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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of Richard Eugene Bush, Deceased | Commissioner's Report  
Fiduciary No. FI-2007-0001651

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

Pursuant to an Order of Reference entered by this court on February 12, 2010, the undersigned set the 4<sup>th</sup> day of August, 2010, at 1:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for hearing objections to accounts filed by the administrator of the above estate. At the said time and place, Joyce Brown, a beneficiary of the estate, appeared with her attorney, Michael H. Doherty, in order to substantiate her objections to the estate administration. John C. Bush appeared with his wife, Anne Miller-Bush, to defend his administration of the estate. Cyndi Richards, an accountant the estate has engaged, appeared to substantiate the estate accounts. No other person appeared at the hearing.

This court appointed John C. Bush as administrator over the above estate on October 10, 2007. Mr. Bush filed an inventory with your commissioner on April 22, 2008. Your commissioner has not yet approved the inventory. The fiduciary filed a first account on April 30, 2009. This account was replaced by an amended account on October 28, 2009, which was again replaced by an amended account on May 10, 2010. Your commissioner has not yet approved the first account. The fiduciary filed a second account on October 28, 2009, which was replaced by an amended account on May 10, 2010. Your commissioner has not yet approved the second account. The fiduciary filed a final account on May 10, 2010. Your commissioner has not yet approved the final account.

The beneficiary, Joyce Brown, notified your commissioner of several objections to the above mentioned accounts and requested a finding on the following issues: 1) Why Section IV of the fiduciary's inventory does not list the decedent's interest as a tenant in common in property located at 9803 Lakepointe Drive, Burke, Virginia, and whether any rents are owed to the rightful beneficiaries of the property; 2) Whether estate funds in the amount of \$25,199 disbursed to PNC Bank to pay off a line of credit of which the administrator and the decedent were co-obligors was a proper estate disbursement; 3) What the underlying charges were on a credit card bill paid by the estate in the amount of \$4,436.62 and whether such charges were

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Fiduciary #: FI-2007-0001651  
Date: 12/01/2010  
Estate: BUSH, RICHARD EUGENE  
Recorded in:  
FAIRFAX COUNTY CIRCUIT COURT  
TESTE: JOHN T. FREY

appropriate estate expenses; 4) Whether the fiduciary properly disbursed the proceeds from a wrongful death action commenced by the decedent's personal representative and whether the fiduciary properly distributed the residuary estate; 5) Whether the attorney fees of the estate as listed in the accounts were proper estate expenses; and 6) Whether the estate should compensate Ms. Brown for attorney fees expended pursuant to resolving the above issues.

*Lakepointe Drive Tenancy in Common:*

The fiduciary included as a part of the estate inventory personal property in the amount of \$92,219.45. No real property was listed on the inventory. Ms. Brown questioned whether the fiduciary should include in the inventory the decedent's one-half interest in real property located at 9803 Lakepointe Drive, Burke, Virginia ("Lakepointe Property"), which the decedent and fiduciary owned as tenants in common by deed of gift dated October 20, 2005. The fiduciary testified that he was originally advised by counsel that the property should not be included in the inventory; however, his counsel understood that the property was titled as joint tenants with the common law rights of survivorship. The fiduciary acknowledged during the hearing that he now understands the interest should be included on the inventory, and the fiduciary stated he will amend the inventory to include the one-half interest in the Lakepointe Property under Section IV of the inventory. Your commissioner will defer approval of the inventory until the interest has been included.

In addition, Ms. Brown questioned whether John Bush has received rents from the property. Ms. Brown claims her proportionate share of all rents received as a part owner of the property. During the hearing, the fiduciary advised your commissioner that he has been renting the Lakepointe property since January 1, 2010, but that he has advanced more funds to repair the home than he has received in rental payments. Your commissioner has limited jurisdiction over the property as the fiduciary does not have power of sale and the real property is not an asset of the probate estate. Therefore, the fiduciary need only list it on the estate inventory, and is not required by law to account for the property's distribution with your commissioner's office. To the extent the beneficiaries believe they are entitled to an account from John Bush for the rents received, your commissioner directs them to pursue such issue with the Court.

