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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of Marion Williams Fisher,  
Deceased  
Fiduciary No. FI-1994-0054719

Commissioner's Report

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

RECEIVED FEB 15 2011

The undersigned gave notice pursuant to Virginia Code § 26-29, setting the 5<sup>th</sup> day of January, 2011, at 1:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for a hearing upon objections to accounts filed by the executor of the above estate. Upon the request of Rand L. Gelber, attorney for the estate beneficiary Jeffrey Fisher, your commissioner rescheduled the hearing for January 6, 2011 at 1:00 p.m. at your commissioner's office. At the said time and place, the said Jeffrey Fisher appeared together with said counsel to present claims against the estate and to raise objections to accounts filed by the fiduciary. Ronald W. Fisher, the executor of the above estate, appeared to present claims against the estate and to substantiate his accounts filed with your commissioner's office. Joseph W. Stuart, trustee for the estate beneficiaries, Benjamin Fisher and Zachery W. Fisher, also appeared. No other person appeared at the hearing.

Ronald W. Fisher qualified as executor of the above estate on December 20, 1994. The fiduciary filed an inventory with your commissioner wherein he reported personal property totaling \$12,575 and real property over which the fiduciary had power of sale totaling \$210,000. The decedent's will directs her residual estate be distributed as follows:

1/4 to Jeffrey Fisher  
1/8 to Rebecca Duncan  
1/8 to Ronald Fisher  
1/12 to Ashley Fisher  
1/12 to Amanda Fisher  
1/12 Jessica Foster  
1/12 to Adam Foster  
1/12 to Benjamin Fisher  
1/12 to Zachary Fisher



Furthermore, the will directs that Richard Fisher receive solely a bequest of \$1,000.

The fiduciary filed nine accounts with your commissioner. The first through eighth accounts reflect cash distributions as follows:

\$44,707.21 to Rebecca Duncan  
\$10,012.00 to Ronald Fisher  
\$5,000.00 to Richard Fisher

In the second account, the fiduciary reports receipts of \$4,000.00 representing the restoration of the disproportionate distribution to Richard Fisher.

Your commissioner approved the first through eighth accounts despite the disproportionate distributions as the real property valued at \$217,763.42 remained available in the estate to correct the disparities; however, subsequent to your commissioner's approval of the accounts, creditors of Jeffrey Fisher filed an action in the Circuit Court seeking sale of the decedent's real property to satisfy outstanding claims against Jeffrey Fisher. The Court appointed a commissioner of sale who sold the property. On March 27, 2009, the Court entered an Order of Distribution directing distribution of the proceeds from the sale in accordance with the percentages set forth in the decedent's will. The order did not account for the previous cash distributions made from the estate. Therefore, there are substantial disproportionate distributions from the estate without assets with which to address such distributions.

Benjamin Fisher and Zachery W. Fisher both signed statements of satisfaction for their distributions due from the estate. Ronald Fisher and Rebecca Duncan have received more than their due distribution. The estate is required to make additional distributions to Jeffrey Fisher, Ashley Fisher, Amanda Fisher, Jessica Foster and Adam Foster.

Prior to addressing the disproportionate distributions, it is necessary to resolve claims against the estate that Jeffrey Fisher and Ronald Fisher filed, as the disposition of such claims will impact the distributable estate.

*Claims of Jeffrey Fisher:*

Jeffrey Fisher seeks reimbursement for payment of the decedent's funeral expenses totaling \$9,135.44 and for payment of the decedent's real estate taxes from 1994 through 1998 totaling \$12,000. In addition, he seeks interest at the rate of six percent (6%) annually on the above claims.

Jeffrey Fisher testified that he paid the decedent's debts with funds from a bank account held jointly with the decedent prior to her death. He stated that his mother added him as a signatory to an account she maintained at First Virginia Bank. Both Jeffrey Fisher and Ronald Fisher testified that the decedent added Jeffrey Fisher to her account after she experienced problems paying her late husband's bills after his death. The brothers stated that the decedent did not want her family to experience the same problems at her death, so she added Jeffrey Fisher to her personal account to help pay her bills. Jeffrey Fisher testified that he used the funds to pay the decedent's bills both prior to and subsequent to her death.

