, a fiduciary is allowed a commission based upon the inventory value and the subsequent receipts of the estate. Based upon the total of the inventory value and receipts in the amount of \$60,920.19, the fiduciary is entitled to a commission of \$3,046.01 as a priority 1 claim. Therefore, your commissioner finds that the estate has established \$13,221.90 in allowable administrative costs to the date of the hearing in this matter. Such amount, together with other additional administrative costs incurred after that date are allowed as priority 1 claims.

Susan E. Brown filed claims for statutory allowances pursuant to Virginia Code §§ 64.1-151.1, 151.2 and 151.3⁵ as follows:

Family Allowance	\$18,000.00
Exempt Property	\$15,000.00
Homestead Allowance	\$15,000.00

A copy of the elections for the family allowance and the exempt property allowance were filed with the Clerk's office and your commissioner's office on September 2, 2005, within one year of the decedent's death. A copy of the election for a homestead allowance was filed with the Clerk's office and your commissioner's office on June 21, 2006, also within one year of the decedent's death. These allowances appear to be in order.

The Virginia Code establishes the amount of the exempt property allowance and the homestead allowance at \$15,000 each. The Code does not establish the amount of the family allowance, rather Virginia Code § 64.1-151.4 provides "The personal representative may determine the family allowance in a lump sum not exceeding \$18,000, or periodic installments not exceeding \$1,500 per month for one year; and he may disburse funds of the estate in payment of the family allowance and any part of the exempt property or homestead allowance, payable in cash." In the instance case, the claimant and the fiduciary have been unable to agree upon the amount of

⁵ It should be noted that the election of a homestead allowance by the decedent's wife makes her ineligible to receive any inheritance from the estate; however, because the estate is insolvent it appears unlikely that any such inheritance would be forthcoming.

such allowance and the Court has requested that your commissioner determine such amount.

§ 64.1-151.1 of the Virginia Code provides that the surviving spouse and minor children of the decedent are “entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge all allowed claims.” Thus, the statute appears to contemplate the potential for a family allowance during administration if the estate is otherwise solvent; however, this section is further limited by the provisions of § 64.1-151.4 which limits the authority of the personal representative to determine “the family allowance in a lump sum not exceeding \$18,000, or periodic installments not exceeding \$1,500 per month for one year.” Thus, Ms. Brown has claimed the maximum family allowance which the personal representative may approve.

Where the spouse has independent resources and income, it is the opinion of your commissioner that the grant of a family allowance in excess of \$18,000 is not appropriate. The persons eligible for payment of a family allowance are only those “whom the decedent was obligated to support.” VA. CODE ANN. § 64.1-151.1. The Virginia statute is substantially similar to the family allowance provisions of the Uniform Probate Code. *See* U.P.C. §§ 2-404 and 2-405. The comments relating to § 2-404 state that “account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and assets distributed.” In the case of *In re Hoffman's Estate*, 213 Cal. App. 2d 635, 29 Cal. Rptr. 60 (1st Dist. 1963), the California Court of Appeals summed up the review of the financial affairs of a surviving spouse as follows:

[W]hile a widow may not be deprived of a family allowance merely because she has property other than her interest in the estate, the nature and extent of such other property is material and relevant to the following issues: (1) Is any sum necessary for the support and maintenance of the petitioner during the period of the administration of decedent's estate?; and (2) If a sum is necessary for her support and maintenance, what is a reasonable amount to allow the petitioner? In making such determination the matter rests in the sound discretion of the trial court. 29 Cal. Rptr. at 65-66 (citations omitted).

In such a review, it is appropriate to take into account the non-probate assets flowing to the spouse. *Matter of Estate of Caffrey*, 120 Ill.App.3d 917, 458 N.E.2d 1147 (1983). In addition, the court may consider any independent source of income available to the spouse. *Matter of Estate of Spurgeon*, 572 N.W.2d 595 (Iowa 1998).

In the instant case, Ms. Brown has received \$137,000 in non-probate assets from the decedent's life insurance policy. In addition, she has been gainfully employed as a school teacher earning approximately \$74,000 per year. While Ms. Brown is not without independent assets, it is also clear she was dependent upon her husband's income to maintain their standard of living. In the experience of your commissioner, it is usual and customary in this circuit to set the statutory allowance in accordance with the maximum allowed under the Virginia Code. This is the amount that Ms. Brown seeks. It is therefore the recommendation of your commissioner that the family allowance be set at \$18,000, the maximum statutory allowance and the amount that Ms. Brown has claimed. Your commissioner is of the opinion that Ms. Brown is entitled to an aggregate amount of \$48,000 pursuant to her claim for the family allowance, the exempt property allowance and the homestead allowance, as a priority 2 claim. The aggregate of such claim and the allowable administrative expenses exceeds the amount available for distribution from the estate.

Ms. Brown personally engaged Everly Funeral Home to perform funeral services for the decedent. The total bill for such services was \$12,107.52. The estate was not a party to the contract; however, the executor authorized a disbursement from the decedent's Navy Federal Credit Union account to Everly Funeral Home to satisfy the charges. Ms. Brown was personally liable for the funeral bill as the contracting party. The estate is responsible for the funeral charges only to the extent of its assets, in the priority order established pursuant to Virginia Code § 64.1-157. Pursuant to that code section, \$2,000.00 of such expense is a priority 3 claim and the balance of the expense is a priority 9 claim. As funeral expenses are a lesser priority under the statute than statutory allowances, which exhaust the estate, the estate bears no responsibility for any funeral expenses. However, Ms. Brown was personally responsible for such expenses. The distribution from the estate to satisfy Ms. Brown's personal obligation for the funeral expenses should be treated as a credit to and offset against the amounts due

to Ms. Brown for the statutory allowances payable to her. Such offset will reduce Ms. Brown's net claim for statutory allowances to \$35,892.48.

