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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

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In Re: Estate of James Constantine, Deceased | Commissioner's Report
Fiduciary No. FI-2007-0000675

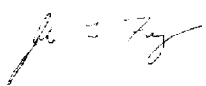
To the Honorable Judges of the Circuit Court of Fairfax County, Virginia:

At the request of James Michael Constantine, a beneficiary of the above estate, the undersigned provided notice of a hearing pursuant to Virginia Code § 26-29, setting the 4th day of January, 2011, at 1:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for receiving proof of objections or other matters of concern to accounts filed in the above estate. At the said time and place, James Michael Constantine appeared to raise objections to Ms. McDermott's accounts. Geraldine C. McDermott, executor of the above estate, appeared together with counsel, Allan M. Heyward, Jr., in order to substantiate Ms. McDermott's accounts.

James Michael Constantine requested that your commissioner make a finding on the following issues regarding the fiduciary's administration of the estate:

- 1) Whether compensation taken by the fiduciary in the amount of \$10,000 was justified in light of the work provided by attorneys and accountants;
- 2) Whether the fiduciary improperly disbursed estate funds to herself totaling \$12,880.26 for reimbursement of moneys advanced to the decedent during his life;
- 3) Whether distributions to James Michael Constantine totaling \$10,727.69 from a joint account between the fiduciary and the decedent were properly calculated as an advancement of the beneficiary's distributive share of the estate; and,
- 4) Whether the fiduciary otherwise properly distributed the net estate per the decedent's will.

In addition, Mr. Constantine raised a number of additional issues which your commissioner resolved in a summary fashion, as is more particularly set forth herein.



Fiduciary Compensation:

Virginia Code § 26-30 sets forth that “[t]he commissioner, in stating and settling the account, shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts, or otherwise.” The Circuit Court has adopted guidelines for fiduciary fees, which provide that “If the fiduciary employs an attorney or accountant to perform duties that should be performed by the fiduciary, the fees of those persons should be deducted from the compensation due the fiduciary.” This rule “does not apply to reasonable fees paid to attorneys or accountants for tax work or litigation or other legal services reasonably necessary for the orderly administration of the estate. The reasonable expense of such services will be allowed in addition to the fiduciary fee.”

The Court’s guideline fiduciary compensation for an estate of the size of the subject estate would allow a fiduciary to take a fee of \$14,097.52. In the instant case, the fiduciary has taken a fee of \$10,000 for the administration of this estate, an amount well within the Court’s guideline amount. The fiduciary has disbursed estate funds for legal fees totaling \$8,953.06 and for accountant fees totaling \$1,400.02. Mr. Constantine alleges that the fiduciary failed personally to perform any substantial work for the estate; rather, he alleges that Mr. Constantine and the fiduciary’s attorney and accountant completed the work. Mr. Constantine asserts that the fiduciary should be entitled to no fee, or if she is allowed a fee, that the amount be reduced by the legal and accountant fees.

Your commissioner finds the fiduciary paid the decedent’s debts, oversaw the sale of the decedent’s home, located the decedent’s heirs, dealt with complaints and administrative issues that Mr. Constantine raised from time to time during the administration, and filed an inventory and accounts with your commissioner. Your commissioner notes that this estate incurred legal fees in a dispute with Mr. Constantine, that required expertise above and beyond that generally required by a lay fiduciary. Your commissioner is of the opinion that in such circumstances, the legal fees should not reduce the fiduciary’s compensation. The estate incurred accounting fees totaling \$1,400.02 related to preparing accounts for your commissioner’s office. As the preparation of such accounts are the responsibility of the fiduciary, such fees should reduce the fiduciary’s compensation; however, the fiduciary has taken a compensation below that allowed by the fee schedule and the

combined total of the fiduciary fee disbursed and the accountant fees paid is below the court recommended guideline. Therefore, your commissioner finds the disbursement of \$10,000 for fiduciary compensation is reasonable and appropriate. In addition, based upon the Court's guideline, the fiduciary may take additional fees of \$2,697.50.

Credit Line Deed of Trust:

Prior to his death, the decedent lived in a condominium in Idlywood Towers, more particularly described as 2311 Pimmit Drive, Apt. 215, Falls Church, Virginia 22043. On September 27, 1993, the decedent executed a statement as follows: "I James Constantine promise to pay back all advances of condo fees paid by Geri and William McDermott, when I sell the condominium." In reliance upon that agreement, Geraldine C. McDermott and her husband, William T. McDermott, began paying condominium fees for the decedent's residence. The McDermott's also paid other occasional household expenses for the decedent. On January 19, 1998, the decedent and the McDermotts signed an agreement in which the decedent acknowledged owing the McDermott's \$21,102.67 for advances the McDermotts made on his behalf. The McDermotts agreed to continue paying the decedent's condominium fees. The decedent promised to repay the outstanding \$21,102.67, together with any future advances.

