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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of John Lowell Child, Sr., deceased
Fiduciary Number FI-2006-0000949

Commissioner's Report

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

At the request of Kathryn A. Teachout, attorney for Mark Child, one of the beneficiaries of the above estate, the undersigned gave the notice required under § 26-29 of the Code of Virginia, setting the 12th day of March, 2008, at 10:00 A.M. at the office of your Commissioner at 10555 Main Street, Suite 500, Fairfax, Virginia 22030, as the time and place for to take evidence in accordance with § 26-29 of the 1950 Code of Virginia, as amended. At the said time and place, the said Ms. Teachout appeared on behalf of Mark Child, together with her client, Mark Child. Martha Child, the executor of the estate, also appeared, together with Stuart H. Gary, her counsel. Jean Mertz, a friend of the decedent, Mary White, the decedent's care giver, and Dana Keegan, the decedent's step-daughter, also appeared and gave testimony before your Commissioner. Dee Brant, Jessica Tadlock, and Sandy Anderson, business acquaintances of Martha Child, attended the hearing as well.

Mark Child, by and through his attorney, Kathryn A. Teachout, raised four objections to the settlement of the decedent's accounts: 1) the funeral expenses were excessive; 2) severance payments to Mary White were not obligations of the estate; 3) the reservation of a litigation fund of $75,000 and an additional sum for payment of your Commissioner in the final account was inappropriate; and 4) the decedent's wife had promised to change the beneficiary of the decedent's individual retirement account, which amount was not included in the estate. At the hearing, Ms. Teachout also objected to the attorney's fees that the estate expended in the defense of the hearing before your Commissioner.

Pursuant to § 26-29 of the 1950 Code of Virginia, as amended, your Commissioner reports as follows:

1. Litigation Fund and Reserve for Payment of Your Commissioner.

Mr. Child is correct in his assertion that unexpended funds may not be reserved in a final account. This office will not approve a final account which contains either a litigation reserve or the reserve for payment to this office. However, your Commissioner intends that this report resolve the differences between the parties. Upon confirmation of this report or resolution of any exceptions thereto, the executor may amend the final account filed with your Commissioner to reflect (a) payment to your Commissioner for this report, (b) the payment of any fees or charges including appropriate litigation expenses which the estate may incur prior thereto, and (c) the distribution of the remaining balance of the estate funds to the residuary beneficiaries. Upon receipt of such an amended final account in proper form and supported by vouchers, this office will approve the same and close the estate.

2. *Funeral Expenses.*

Mark Child objected to the payment of funeral expenses. Your Commissioner has identified $33,361.22 in such expenses,[1] which expenses may be broken down as follows:

Money & King Funeral Home	-	$17,697.10
(Paid $8,000 – credit card and checks of $8,742.10 and $955)		
Washington Golf & Country Club	-	$9,742.32
Reception after funeral service		
Elegance to Simplicity Catering	-	$2,221.80
Reception following internment		
(Paid checks of $1,359.38, $725 and $137.42)		
Women's Memorial	-	$500.00
Contribution for post-internment reception		
Fort Myer caterer	-	$300.00
(Paid by credit card)		
Funeral participants (including pastor, organist and musicians	-	$2,050.00
Musicians, reception after internment-		$750.00
Wait staff tip – reception after funeral -		$100.00

During the testimony before your Commissioner, Ms. Teachout represented that she was not objecting to the bill of the funeral home itself, rather her client objected to the expenditures upon the receptions after the funeral service and after the internment. This is consistent with her earlier correspondence (of which your Commissioner received copies) objecting to $15,364.12 for memorial services (to-wit: Washington Golf & Country Club; Elegance to Simplicity Catering; Women's Memorial; Funeral participant payments, musicians and wait-staff tip).

Your Commissioner finds based upon the testimony presented that the decedent retired as a full colonel from the United States Army and served as a congressional liaison on Capitol Hill. Ms. Keegan testified that her step-father had asked that there be a party to celebrate his life at his death. The friends and relations of the decedent, including Mark Child, attended the reception at Washington Golf & Country Club. Jean Martz testified that the reception was elegant. Ms. Martz also testified that the decedent's career was one of the principal foci of his life. Ms. Child testified that burial at Arlington Cemetery was very important to the decedent. She also testified that the United States Army assisted her in making funeral arrangements and that the United States Army representative had advised her that a reception after internment was customary. Mr. Child testified that he never spoke to his father about his funeral arrangements and that the only comment about such matters he recalled was that his father requested that there not be an open casket. The decedent left no direction or instructions contrary to the actions of the executor in arranging for the receptions on behalf of the decedent.