*PNC Bank Line of Credit:*

On or around December 23, 2005, the decedent and fiduciary entered into a Choice Home Equity Line of Credit-Variable Rate Agreement (“line of credit”) as co-borrowers, with PNC Bank, National Association (“PNC”) as lender. On the date of the decedent’s death, the outstanding balance on the line of credit equaled \$25,075.69. The fiduciary lists in his first account a disbursement of estate funds in the amount of \$25,199.89 to PNC for satisfaction of the outstanding balance. Ms. Brown requests a determination from your commissioner whether the fiduciary, as a co-borrower on the line of credit, is liable to the estate for contribution of a portion of the balance.

Generally, if parties sign as co-borrowers, each maker is personally liable on the debt. Each co-borrower has the right to look to the other for contribution for any amount paid beyond the proportionate amount of the debt which that co-borrower owes. *See Van Winckel v. Carter*, 198 Va. 550, 95 S.E.2d 148 (1956). Mr. Bush claims he should not be held liable for any portion of the debt because when the parties borrowed the funds, both understood that the debt was solely debt of the decedent and that Mr. Bush would not be liable to make payments on it.

The credit application states that the line of credit was for home improvements. Mr. Bush testified that the parties’ true purpose for getting the line of credit was for the decedent’s personal use. Mr. Bush stated that the parties understood that Mr. Bush was only signing as a co-borrower to make it possible for the decedent to get the credit and that he would not be held liable for the debt. Mr. Bush provided no corroborative evidence to support his assertions.

Virginia Code § 8.01-397 provides that in an action against an estate where the decedent is incapable of testifying, “no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.” The statute is intended to prevent a claimant from prevailing against a decedent’s estate solely because the fiduciary is deprived of the decedent’s version of the agreement.<sup>1</sup> Mr. Bush provided no corroborative evidence in support of his allegations. In fact, the written documents creating the loan and describing its purposes contradict the

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<sup>1</sup> *Vaughn v. Shank*, 248 Va. 224, 445 S.E.2d 127 (1994); *Hereford v. Paytes*, 226 Va. 604, 311 S.E.2d 790 (1984).

allegations that Mr. Bush has made. Therefore, your commissioner declines to hold that the line of credit was solely for the decedent's benefit.

Ms. Brown argues that John Bush incurred more than half of the debt on the line of credit, and, in equity ought to be responsible for repayment of the excess amount. Ms. Brown submitted as evidence PNC Bank check number 118 from the line of credit in which John Bush paid \$15,000 to himself on February 21, 2007. Ms. Brown also originally questioned whether check number 117 in the amount of \$5,000 written to "Home Depot" was for the personal benefit of John Bush. Ms. Brown subsequently notified your commissioner that she withdraws her objection to the additional \$5,000 to Home Depot.

Mr. Bush claims the check in the amount of \$15,000 was not for his personal use and was written at the request of the decedent. Mr. Bush testified that \$3,000 of the amount was reimbursement to Mr. Bush for personally paying some of the decedent's expenses. Mr. Bush claims that the remaining \$12,000 was paid to Chem-Dry of Southern Maryland ("Chem-Dry") as a loan at the direction of the decedent. In support of his claim, Mr. Bush submitted a copy of a personal check number 473 paid to the order of Southern MD Cleaning on February 22, 2007 for \$12,000. Furthermore, Mr. Bush submitted a copy of a promissory note from Chem-Dry, signed by Linda A. Bush, President, dated February 22, 2007, promising repayment of the \$12,000 to Richard E. Bush and John C. Bush. Mr. Bush notified your commissioner that the business is now bankrupt and it is unlikely to satisfy the loan. Based upon the evidence presented, your commissioner is unable to find that the advances on the line of credit disproportionately benefited Mr. Bush.