The estate paid personal property tax in the total amount of \$567.76 to Fairfax County for taxes owed on two of the decedent's vehicles. The estate has presented to your commissioner a 2006 opinion rendered by Judge Wooldridge of the Fairfax Circuit Court where he found that a "Fairfax County personal property tax payment qualifies as a cost or expense of administration."⁶ At the time of the *Wisemiller* opinion, Virginia Code § 64.1-157 did not specify the treatment of such debts of a decedent. However, effective July 1, 2007, the legislature amended Virginia Code § 64.1-157 and added an eighth class which sets forth that in the case of an insolvent estate, debts and taxes due localities and municipal corporations of the Commonwealth are to be treated as priority 8 claims against his estate. While your commissioner concedes that taxes may be considered an administrative expense in circumstances where the tax assessment is against a decedent's estate rather than the decedent personally, such is not the case here. Fairfax County assessed personal property taxes against the decedent and the priority of such taxes is explicitly set forth by Virginia Code § 64.1-157(8). Therefore, in your commissioner's opinion, the Fairfax County personal property tax assessed against the decedent should be treated as a priority 8 claim against his estate.

All other claims against the estate are priority 9 claims. The estate reports additional expenses paid of \$1,088.01, consisting of ancillary funeral expenses of \$370.10, utility costs of \$561.92, and expenses for qualification as trustee of \$155.99. Ms. Brown has objected to the payment of these creditors of the estate as contrary to the priority scheme set forth by Virginia Code §§ 64.1-157 and 64.1-158. Payment of these expenses is in derogation of the priorities established in Virginia Code § 64.1-157 and the executor will be responsible for reimbursing the estate for such amounts. The executor represented at the hearing that the expenses for qualification as trustee had already been reimbursed to the estate prior to the hearing.

Pursuant to Virginia Code § 64.1-158, classes of claims should be satisfied in their order of priority. If there are insufficient assets to satisfy all the claims of a particular priority class, then those claims within that class

⁶ *In Re Estate of Wisemiller*, 2006 WL 3420623 (Fairfax Cir. Ct. 2006).

shall be paid ratably.⁷ A fiduciary that satisfies claims of a lower priority, at the detriment of preferred claims, will be personally liable to the estate for the overpayments made to those claims with inferior priority.⁸ The estate does not have enough assets to pay all of the priority claims against the estate; therefore, pursuant to Virginia Code § 64.1-158, the total amount of \$13,221.90 should be paid in satisfaction of the priority 1 administrative expenses and the executor's commission. The claim of Ms. Brown for statutory allowances should be paid only to the extent that there are sufficient assets in the estate to satisfy her priority 2 claim and subject to the offset for payment of her personal obligation for the funeral expenses. Such claim exceeds the balance of the estate and the executor should therefore pay Ms. Brown the balance of the estate, subject only to further expenses incurred in the administration of the estate.

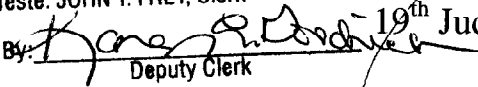
Your commissioner finds that there are no assets remaining for the payment of the priority 8 taxes due Fairfax County or any general priority 9 creditor of the estate; however, the executor paid such creditors in the total amount \$1,571.74.⁹ Under Virginia Code § 64.1-158, the executor is personally liable for such overpayments and should reimburse the estate in the total amount of \$1,571.74. The executor may choose to either directly reimburse the estate in this amount or deduct the same from her fiduciary commission.

Respectfully submitted this 7th day of January, 2009.

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

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

By: 
Deputy Clerk

1-26-09
Date

⁷ Va. Code Ann. § 64.1-158.

⁸ *Id.*

⁹ This amount includes the automated Visa payment of July 21, 2007 in the amount of \$71.96. However, it does not include the executor's expenses in the amount of \$155.99 incurred qualifying as trustee. While qualifying as a trustee is not an appropriate administrative expense of the decedent's estate, the executor represented at the hearing that such amount has previously been reimbursed to the estate.

Commissioner's Fee for Debts & Demand Hearing	\$ 150.00	
Commissioner's Fee for § 26-29 Hearing	\$ 150.00	
<u>Publication Costs</u>	<u>\$ 10.00</u>	
Total Amount Due	\$ 310.00	-UNPAID

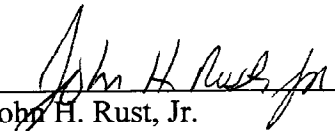
cc: Nadine Brendza, Executor
 John O. Forest, II, Esquire
 Susan E. Brown
 Michael J. Holleran, Esquire
 Cox Cable
 Everly Funeral Home
 County of Fairfax, Department of Tax Administration
 Verizon Wireless

IN THE OFFICE OF THE COMMISSIONER OF ACCOUNTS
CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

IN RE: **Estate of Eugene M. Brown**)
 Deceased) **NOTICE**
 Fiduciary No. FI-2005-0075350)

Pursuant to the provisions of §64.1-171 of the Code of Virginia, 1950, as amended, notice is hereby given that the undersigned Commissioner of Accounts has appointed the 24th day of September, 2007, at 3:00 P.M., at his office at 10555 Main Street, Suite #500, Fairfax, Virginia, as the time and place for receiving proof of debts and demands against the estate of Eugene M. Brown, at the request of Southy E. Walton, Attorney of claimant against said estate.

Given under my hand as Commissioner of Accounts this 6th day of September, 2007.



John H. Rust, Jr.
Commissioner of Accounts for
Fairfax County, Virginia
By SW

JHRJ:tlw

Exhibit 1