[1] Ms. Teachout represented the funeral expenses to be $41,140.19. Upon further inquiry, it appears that Ms. Teachout included the credit card charges to Money & King twice, thus resulting in the discrepancy in the calculation of funeral expenses.

Ms. Teachout relies upon the holding in *Scott Funeral Home, Inc. v. First National Bank*, 211 Va. 128, 176 S.E.2d 335, which upheld the funeral expenses incurred where the estate was solvent, the charges were not disproportionate to the estate, and the funeral fairly reflected the decedent's station in life. The testimony presented before your Commissioner revealed that the decedent lived well over the last twenty-eight years of his life, sharing in his wife's good fortune in business, traveling extensively, and residing in well-appointed and substantial homes. He served as a congressional liaison and had achieved the rank of full colonel in the United States Army. In the opinion of your Commissioner, there was nothing inconsistent between the decedent's station in life and the ceremonies after his death to celebrate that life. There was no evidence presented that the receptions were out of the ordinary, lavish or extravagant. The fact that the receptions were not consistent with the impression that Mark Child had of his father does not make them inconsistent with the decedent. For these reasons, your Commissioner is of the opinion that the funeral expenses incurred in the above estate were reasonable, proper and should be approved.

3. Severance Payment to Mary White.

Mr. Child objects to the payment of $8,400 in severance payments to Mary White. Such payments are set forth in the first account, and are a part of an agreement to pay Ms. White two weeks pay for each year she worked for the decedent. Ms. White worked for the decedent for seven years. The total of the payments to be made under such an agreement would be $9,800. Your Commissioner can find no evidence that the seventh and final payment has been made. If the agreement is sustained, Ms. White is owed an additional $1,400 from the estate.

Your Commissioner finds that Mary White worked for the decedent for seven years. In 2001 or 2002, Ms. White, Ms. Child and the decedent were discussing the termination of the employment of a mutual friend. He had worked for the company which employed Ms. Child. Ms. Child noted that he received two weeks pay for each year he had worked for the company. She then asked if the Childs should do something like that for Mary White. The decedent responded that such a severance package would be appropriate for Mary. Both Mary White and Martha Child testified to the conversation and were in substantial agreement about its terms. Both also testified that there were no further discussions of the severance package. Ms. White testified that she did not request payment of the severance package after the decedent's death, but accepted it as she recalled the conversation about its payment.

Your Commissioner is faced with two issues concerning the severance payments. First, does the reported conversation constitute an agreement which is enforceable against the estate; and second, is there sufficient corroboration of the agreement to prove the same pursuant to § 8.01-397 of the Virginia Code. In the instant case, the decedent employed Ms. White to assist him in the activities of daily life. This assistance ranged from cooking his meals, transporting him to medical appointments and attending to his needs when Ms. Child was absent to more comprehensive services such as assisting his

movements from room to room, changing his clothes and bedding, and assisting in personal sanitation as he become less capable of assisting himself. The services ranged from a few hours each day at the beginning of the relationship to services 24 hours each day, seven days a week at the conclusion of the decedent's life. Ms. White had been an employee of Sunrise Senior Living, an assisted living organization, prior to her engagement with the decedent. She gave up that employment and became a full time employee of the decedent at the end of his life.

The contract of employment between the decedent and Mrs. White existed at the time the discussion of severance pay occurred. An employment contract can be modified, but that modification must be supported by consideration unless the consideration supporting the original contract also supports the modification. 27 AM. JUR. 2d *Employment Relationship* § 23 (2008). The grant of a preferential claim to one's services constitutes consideration running from the employee to the employer. *Vincent v. Palmer*, 179 Md. 365, 19 A.2d 183 (1941). A contract to provide severance pay may be established by an employer's representations to an employee, and need not take written form. 27 AM. JUR. 2d *Employment Relationship* § 70 (2008). Sufficient consideration to support a contractual provision for severance pay may be found where an employee remains in employment in reliance upon such provision. 27 AM. JUR. 2d *Employment Relationship* § 70 (2008).