Base upon the above, your commissioner finds that Mr. Bush is liable to pay \$12,599.95 to the estate, representing contribution of his one-half share of liability on the line of credit which the estate paid. Additionally, your commissioner directs the fiduciary to adjust his accounts to include a one-half interest in the outstanding loan to Chem-Dry as an asset of the estate.

*PNC Credit Card:*

The fiduciary disbursed \$4,436.62 to PNC Bank to pay off a credit card bill. Ms. Brown requested documentation of the underlying charges made on the account and whether they were a proper debt of the decedent.

The fiduciary testified during the hearing that all of the charges were made prior to the decedent's death and the fiduciary provided your commissioner with a copy of a PNC bank statement from October 5, 2007 through November 2, 2007 showing an end balance of \$4,528.69. The decedent passed away on October 29, 2007. Subsequent to the hearing, Mr. Doherty notified your commissioner that Ms. Brown concurs with the disbursement to PNC Bank and therefore withdraws her objection to it. Based on the above, your commissioner is of the opinion that the expenses were a proper debt of the estate and therefore plans to approve the disbursement in the amount of \$4,436.62 to PNC Bank.

*Estate Attorney Fees:*

Ms. Brown inquired as to whether attorney fees paid to Jeffrey Rosenfeld & Associates were proper disbursements or whether they should be deducted from the fiduciary's fee. Generally, if a fiduciary employs an attorney to perform duties that should be performed by the fiduciary, the fees should be deducted from the compensation due the fiduciary; however, this does not apply to reasonable fees paid to attorneys for tax work or litigation or other legal services reasonably necessary for the orderly administration of the estate. The reasonable expenses of such services are allowed in addition to the fiduciary fee. Upon review of the fees of Jeffrey Rosenfeld & Associates, your commissioner finds the fees were incurred in assisting the fiduciary at his qualification and represent legal services reasonably necessary for the administration of the estate, and not to complete the fiduciary's duties. Therefore, the amount is allowed in addition to the fiduciary's compensation fee.

*Ms. Brown's Attorney Fees:*

Ms. Brown seeks reimbursement for attorney fees expended in an effort to compel the completion of the estate administration. Ms. Brown claims the fiduciary failed to timely administer the above estate, and therefore, Ms. Brown had to resort to hiring counsel to compel further action. Mr. Doherty spent 27 hours counseling Ms. Brown in this matter; and Mr. Doherty bills at an hourly fee of \$175. Ms. Brown argues that her legal fees totaling \$4,725 should be deducted from Mr. Bush's fiduciary fee, as professional fees for doing the fiduciary's work. Your commissioner respectfully denies such request. The fees incurred were not to perform the administrative duties of the fiduciary, but were to compel the fiduciary to do that work. Generally, absent a specific statutory entitlement or contractual agreement,

parties bear their own attorney fees. Your commissioner is of the opinion that the general rule is the appropriate rule in this case.

*Wrongful Death and Estate Distributions:*

Joyce Brown and John Claude Bush, as personal representative of the above estate and individually, filed suit against State Farm Mutual Automobile Insurance company, H.W. Warriner, Valerie H. Warriner and William K. Warriner for the wrongful death of the decedent. Pursuant to a Petition for Court Approval of Wrongful Death Compromise filed with the Circuit Court, the court ordered State Farm Mutual Automobile Insurance Company to distribute \$70,000.00 as follows: \$23,333.33 to Samuel M. Shapiro, P.A. for attorney fees and \$46,666.67 to John Claude Bush as Personal Representative of the estate of Richard E. Bush. The court further decreed John Claude Bush and Joyce Brown as the only persons entitled to distribution of the proceeds. Ms. Brown requests a determination on whether the wrongful death proceeds should be a part of the estate and whether the decedent has properly distributed the proceeds from the wrongful death lawsuit as well as the estate funds. Virginia Code § 8.01-54(C) states that an amount recovered in a wrongful death suit shall "be paid to the personal representative who shall first pay the costs and reasonable attorney's fees". The remainder is to be distributed to beneficiaries as specifically determined pursuant to Virginia Code § 8.01-53. Your commissioner is of the opinion that the wrongful death proceeds are not a part of the probate estate.