On July 8, 1999, the decedent executed a credit line note secured by a deed of trust conveying the condominium for "the payment of the principal sum of up to a maximum of Sixty Thousand Dollars (\$60,000), or so much thereof as shall from time to time have been advanced and/or readvanced and remain unpaid evidenced by a Note executed by James Constantine, without interest, evidenced by one certain negotiable Promissory Note of even date herewith drawn by James Constantine and payable to William T. McDermott and Geraldine C. McDermott."

By 2005, the McDermotts had advanced funds in excess of \$60,000 on the decedent's behalf. The decedent wrote to the McDermotts expressing his gratitude for the advances; however the decedent did not execute any further agreements to repay the amounts in excess of the amount of the credit line note. By the date of the decedent's death, the McDermotts had advanced \$72,556.58 on behalf of the decedent. Upon the sale of the decedent's condominium, the McDermotts received \$60,000 in satisfaction of the credit line note.

The fiduciary thereafter disbursed estate funds in the amount of \$12,556.58 to the McDermotts in satisfaction of the additional outstanding advances they had made on the decedent's behalf, plus \$323.68 representing interest on the amounts advanced. The fiduciary states that the decedent and the McDermotts understood that the decedent would repay the McDermotts for amounts advanced on the decedent's behalf in excess of the \$60,000 note amount.

Virginia Code § 8.01-397 provides that in an action involving 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.¹ In Virginia, while there is no hard and fast rule to determine what constitutes corroborative evidence; the statute requires that there be some corroborative evidence of the alleged agreement.² In the instant case, the McDermotts claim it was not the decedent's intent to restrict reimbursement to the \$60,000 evidenced by the credit line note; however, the McDermotts failed to provide any corroborative evidence of an agreement to pay more than \$60,000. Therefore, your commissioner finds the fiduciary improperly disbursed \$12,880.26 in estate funds to herself and her husband, and is therefore personally liable to return the same to the estate.

Distributions to James Constantine from Joint Account Assets:

Sometime prior to his death, the decedent added Geraldine C. McDermott as a joint owner to his money market account at SunTrust. Virginia Code § 6.2-608 (A) states, "Sums remaining on deposit at the death of a party to a joint account belong to the surviving party as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." Ms. McDermott testified that she and the decedent understood that the funds in the joint account would pass directly to Ms. McDermott upon the decedent's death. No evidence was provided to the contrary. Ms. McDermott listed the bank

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

² *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).

account as a payable on death account on Part 2 of her inventory filed with your commissioner. Your commissioner approved the fiduciary's inventory.

Subsequent to the decedent's death, but prior to qualifying, the fiduciary disbursed funds from the joint account totaling \$10,727.69 to the beneficiary, James Michael Constantine. Mr. Constantine states that he had made deposits into the decedent's money market account from his TIAA-CREF annuity for many years prior to the decedent's death. He alleges that the funds in the account belonged to him. Mr. Constantine claimed that he and the decedent understood that the decedent was holding the assets in the account for Mr. Constantine. Mr. Constantine also asserts that the fiduciary distributed the funds to him based on her knowledge of the agreement.

The fiduciary stated that she distributed the funds to Mr. Constantine as an advance toward his share of the estate because he needed the money for living expenses and could not wait for estate funds to be collected and distributed. The fiduciary further stated that the money deposited into the account from Mr. Constantine's TIAA-CREF annuity was for repayment of a loan Mr. Constantine received from the decedent, as well as payment of rent while Mr. Constantine lived with the decedent. The fiduciary testified that she never believed the assets in the account belonged to Mr. Constantine. The records of the account provided to your commissioner show an active account with deposits and withdrawals occurring on a regular basis.

Mr. Constantine failed to provide any corroborative evidence that the decedent held the assets in the joint account as a bailment for Mr. Constantine. In fact, the only external evidence of the testator's intent was the addition of Ms. McDermott to the account as a co-owner. Therefore, your commissioner finds the assets passed outside of the probate estate to Ms. McDermott upon the decedent's death. As the funds were property of Ms. McDermott, your commissioner finds that her payment to Mr. Constantine represented an advance by her toward his distributive share of the estate.

Total Distributions:

In her first account, the fiduciary shows disbursements to herself totaling \$39,624.70 for reimbursement of advances she personally made to the estate; including the advance to James Michael Constantine from the

joint account discussed above. In addition, the fiduciary shows payment of her claim in the amount of \$12,880.26, which your commissioner disallowed above. The fiduciary also shows distributions to herself in the first and second accounts totaling \$62,388.85; however, based upon the testimony at the hearing, \$750 of that amount was in fact reimbursement for the balance of the money market account which the fiduciary had deposited into the estate account at the beginning of her administration. Therefore, the fiduciary has received distributions totaling \$61,638.85, reimbursements for allowed expenses totaling \$40,374.70, and payments for disallowed claims totaling \$12,880.26.