Based upon the foregoing, in the opinion of your Commissioner an obligation to make severance payments can arise in an employment relationship based upon the unilateral offer of the employer and the employee's continuing employment in reliance thereon. In the instant case, Ms. White removed herself from the employment market for an extended period of time and continued her exclusive employment with the decedent after his offer of severance compensation. Therefore, your Commissioner finds that the contract for severance payments, if otherwise corroborated, is supported by consideration and is binding upon the estate.

In order to be sustained, the contract with Ms. White must be corroborated as set forth in § 8.01-397 of the Virginia Code. That section 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." VA. CODE ANN. §8.01-397. In Virginia, there is no hard and fast rule to determine what constitutes corroborative evidence, rather each case must be decided on its own facts and circumstances. *See Davies v. Silvey, Adm'x*, 148 Va. 132, 138 S.E. 513 (1927); *Burton's Executor v. Manson*, 142 Va. 500, 129 S.E. 356 (1925). It is clear, however, that the corroborative evidence need not be sufficient to support the verdict alone, for otherwise there would be no requirement for the testimony of the adverse party. *See Brooks, Adm'r v. Worthington*, 206 Va. 352, 143 S.E.2d 841 (1965); *Clay v. Clay*, 196 Va. 997, 86 S.E.2d 812 (1955).

In Virginia, corroboration of an adverse party may not emanate from her or depend upon her credibility, but it may come from any other competent witness or other legal source. *Leckie v. Lynchburg Trust*, 191 Va. 360, 60 S.E.2d 923 (1950). Sufficient

corroboration may be found in the testimony of witnesses other than the adverse party. *Fauntleroy v. Borden*, 63 Va. Cir. 144, 2003 WL 22521440. In the instant case, both Ms. White and Ms. Child testified to the decedent's offer of severance pay and to the terms then under discussion. While the evidence of that agreement is sparse, it is uncontradicted. The executor is not adverse to the estate nor is she otherwise interested in the existence of such an employment contract. Her testimony is independent of the adverse party and sufficient to corroborate the existence of the agreement to pay severance to Ms. White. Based upon the foregoing, it is the opinion of your Commissioner that the decedent entered into a valid and binding contract with Mary White to pay her two weeks' severance pay for each year of employment with him, that such contract was supported by consideration, and was sufficiently corroborated to constitute an enforceable claim against the estate. For these reasons, the payments to Mary White of $8,400 are approved. The estate is further obligated to pay an additional $1,400 to Ms. White prior to closing the estate, which amount should be paid and reflected in the amended final account.

4. Beneficiaries of the Decedent's Individual Retirement Account.

Mark Child asserted that he should have an interest in the decedent's individual retirement account based upon the withdrawal of certain funds from the decedent's brokerage account to purchase a new home in which he and his wife might reside. Evidence presented by the estate with the accounts indicates that the decedent executed a gift letter authorizing a gift of $200,000 to his wife in connection with the purchase of their new home. Mr. Child based his claim upon a statement from Ms. Child in a letter about the purchase of the new home that if funds were withdrawn from the brokerage account, the beneficiary of the individual retirement account would be changed to the children of the decedent. Ms. Child had no legal interest in that individual retirement account and no ownership thereof. Mr. Child stated that he repeatedly asked his father to change the beneficiary of the individual retirement account prior to his death and that his father refused. He further stated that he offered to obtain a change of beneficiary form for his father to sign and his father also refused. Ms. Child stated that she asked the decedent to make the change and he stated "I'm living here too." The decedent again declined to make the change.

The individual retirement account and the brokerage account were the property of the decedent, to do with as he pleased. No matter how sincerely Mark Child believed he was entitled to those accounts, his father was the owner of the funds. There is no merit in Mark Child's claim to those funds in light of the uncontroverted evidence that his father refused to make the change of beneficiary which Mark Child demanded.

5. Attorney's fees incurred by the estate in defending the objections to the accounts.

Mark Child, through his attorney, objected to the payment of counsel fees required to defend the objections to the accounts as presented. There is no evidence that such fees are unreasonable or unrelated to the estate. Rather, the objection is based upon the personal liability of the executor to restore funds if the objections to the expenses

were to be sustained. As executors are generally personally liable for any wrongful application of estate funds,[2] this analysis would bar any executor from using estate funds to defend challenges to his administration of the estate.