Your commissioner asked Jeffrey Fisher whether he deposited any funds to the account. Mr. Fisher responded that shortly before his mother's death, he deposited about \$19,000 into the account from the sale of his personal real estate. He did not present evidence of any other additions to the account from his own funds. The decedent filed suit in this Court against Jeffrey Fisher's former spouse in the matter styled *Marion Fisher v. Joan M. Fisher*, In Chancery No. 132936, seeking to recover the original down payment she advanced to Jeffrey Fisher to acquire his home known as Lot 59, Masonville Heights, Fairfax County, Virginia. By order entered September 12, 1994, approximately two months before Marion Fisher died, this court directed the net proceeds of \$19,733.53 from the sale of real property at Lot 59, Masonville Heights, Fairfax County Virginia, be distributed to the decedent, Marion Fisher, as the net proceeds of sale were less than her original down payment on the house.

Your commissioner requested that Jeffrey Fisher explain whether the deposit to which he testified was in fact the distribution of the net proceeds of sale to his mother. Jeffrey Fisher responded by counsel that "the funds obtained from the sale of the house and put into the joint account with his mother is separate and apart from the amount set forth in the Order, which were funds that his ex-wife borrowed from his mother." As the order disposed of the entire net proceeds of sale, your commissioner finds the

explanation not to be credible and your commissioner finds that Jeffrey Fisher made no personal contribution to the assets in the account he held jointly with his mother.

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.” This is in contravention of the common law, which held that the intention of the depositor is controlling, and that there is a presumption that deposits were made for the depositor’s convenience only. *See Wrenn v. Daniels*, 200 Va. 419, 106 S.E.2d 126 (1958); *King, Ex’x v. Merryman, Adm’x*, 196 Va. 844, 86 S.E. 2d 141 (1955).

In the instant case, based upon the testimony of both Jeffrey Fisher and Ronald Fisher, there is clear and convincing evidence that the decedent intended that Jeffrey Fisher use her funds to pay her bills after her death. Based upon her prior experience with her husband’s estate, both brothers testified that this was her primary motivation in adding Jeffrey Fisher to the account. Secondly, it is clear that Jeffrey Fisher used the funds during his mother’s lifetime to pay her bills on her behalf. This is the classic description of an account established for the depositor’s convenience and not intended as a gift. Therefore, your commissioner is of the opinion that in paying the decedent’s funeral bills, Jeffrey Fisher complied with the express wishes of his mother that her funds be used to pay her bills upon her death. To this extent, your commissioner is of the further opinion that Jeffrey Fisher is entitled to no reimbursement for such payments from his mother’s funds.

Your commissioner finds that there is no clear and convincing evidence whether the decedent intended the remaining funds after payment of her bills and expenses to pass to anyone other than Jeffrey Fisher. Therefore, your commissioner is of the opinion that the presumption in Virginia Code § 6.2-208 applies and Jeffrey Fisher is entitled to retain the remaining balance of the funds as his property.

Jeffrey Fisher also claims the right to reimbursement for payments of real estate taxes from 1994 to 1998 in the amount of \$12,000. He also presented during his testimony vouchers for payment of the loan payments upon the home for a period of time. Your commissioner is unable to

determine in what amount and for what period Jeffrey Fisher may have made such payments, although the last voucher submitted to your commissioner is dated October 1997. Your commissioner notes that Jeffrey Fisher resided in the decedent's home until it was sold in 2009, without payment of rent or other amounts to the estate, for which the estate requests compensation. Your commissioner further notes that Jeffrey Fisher actively pursued litigation in this Court against the estate for payment of funeral bills, taxes and other expenses related to the decedent's real estate in the matter styled *Jeffrey B. Fisher, et al. v. Ronald W. Fisher*, In Chancery No. 144744. This matter was non-suited in 1999 and not reinstated. Your commissioner also notes that Jeffrey Fisher did not file a claim with your commissioner for such expenses, which would toll the statute of limitations upon such claims pursuant to Virginia Code § 64.1-173. Finally, your commissioner notes that when the decedent's real estate was sold and this Court dealt with other claims for reimbursement of taxes, it does not appear that Jeffrey Fisher made any claim as a part of that partition action for payments of real estate taxes or debt upon the real estate.

The claim for reimbursement, as a claim for which no specific limitation is applicable, would be subject to the two-year statute of limitations in Virginia Code § 8.01-248. Even if the claim were couched as an unwritten contract claim, it would be subject to the three-year statute of limitations in Virginia Code § 8.01-246. There is no issue whether Mr. Fisher was aware of his claims, as he initiated litigation to recover those funds more than 15 years ago. He failed to reinstate that litigation within six months after his voluntary non-suit, as set forth in Virginia Code § 8.01-229. Given the above, the time period under which Jeffrey is allowed to bring his cause of action has passed.

