IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In re: Estate of Frances Gambaro, an incapacitated adult	Fiduciary No. FI-2009-0001400 Commissioner's Report

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

On August 14, 2009, this Court entered an order appointing Needham Mitnick & Pollack, PLC as guardian and conservator over the estate of Frances Gambaro, an incapacitated adult. In its order of appointment, the Court directed that the fiduciary "shall be entitled to be compensated for its services as fiduciary in connection with the administration of the Estate of Frances Gambaro at the then current hourly rate of the person performing the services at the time the services are rendered."

The fiduciary filed an inventory with your commissioner listing assets over which it has control as $174,753.75. The fiduciary filed a first and final account with your commissioner listing billing for fiduciary compensation totaling $25,510.00 and disbursements for fiduciary compensation of $6,000.00. The ward died on October 25, 2009, without sufficient assets to satisfy the total charges of the fiduciary. The fiduciary filed a claim in the amount of $20,738.41with your commissioner for the balance of their fees. Your commissioner advised the fiduciary that your commissioner did not have statutory authority to accept a claim in the conservatorship. Your commissioner is not aware whether the fiduciary has elected to pursue its claim with the administrator of the ward's decedent's estate, as the filings were waived in that estate pursuant to Virginia Code § 26-12.3. The allowable fiduciary fee for the same period for an estate of this size under Court's Fiduciary Compensation Schedule for Conservator for Incapacitated Adult would be $1,069.49. Your commissioner has not yet approved the first and final account.

On August 4, 2010, your commissioner notified the fiduciary of concerns regarding the reasonableness of its compensation in the first and final account. Your commissioner requested the fiduciary provide your commissioner with a categorization of the fees whether they were for guardian, conservator or legal services; and to provide your commissioner with an analysis of the reasonableness of the fees using the criteria set forth in Virginia Rules of Professional Conduct 1.5.

On September 20, 2010, the fiduciary responded to your commissioner. The fiduciary challenged whether your commissioner had the authority to require such a review, stating that "[t]he court order permits us to charge at our hourly rate for fiduciary services." Your commissioner respectfully disagrees. The Virginia Code provides that the commissioner of accounts "shall have a general supervision of all fiduciaries admitted to qualify in such court or before the clerk thereof and make all ex parte settlements of their accounts."[1] A commissioner, as a quasi-judicial officer charged with responsibility for fiduciary matters, has a duty to render a complete opinion on the matters that are before him. When a party brings an action to settle an account, the court has a duty "to try all the issues, administer full relief to the parties, and to either render an order for the amount found to be due, or to issue an order showing that there is nothing due. The court enjoys broad discretionary power in account matters to make any order or decree as justice requires."[2] The commissioner of accounts has a similar duty. The Circuit Court for the City of Norfolk had occasion to consider the limitations upon the inquiries of the commissioner of accounts in the matter of *Trustee's Sale of the Property of Willie Brown.*[3] The Court stated

> To perform his duties on behalf of the court, a Commissioner's authority must extend to every aspect of law or fact related to a fiduciary's duties, qualifications, and actions that may affect the rights of a beneficiary of an estate or a fund before him. No question of law, equity, or disputed fact concerning an account should be insulated from a Commissioner's inquiry. Were a Commissioner of Accounts to be prohibited from considering such matters, how could he accurately and effectively assist the court?

Thus, within the scope of the commissioner's statutory duties, the commissioner has broad authority to address all the issues affecting those duties.

Judge Lamb described the commissioner of accounts eloquently, stating

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[1] VA. CODE ANN. § 26-8.
[2] 1 AM. JUR. 2d *Accounts and Accountings* § 67 (2006).
[3] 67 Va. Cir. 204 (2005).

> If the probate courts are "the courts of widows and orphans", as they are sometimes called, the Commissioner of Accounts is the executive arm of the court, supporting the shield by which protection is afforded to those inadequately armed to protect themselves.[4]

Fundamental to the commissioner's oversight of fiduciaries is the review of the reasonableness of the fees fiduciaries charge. Virginia Code § 26-30 provides that "The 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 *Estate of Hyman J. Fine*, the Circuit Court of the City of Norfolk reviewed the commissioner's determination to reduce Crestar Bank's executor's fee from the amount dictated in its standard fee schedule to an amount that the commissioner determined to be reasonable.[5] The Court stated that the testator's agreement that the fee should be in accordance with the Bank's fee schedule did not establish a definite and ascertainable provision concerning the amount of the fee, as the fee schedule could change from time to time and there was no limit upon the amount of that fee.[6] The Court held that

> Absent a clear, definite provision setting the compensation of an executor, the Court had not only the authority but also the duty to inquire as to the reasonableness of the executor's compensation, This inquiry is normally done through the Commissioner of Accounts, the officer of the Court to whom this responsibility is delegated. His findings and recommendations are subject to review by the Court.[7]

In the opinion of your commissioner, when the Court authorizes a lawyer fiduciary to charge his or her standard hourly rate in connection with a matter under the supervision of your commissioner, the Court has not determined that that hourly rate is the standard for determining the

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[4] Lamb, VIRGINIA PROBATE PRACTICE § 107 (1957).