Ms. Teachout relies upon *Norris v. Barbour*, 188 Va. 723, 51 S.E.2d 334 (1949), to support this proposition. In *Norris*, the Court found that a bond payable upon death was not supported by consideration and therefore the bond was not a charge against the assets of the estate and did not bar the spouse from recovering her statutory share of the estate. The Court declined to allow the spouse's attorney fees as a charge against the estate on the grounds that the wife's suit had not increased the assets of the estate by creating an additional fund, rather the litigation merely prevented a charge against the existing assets of the estate and there was no basis for granting the wife's attorney fees. *Norris* has no application to the use of estate funds to defend objections to the administration of the estate.

As a general and long-standing rule, attorney's fees incurred in the course of an administration are appropriate administrative expenses of the estate. *See, e.g. Lindsay v. Howerton*, 12 Va. (2 Hen. & M.) 9 (1807). This is in accord with the general rule in the United States. 31 AM. JUR. 2d *Executors and Administrators* § 428 (2008). Moreover, in Virginia, "a fiduciary's accounts settled before a commissioner are presumed to be correct and the burden of proving them incorrect is upon the moving party." *Commercial and Savings Bank of Winchester v. Burton*, 183 Va. 133, 31 S.E.2d 829 (1944). As stated by Judge Vieregg in *Gaymon v. Gaymon*, 63 Va. Cir. 264, 2003 WL 22785033,

> There are three tests for evaluating the propriety of a fiduciary's conduct. The first is whether or not the fiduciary's conduct fell within the scope of his powers and duties. The second is whether or not the fiduciary's conduct was undertaken in good faith. The third is whether or not the conduct is consistent with ordinary prudence. *(citing Commercial and Savings Bank of Winchester, supra)*

In the instant case, the payments which the executor made of funeral expenses and severance obligations under an employment agreement are clearly within the scope of the executor's powers and duties. There is no evidence that the executor acted in bad faith or in furtherance of any personal interest, and the payments were consistent with ordinary prudence. In such circumstances, the executor is certainly entitled to engage counsel to defend challenges to her account.

In Virginia, an executor's engagement of counsel, if otherwise reasonable and commensurate with the benefit to the estate, is subject to challenge only if the executor is adverse to the interests of the estate. *See, e.g. Gaymon v. Gaymon*, 63 Va. Cir. 264, 2003 WL 22785033; *Scott v. Porter*, 99 Va. 553, 39 S.E. 220 (1901). There is no evidence before your Commissioner that the executor had any interest adverse to the estate in the payment of the funeral bills or the severance payments to Ms. White. Therefore, in the opinion of your Commissioner, the fees paid to counsel to defend the estate against Mark

[2] VA. CODE ANN. § 26-5.

Child's objections to the accounts are reasonable, proper and chargeable to the estate.

Conclusion

In summary, your Commissioner reports that the funeral expenses and the severance payments to Mary White are reasonable, proper and chargeable to the estate. Your Commissioner has approved the first account in the above estate, which sets out those payments. Your Commissioner notes that the estate owes Mary White an additional payment of $1,400. There is no basis for Mr. Child's claim to a share of the individual retirement account of the decedent and the same is denied. The executor is authorized to expend the funds of the estate to engage counsel to defend the objections to the accounts filed with this office. This office shall approve accounts containing such expenditures provided the amounts are reasonable and commensurate with the effort necessary to defend such claims. Upon confirmation of this report or resolution of any exceptions thereto, the executor is directed to file an amended account reflecting payment of the additional sum to Mary White, payment of fees due to this office, and payment of the expenses of defending the objections, and distributing the balance of the estate to the residuary beneficiaries.

Your Commissioner's fee for the conduct of the hearing in the above estate and the preparation of this report is $1,250, unless the Court shall establish another amount therefor.

Respectfully submitted this 13th day of March, 2008.

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

Hearing Fee - $1,250 UNPAID
cc: Stuart H. Gary, Esquire
Martha Child, Executor
Kathryn A. Teachout, Attorney at Law
Mark Child

In the Clerk's Office of the Circuit Court of Fairfax County, Virginia MARCH 31 2008 the foregoing document(s) was/were received and admitted to record
Teste: JOHN T FREY, Clerk
By: Deputy Clerk