Counsel for Jeffrey Fisher asserts that the estate did not file a plea of the statute of limitations and therefore, the bar to Jeffrey Fisher's claims may not be considered. Your commissioner is of the opinion that this is incorrect. Counsel's assertion fails to take into account the informal nature of hearings before your commissioner, where no pleadings are required. As the Virginia Supreme Court stated in *Bickers v. Pinnell*, 199 Va. 444, 100 S.E.2d 20 (1957),

The method and procedure of proving claims against a decedent's estate before a commissioner in chancery were intended to provide simple, speedy and inexpensive settlements

of estates. Claims are presented in an informal manner and without such pleadings as are required in courts of law or equity. 199 Va. at 452, 100 S.E.2d at 26.

Your commissioner is of the opinion that the claims of Jeffrey Fisher against the estate for reimbursement of payments he allegedly made on behalf of the estate prior to 1997 are barred by the applicable statutes of limitation and unenforceable. Based upon the foregoing, the claims of Jeffrey Fisher against the estate are denied.

*Claims of Ronald Fisher:*

Ronald Fisher seeks reimbursement from the estate for delinquent real estate taxes in the amount of \$19,891.19; reimbursement for paying off the decedent's home equity line of credit with First Virginia in the amount of \$8,273.44; and reimbursement for attorney fees totaling \$1,000. Furthermore, the fiduciary seeks a fiduciary compensation fee for the administration of the above estate.

Your commissioner notes that Ronald Fisher, as the fiduciary in this matter, is personally responsible for any disproportionate distributions that may have been made. To the extent that he seeks reimbursement for advances he made on behalf of the estate, such reimbursements are in effect a claim of common law recoupment against his liability for the disproportionate distributions to the beneficiaries. To that extent, Mr. Fisher's claims are not subject to any statute of limitations that may have expired. *City of Richmond v. C&P Telephone Co.*, 205 VA. 919, 140 S.E.2d 683 (1965). *See also* *Bremer v. Bitner*, 44 Va. Cir. 505 (Vieregg, Fairfax County 1996).

Secondly, your commissioner is of the opinion that a fiduciary must be given broad discretion in determining when and in what amount to pay debts of the estate. The fiduciary, as the administrator of the estate, is the person that best knows what claims are outstanding and what assets the estate has available to satisfy those claims. Your commissioner will not interpose his direction over the order and amount of such payment absent extraordinary circumstances. Delays in reimbursements to the fiduciary himself are to be favored in estate administration, as such delays provide maximum protection to beneficiaries and creditors. Therefore, your

commissioner finds that Mr. Fisher's delay in reimbursing himself is no bar to his proper reimbursement at any time prior to the closing of the estate.

Finally, to the extent that Ronald Fisher seeks payment of his fiduciary fee in this matter, such payment is always appropriate at any time before the estate is closed and there is no bar to delaying payment of such fee for so long as the fiduciary deems appropriate, provided that the estate is not otherwise closed.

Your commissioner finds that \$18,691.19 of Ronald's claim for delinquent real estate taxes was already resolved by this court in its order of distribution of the proceeds from the sale of the real property on March 27, 2009. Mr. Fisher provided documentation that a total of \$19,891.19 had been garnished from his paychecks to satisfy outstanding real estate taxes. As this Court previously resolved a portion of the claim, your commissioner denies Ronald Fisher's claim for reimbursement of real estate taxes in the amount of \$18,691.19 and allows such claim in the amount of \$1,200.00. Additionally, Ronald Fisher provided your commissioner proof that he personally satisfied the outstanding loan on the decedent's home equity line of credit with First Virginia in the amount of \$8,273.44. In addition, the fiduciary provided your commissioner with evidence of personally satisfying attorney fees in the amount of \$1,000. Therefore, your commissioner finds Ronald Fisher has a valid claim against the estate in the amount of \$10,473.44 for personally satisfying debts of the decedent.

The court recommended guidelines generally allow a fiduciary to take a fee of \$15,982.42 for an estate of this size. While the executor may not have administered the estate in the most prudent manner, given the complexities, large amount of litigation and difficulties in working with all parties involved, your commissioner will allow the executor a total of \$15,982.42 in fiduciary compensation.