Mr. Bush received proceeds in the amount of \$46,666.67 from the wrongful death lawsuit. The fiduciary distributed \$23,333.33 of the wrongful death proceeds to himself and \$23,000 to Ms. Brown. After making the distributions, Mr. Bush discovered additional expenses were owed in connection with the lawsuit totaling \$4,918.64. Mr. Bush used the remaining \$333.33 to pay those expenses in part and then took half of the remaining amount owed from Ms. Brown's distributable share of the estate and the other half from his share of the estate. Your commissioner finds the co-mingling of the wrongful death proceeds with the probate estate improper. If Mr. Brown made an error in the distribution of the wrongful death proceeds, he has responsibility under the statute to pay the omitted costs as the one responsible for such payments under the Virginia Code. Any recovery of improper distributions from those receiving distributions under Virginia Code § 8.01-53 is between Mr. Bush and Ms. Brown. Mr. Bush has no authority to offset amounts from Ms. Brown's distribution from the probate estate to redress his error in distributing the wrongful death

proceeds. Any imbalance in the distribution of wrongful death proceeds is to be resolved between them outside probate. The distribution of \$4,918.64 in attorney's fees and costs for the wrongful death proceeding from the estate assets is improper. In sum, Mr. Bush deposited \$46,666.67 into the estate account representing the total wrongful death settlement. He disbursed \$51,252.07 from the estate account for expenses and distributions related to that proceeding. Mr. Bush is directed to restore the net excess distributions of \$4,585.40 to the estate. Your commissioner notes this finding does not preclude Mr. Bush from seeking reimbursement from Ms. Brown for the additional expenses incurred from the wrongful death suit; he simply cannot do so as an offset against the estate distributions.

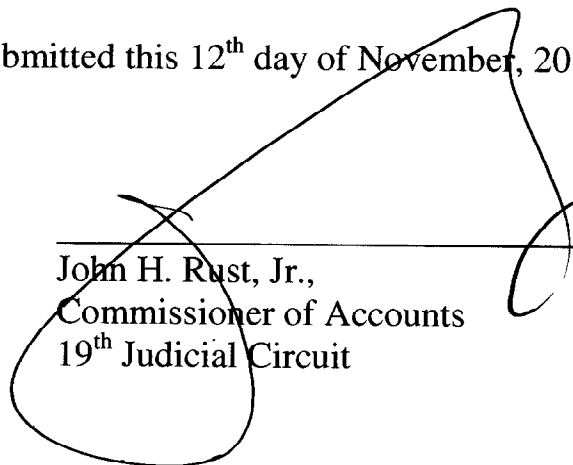
Robert Wayne Bush, the decedent's brother, predeceased the decedent. The parties asked your commissioner to opine whether his five children inherit his interest in the decedent's estate. The fiduciary filed a list of heirs on October 10, 2007, listing the heirs of Robert Wayne Bush as Robin Bush, Wayne Bush, Debbie Bush, and Bobbi Bush. The fiduciary subsequently filed an affidavit of notice on December 26, 2007, naming a fifth child of Robert Wayne Bush, Jennifer Bush, in addition to the four previously named. During the hearing, both parties testified that Robert Wayne Bush was survived by a spouse, Sherri Bush, and five children, Robin Bush-Smith, Edward Wayne Bush, Deborah Bush Trice, Bobbi Lynn Bush Howsare, and *Jennifer Bush*. Your commissioner finds that the descendants of Robert Wayne Bush were his five children, Robin Bush, Edward Wayne Bush, Deborah Bush Tice, Bobbie Lynn Bush Howsare, and Jennifer Bush. Virginia Code § 64.1-1(4) provides that if an intestate decedent has no surviving spouse, children or parents, his estate shall pass to "his or her brothers and sisters, and their descendants." Your commissioner finds that the five children of Robert Wayne Bush are his descendants to whom one-third of the estate of the decedent passes. This finding is consistent with the fiduciary's previous disposition of the estate.