[5] In re Estate of Hyman J. Fine, 41 Va. Cir. 597 (Norfolk Cir. Ct. 1995).

[6] 41 Va. Cir. at 598-599.

[7] In re Estate of Hyman J. Fine, 41 Va. Cir. 597, 599 (Norfolk Cir. Ct. 1995). It should be noted that in 2005, the General Assembly amended Virginia Code § 26-30 to provide an express provision authorizing the adoption of institutional fiduciaries fee schedules in a will or trust; nevertheless, the General Assembly still allowed review of that fee for reasonableness if "such compensation is excessive in light of the compensation institutional fiduciaries generally receive in similar situations."

reasonableness of compensation to that lawyer for acting as a fiduciary. To the contrary, any fee calculated pursuant to that hourly rate is indefinite, subject to change, and without limit as to amount. In such circumstances, the Court and its commissioner have both the authority and the duty to review the reasonableness of the fees which the lawyer fiduciary seeks.

In its response of September 20, 2010, the fiduciary did address your commissioner's questions with regard to the fees billed in the first and final account. The fiduciary indicated that expenses advanced on behalf of the ward for carpet cleaning and window blinds were included in the legal bills and that the actual fiduciary fees charged were $25,510.00. Of this amount, the fiduciary estimated that $14,445.00 represented fees in connection with its role as conservator, $6,665.00 were fees related to its role as guardian, and $4,400.00 were fees related to its legal services to the ward. The fiduciary states that $11,437.50 of those fees were incurred post-death, for transferring conservatorship property, preparing the final account, and arranging for disposition of the ward's remains. The billing records submitted indicate that no more than $5,572.50 in fees were incurred after the ward's death on October 25, 2009. The fiduciary noted that its billing system did not permit it to distinguish between services by category and that the allocation was "our best estimate of how our time has been allocated between our work as guardian and as conservator, as well as legal work." The legal work consisted of reviewing and editing the proposed court order, and reviewing real estate contracts and settlement documents.

Rule 1.5 of the Virginia Rules of Professional Conduct governs the determination of the reasonableness of a lawyer's fee.[8] The rule requires that "a lawyer's fee shall be reasonable." In *Trotman v. Trotman*,[9] the Court stated that the word "reasonable" as used in Virginia Code § 26-30 "is but another way of saying that they [commissions] are to be measured by the conscience of the court."[10] While there is no hard and fast rule regarding the proper amount of fiduciary fees, the Court has stated that factors to be considered include: the value of the estate, the character of the work, the difficulties encountered, the results obtained, the responsibilities assumed, and the risks incurred.[11] These factors, however, do not stand alone. The

[8] *See* Dickerson v. Ford Motor Company, 74 Va. Cir. 509 (Roanoke Cir. Ct. 2008); O'Neil v. Chrysler Corp., 54 Va. Cir. 64 (Loudoun Cir. Ct. 2000).
[9] 148 Va. 860 (1927).
[10] *Trotman* at 868
[11] *Pritchett v. First Nat. Bank of Danville*, 195 Va. 406, 432, 78 S.E.2d 650, 653 (1953)

Court has further instructed that said factors are to be evaluated in light of the fiduciary's duty to exercise "the highest fidelity and utmost good faith" in their administration of the estate.[12]

While Virginia law does not forbid a fiduciary from hiring his own company to perform services for the estate he is administering, the Virginia Supreme Court has repeatedly stated that "[A fiduciary cannot] unite his personal and fiduciary character in the same transaction without consent of the *cestui que* trust."[13] Indeed, it is a long standing principle that

> as long as the confidential relation lasts, the trustee or other fiduciary owes an undivided duty to his beneficiary, and cannot place himself in any other position which would subject him to conflicting duties, or expose him to the temptation of acting contrary to the best interests of his original *cestui que* trust. The rule applies alike to agents, partners, guardians, executors and administrators, directors and managing officers of corporations, as well as to technical trustees.[14]

When the fiduciary engages itself to perform services for the ward's estate, it places itself in a position which inherently subjects it to conflicting duties.