In addition to the advancements made to James Michael Constantine from the joint account, the fiduciary distributed \$48,911.15 from the estate to Mr. Constantine. She distributed an additional \$10,727.69 from her own funds as an advance to Mr. Constantine. Therefore, Mr. Constantine has received total distributions of \$59,638.84.

Your commissioner finds the net distributable estate was \$131,460.45, representing the total of distributions to Ms. McDermott of \$61,638.85, distributions to Mr. Constantine of \$59,638.84, and \$12,880.26 in disallowed claim payments, less \$2,697.50 in additional fiduciary compensation allowed. The fiduciary and Mr. Constantine share equally in this amount and each should receive \$65,703.23. Your commissioner finds that Mr. Constantine is still due \$6,091.39. Ms. McDermott received \$6,091.38 more than the amount to which she was entitled, representing the disallowed claim, less the additional fiduciary compensation allowed, and less the difference between her one-half share and the distributions she received.

Further Issues:

Mr. Constantine claimed the fiduciary failed to sell the decedent's condominium at its then current fair market value. The fiduciary listed the condominium for sale at \$279,000 in May 2007. This was somewhat less than the \$301,180 assessed value of the unit. The fiduciary based the listing price on the recommendation of her real estate agent in light of the deferred maintenance of the unit and the falling real estate market. The executor received a lower offer. Rather than make improvements to the unit in an effort to receive a higher offer, the executor determined to accept the offer, based upon her agent's recommendation. The fiduciary sold the house for

\$259,000, and provided an allowance to the purchasers towards closing costs and repairs. The assessed value of the unit in 2008 was consistent with this selling price. Your commissioner is of the opinion that the executor reasonably relied on the judgment of a professional real estate agent as to the fair market value of the condominium unit and your commissioner will not disturb the executor's judgment.

Mr. Constantine alleges the fiduciary is responsible and personally liable for any discrepancies upon tax returns the decedent submitted to the Internal Revenue Service between 1986 and 1996. In particular, Mr. Constantine alleges that the decedent failed to report properly Mr. Constantine's payments of rent to his father and that the decedent did not report interest upon Mr. Constantine's repayment of a debt to his father. Your commissioner finds Mr. Constantine's allegations to be without merit and declines to hold the fiduciary personally liable for alleged discrepancies in the decedent's tax reporting that occurred more than fourteen years ago on tax returns which the Internal Revenue Service has accepted.

The decedent's will directs the executrix to pay all of the decedent's debts and funeral expenses "from insurance and other available cash funds." The estate received no insurance proceeds with which to pay debts and funeral expenses. On July 7, 1995, the decedent designated Geraldine McDermott as the primary beneficiary of his life insurance policy. Mr. Constantine alleges that Ms. McDermott should have paid the life insurance proceeds to the estate. Your commissioner disagrees. The terms of the policy control the distribution of insurance proceeds, not the terms of the decedent's will. Your commissioner is of the opinion that Mr. Constantine's allegations are without merit.

Your commissioner notes that the estate objected to the conduct of the hearing before your commissioner based upon Mr. Constantine's submission of a statement of satisfaction and his agreement that the accounts of the fiduciary be approved. Your commissioner overruled the objection as your commissioner had not yet approved the accounts and the matters at issue remained before him. Nevertheless, it is correct that Mr. Constantine originally raised many if not all of the above issues with the estate previously. On May 14, 2008, counsel for Mr. Constantine wrote to your commissioner objecting to the accounting for distribution of \$10,727.29 to Mr. Constantine, to payments of \$12,556.68 to the McDermotts for condominium fees and other advances, and questioning the payment of the

\$60,000 credit line note to the McDermotts and the manner in which the condominium unit was sold. On June 6, 2008, Mr. Constantine wrote to your commissioner objecting to additional matters, including the reduction in the sales price of the condominium unit. The fiduciary responded to Mr. Constantine at your commissioner's request in August and September 2008. On October 23, 2008, counsel for Mr. Constantine wrote to your commissioner renewing objections to the treatment of the distribution of \$10,727.29 to Mr. Constantine and the repayment of advances of \$12,556.68 to the McDermotts. Counsel also objected to Ms. McDermott retaining the insurance proceeds rather than using the funds for estate expenses and made a demand for compensation for Mr. Constantine. The fiduciary again responded. On December 15, 2008, counsel for Mr. Constantine wrote to your commissioner again objecting to repayment of advances to the McDermotts in excess of \$60,000, and transmitting additional allegations from Mr. Constantine objecting to the fiduciary's claims for repayment of a loan from the decedent to Mr. Constantine, and inter alia objecting to distribution of certain personal property.