Based on the above, and after taking into account outstanding fees still due your commissioner for this report, your commissioner finds the distributable estate equals \$56,156.91. Therefore, John Bush and Joyce Brown should have each received distributions totaling \$18,718.97, and Robert Wayne Bush's heirs together should have received distributions totaling \$18,718.97. Excluding distribution of the wrongful death proceeds, John Bush received \$12,497.22, including in the first account, \$10,000 cash and \$300 for excess reimbursement for attorneys fees and funeral expenses,

in the second account \$50 as payment by the estate of delinquency fees due from the fiduciary personally, and in the third account \$2,147.22, representing the entire balance on hand less the \$50 which Mr. Bush originally contributed to the estate account. Mr. Bush is due an additional \$6,221.75, from which his improper distribution of \$4,585.40 for expenses related to the wrongful death litigation must be offset. Therefore, Mr. Bush is entitled to an additional sum of \$1,636.35, which he may deduct from the funds due to the estate for his share of the line of credit in the amount of \$12,599.95. Mr. Bush is to pay to the estate the sum of \$10,963.60.

This sum shall be distributed as follows: Joyce Brown has received funds totaling \$11,532.74. She is due an additional sum of \$7,186.23. Each of the five children of Robert Wayne Bush has received \$3,088.32. Each of them is entitled to an additional sum of \$655.47, representing the net amount due to each of them. The remaining balance of \$500 shall be paid to the office of your commissioner for the preparation of this report.

Respectfully submitted this 12<sup>th</sup> day of November, 2010.



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

Commissioner's Fee for this Report \$ 500.00 - UNPAID



## CERTIFICATE OF MAILING

I hereby certify that on this 12<sup>th</sup> day of November, 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:

John C. Bush  
116 Lea Road  
Colonial Beach, VA 22443

Cyndi Richards  
7090 Bensville Road  
White Plains, MD 20695

Michael H. Doherty  
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Fairfax, VA 22030

Joyce Ann Brown  
7205 Oliver Street  
Lanham, MD 20706

Robin Bush-Smith  
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Garden City, SC 29576

Edward Wayne Bush  
P.O. Box 802  
Lusby, MD 20657

Deborah Bush Trice  
21334 Fox Glove Court  
Lexington Park, MD 20653

Bobbi Lyn Bush Howsare  
424 Centennial Road  
Bedford, PA 15522

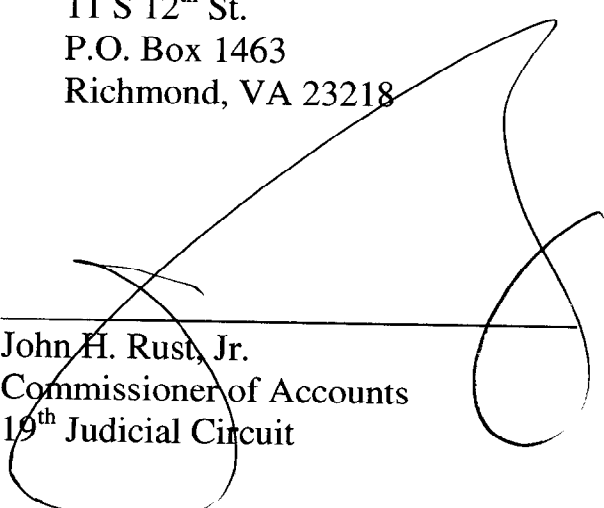
Jennifer Bush  
23455 White Tale Lane  
Leonardtown, MD 20650

Ohio Casualty Insurance Co.  
c/o Corporation Service Co.  
11 S 12<sup>th</sup> St.  
P.O. Box 1463  
Richmond, VA 23218

In the Clerk's Office of the Circuit Court of  
Fairfax County, Virginia 12/11 2010  
the foregoing document(s) was/were received  
and admitted to record.

Teste: JOHN T. FREY, Clerk

By: James Z Brown  
Deputy Clerk

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