In the instant case, the fiduciary estimated that $4,400.00 were fees related to its legal services to the ward. The legal work consisted of reviewing and editing the proposed court order appointing the fiduciary, and reviewing real estate contracts and settlement documents. Your commissioner is of the opinion that the fiduciary's hourly rate for legal services was reasonable; however, it appears that substantial legal work was performed in anticipation of the fiduciary's appointment. The fiduciary incurred $700 in legal fees for services prior to the hearing at which the Court appointed the fiduciary as conservator and guardian. These services involved principally review of the petition, order and guardian *ad litem* report. Your commissioner is of the opinion that the fiduciary's legal fees incurred prior to its appointment are not a proper expense of the estate, absent specific provision for those expenses in the Court's order of appointment. The conservatorship derives its existence from the entry of the Court's order appointing the fiduciary. Expenses that the fiduciary incurs in anticipation of that appointment are incurred in for the benefit of the

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[12] *Id.* at 412
[13] *Rowland v. Kable*, 174 Va. 343 at 368 (1940)
[14] *Id.* at 367

fiduciary and not for the benefit of the ward. Absent provision in the Court's order or specific statutory authority, these are not expenses of the conservatorship. The balance of the legal expenses is predominantly work in connection with the sale of the ward's real property. This process was nearly complete at the ward's death and there was some time pressure to complete the work in light of the exhaustion of the ward's other assets. Your commissioner is of the opinion that this legal work is reasonable in both rate and time. Your commissioner therefore allows the fiduciary payment of legal fees in the amount of $3,700.00. These fees are ample compensation for the complication and time pressure involved in the sale of the ward's property.

The fiduciary reports $14,445.00 in fees in connection with its role as conservator. Approximately $3,700 of those fees were incurred post-death, for transferring conservatorship property, preparing the final account, and arranging for disposition of the ward's remains. Your commissioner finds that the hourly rate at which the fiduciary billed for such services to be reasonable, in accordance with the Court's order of appointment. Your commissioner is concerned, however, with the hours billed. A detailed examination of the time records reveals charges disproportionate to the services in many instances. By way of example, the fiduciary billed 0.8 hours to prepare a bank deposit, 1.5 hours researching online prices for window blinds, 1.7 hours shopping for clothes, 4.7 hours traveling to and from the ward's condominium to meet carpet cleaners, 0.8 hours to transfer funds to a funeral account, 3.2 hours meeting window blinds installers and delivering clothes to the ward, and 1.1 hours exchanging slippers at Sears. The billing records are replete with similar examples.

Your commissioner notes that the fiduciary was appointed on August 14, 2009, and the ward died on October 25, 2009. Thus, approximately $11,700 of these fees were incurred in a period of only two months. The fiduciary noted that it had disputes with the ward's neighbors and certain of the ward's relatives which complicated its role; however, your commissioner finds that such conflicts are not unusual or novel in the administration of a conservatorship and there is nothing that the fiduciary has presented that indicates any undue complication in the estate.

Your commissioner is of the opinion that the analysis of Judge Ney in *Unger v. Beatty*[15] is on all fours with the instant case. Judge Ney stated

> The major reservation the Court has with the amount of fees claimed is that the total amount of the fees - albeit legitimately incurred - seem out of proportion to the nature of the lawsuit. The underlying suit, its successful defense, the fee claim were straightforward matters involving nothing especially complex. Simply put, this litigation should not have cost this much.[16]

In the instant case, this administration should not have cost this much. The total amount of the fees is out of proportion to the size of the estate and the administration was a straightforward matter involving nothing especially complex. As the Circuit Court of the City of Richmond noted, in *Iuorno v. Ford Motor Co.*, "[a]ttorneys should not be rewarded for excessively working a case simply because they know that their requested fees will be forthcoming."[17] This is the general rule throughout the United States.[18]

Your commissioner does recognize that disproportionate time is required at the beginning of a conservatorship to take charge of the assets of the ward and arrange for his care; however, an allowance of disproportionate charges is not the same as an allowance of exorbitant charges. Simply put, there was nothing novel or difficult in the instant proceeding; the fees charged exceeded the fee guidelines that this Court adopted more than tenfold; the fees exhausted the liquid resources of the ward without tangible benefit to the ward; there was no long term professional relationship with the ward; and the fiduciary bore no risk for payment of its fees other than its own actions in exhausting the ward's estate.[19] Your commissioner finds that the charges for conservatorship services in this estate are unreasonable and not a prudent management of the ward's estate notwithstanding the Court's authorization that the fiduciary may bill for conservatorship services at its usual and customary hourly rate. Your commissioner is of the opinion that a reasonable fee for the services rendered is $3,500.00. The fiduciary is