After considering estate expenses, receipts, and the real estate already distributed pursuant to the court order, the net distributable estate totaled \$58,050.87. This amount shall be reduced by \$10,473.44, the amount of the executor's valid claim. This amount shall be further reduced by \$15,982.45, which represents allowable fiduciary compensation. The adjusted net distributable estate totals \$31,594.98.

Your commissioner finds the fiduciary has failed to properly distribute the estate assets in accordance with the provisions of the decedent's will. Based on the above findings, the fiduciary is personally liable to return \$18,430.31 to the estate and distribute it as follows: \$7,898.75 to Jeffrey Fisher; \$2,632.92 each to Ashley Fisher, Amanda Fisher, Jessica Foster and Adam Foster. *See Bliss v. Spencer*, 125 Va. 36, 99 S.E. 593 (1919).

There remain several additional issues which the parties sought to address at the hearing, including the distribution of the decedent's motor vehicle to Rebecca Duncan, whether the assets of the estate were properly reported and whether the estate has any claim against Jeffrey Fisher for occupancy of the decedent's real estate with payment of rent since her death in 1994 until its sale in 2009.

*Ford Escort:*

Jeffrey Fisher claims the executor improperly distributed the decedent's Ford Escort to Rebecca F. Duncan as the executor did not discuss the distribution with Jeffrey Fisher. He further argues the distribution should be calculated into the final residuary amount given to Rebecca F. Duncan. Pursuant to the decedent's will, the tangible personal property of the estate is to be divided among Rebecca F. Duncan, Ronald W. Fisher, and Jeffrey B. Fisher "as they shall agree among themselves, or failing agreement, then in such manner as the executor shall determine". Your commissioner finds the fiduciary had discretion to distribute the decedent's tangible personal property in such manner as he might determine and that the distribution of the Ford Escort to Rebecca F. Duncan was therefore proper and should not be included as a part of her residual share of the estate.

*Additional Estate Assets:*

Jeffrey Fisher alleges that the decedent had additional assets which the fiduciary omitted from his inventory of the estate; however, Jeffrey failed to provide your commissioner with evidence supporting his allegations. Your commissioner therefore finds that the fiduciary accurately reported the assets of the estate.

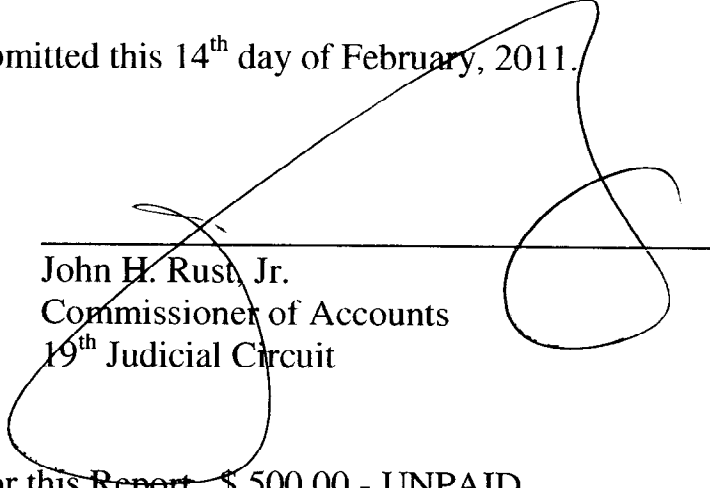
*Rents owed by Jeffrey Fisher:*

Subsequent to the hearing, Ronald Fisher requested that your commissioner make a finding that Jeffrey Fisher's distributive share should



be offset by the value of rent due to the estate from Jeffrey Fisher while he lived at the decedent's home at 7210 Statecrest Drive from her death until its sale in 2009 without compensating the estate or its heirs. Your commissioner is of the opinion that any such claim was properly a part of the creditor's bill for sale of the decedent's real estate that this Court determined in 2009. Moreover, your commissioner is of the further opinion that your commissioner has no jurisdiction over affirmative claims of the estate against others not subject to your commissioner's supervision, which are exclusively within the purview of Virginia's court. Therefore, your commissioner declines to make any finding regarding rents that Jeffrey Fisher might owe to the estate. Your commissioner notes that this does not preclude the estate from pursuing the matter in the appropriate forum.

Respectfully submitted this 14<sup>th</sup> day of February, 2011.



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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 14<sup>th</sup> day of February, 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:

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Jeffrey Fisher  
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Steve Johnson, Trustee  
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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

3-7-2011  
Date

By: Nancy A. Danner  
Deputy Clerk

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