On March 2, 2009, counsel for Mr. Constantine wrote to your commissioner stating that "In the spirit of cooperation and with the intent of moving the administration of the estate forward in a timely manner and with minimal additional expense to the estate, Mr. Constantine will not be requesting a hearing. He does request that you proceed with whatever approvals are necessary to permit the executrix to complete the administration of the estate and complete the distributions in a timely manner." Relying on Mr. Constantine's actions, the fiduciary distributed the remaining assets of the estate and filed her final account on May 28, 2009.

The interim first account and the final account were not approvable as filed. On February 12, 2010, the fiduciary filed amended accounts replacing both the interim first account and the final account. On April 22, 2010, Mr. Constantine provided your commissioner with an executed and notarized statement of satisfaction consenting to "any and all disbursements, fiduciary fees and distributions contained in the accounts" and requesting "that the Commissioner approve any outstanding accounts and that the estate be closed." Nevertheless, Mr. Constantine continued to contact your commissioner's staff about the accounts and the transactions reported therein. On August 13, 2010, Mr. Constantine met with members of your commissioner's staff about the accounts and thereafter on August 24, 2010, filed a request for a hearing pursuant to Virginia Code § 26-29 to address the

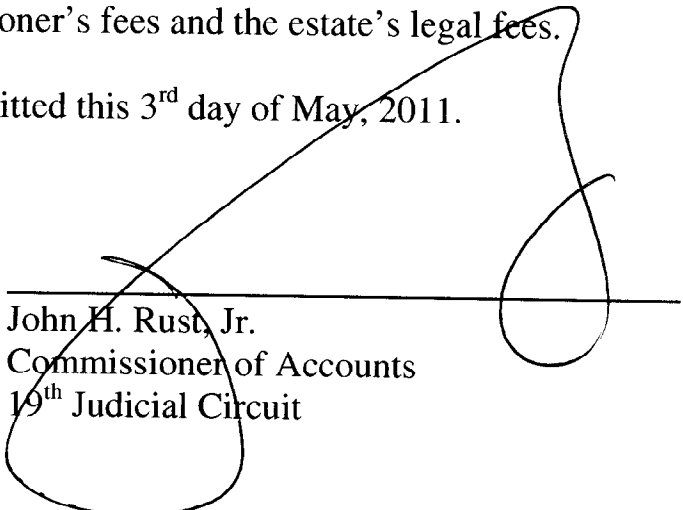
fiduciary compensation, the credit line deed of trust, the early distributions to Mr. Constantine and disproportionate distributions. Your commissioner initially scheduled the hearing for November 9, 2010. It was continued several times until January 4, 2011.

Your commissioner is of the opinion that, while Mr. Constantine may not be bound by his prior consent and agreement, he has not acted in good faith in presenting the issues to your commissioner. Therefore, your commissioner is of the opinion that Mr. Constantine should bear the costs of this proceeding.

Conclusion:

As set forth above, Ms. McDermott is directed to pay \$6,091.08 to Mr. Constantine; provided that from this amount she may offset and deduct against Mr. Constantine's outstanding distributive share of the estate the entire amount of fees and costs that the estate has incurred for this hearing, including your commissioner's fees and the estate's legal fees.

Respectfully submitted this 3rd day of May, 2011.



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

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

CERTIFICATE OF MAILING

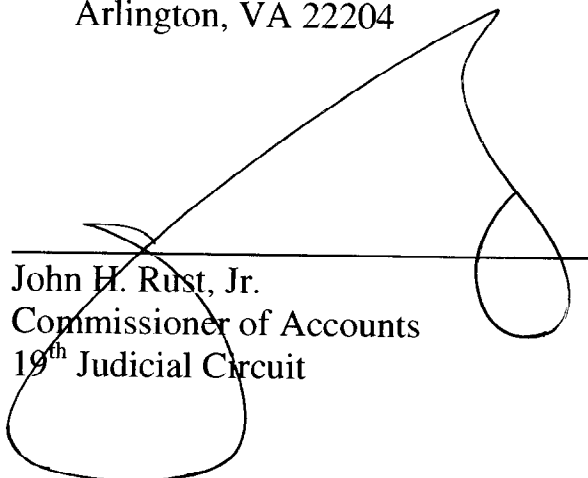
I hereby certify that on this 3rd day of May, 2011, a true and correct copy of the above Commissioner's Report was mailed, first-class mail, postage prepaid, to the following persons at the addresses shown below:

James M. Constantine
P.O. Box 3312
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John H. Rust, Jr.
Commissioner of Accounts
19th Judicial Circuit

In the Clerk's Office of the Circuit Court of
Fairfax County, Virginia 5-23-2011
the foregoing document(s) was/were received
and admitted to record.

Teste: JOHN T. FREY, Clerk

By: 
Deputy Clerk