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[15] 52 Va. Cir. 289 (Fairfax 2000).
[16] 52 Va. at 293.
[17] 40 Va. Cir. 387 (1996).
[18] *See, e.g.*, In re Comstock, 664 N.E.2d 1165 (Ind. 1996); In re Estate of Langland, 2006 WL 1752261 (Mich. Ct. App. 2006); In re Coffey's Case, 880 A.2d 403 (N.H. 2005); In re Dorothy, 605 N.W.2d 493 (S.D. 2000).
[19] *See* Rule 1.5, Virginia Rules of Professional Conduct, setting out eight factors to be considered in determining the reasonableness of attorney's fees.

directed to reduce its claim for conservator services to the ward's estate by the sum of $10,945.00.

The fiduciary reported to your commissioner that $6,665.00 were fees related to its role as guardian. Approximately $1,710.00 were fees incurred after the death of the ward. Your commissioner notes that the fiduciary makes no distinction in its hourly rates between conservatorship and guardian services. While the services that a conservator routinely performs, such as the management and investment of assets, the accounting for receipts and expenditures, and the protection of the ward's estate, involve professional judgment and require a certain level of expertise, not all the services that a guardian routinely performs require the same level of skill or judgment. The guardian of the person of the ward often acts as a companion, a caretaker, and a personal assistant to the ward. The tasks can be as routine as accompanying the ward on a shopping trip, planning a birthday party or scheduling a hair appointment.

This Court has adopted fiduciary compensation guidelines for conservators but not for guardians. The Code does provide that a guardian is entitled to reasonable compensation for his or her services.[20] In the opinion of your commissioner, to the extent the conservator pays himself for services that the fiduciary rendered as guardian, there is an inherent conflict of interest which requires special scrutiny. *See discussion infra.* When the fiduciary engages itself to perform services for the ward's estate, it placed itself in a position which inherently subjected it to conflicting duties.

As a general rule, when the conservator and the guardian are the same person, your commissioner requires separate time records to support fees for guardian services. Moreover, as a general rule, your commissioner does not allow a professional fiduciary to charge at his or her professional hourly rate for guardian services. It is the opinion of your commissioner that any such compensation paid to a professional fiduciary serving as guardian should be commensurate with the fees charged by lay firms or individuals who routinely provide such services. In the instant case, the Court has allowed that the fiduciary may bill for guardian services at its hourly rate; however, these fees must be reasonable and the Virginia Supreme Court has determined that any fees must be evaluated in light of the fiduciary's duty to

[20] VA. CODE ANN. § 37.2-1022.

exercise "the highest fidelity and utmost good faith" in their administration of the estate.[21]

In the instant case, the fiduciary has, as a part of its duties and as a part of its charges to the ward's estate, arranged for carpet cleaning and installation of window blinds, sorted through boxes of personal items, shopped for clothes for the ward, delivered clothing to the ward and labeled the same, and purchased shoes and sweaters for the ward. These are necessary and reasonable services for the care and maintenance of the ward; however, it is neither necessary nor reasonable that such services be performed by lawyers billing at $250 per hour.

A conservator has a fiduciary duty to manage the property of his ward with "the judgment of care, skill, prudence and diligence . . . that a prudent person familiar with such matters and acting in his own behalf would exercise . . ."[22] In the opinion of your commissioner, it is reasonable that the fiduciary charge its normal hourly rate for the management of guardian services and for undertaking those guardian services that require professional skill and judgment; however, not all guardian services require such professional skill and judgment. In the case of guardian services that require no professional skill or judgment, such services are more properly delegated to commercial services which bill at substantially lesser rates, usually, in the experience of your commissioner, between $25 to $50 per hour.[23] Rates for managers of such care services are also less than the fiduciary's hourly rates, usually in the experience of your commissioner between $70 to $100 per hour.[24] The fiduciary has recognized the requirements of prudent management, noting that "we use the services of a geriatric care management agency to reduce costs in many instances." Nevertheless, the fiduciary's account reports substantial fees paid to the fiduciary at professional rates for non-professional services. In the instant case, the fees paid to care managers were limited to $845.00. The fiduciary charged $6,665.00 during the same period.

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[21] *Pritchett v. First Nat. Bank of Danville*, 195 Va. 406 at 412 (1953).

[22] VA. CODE ANN. § 26-45.1.

[23] According to the American Association of Homes and Services for the Aging, the national average hourly rate in 2008 for a certified home health aide was $32. The average hourly rate for non-certified workers was $19.

[24] *Cf.* In re Larry Banton, FI-2004-72484, CL-2006-999, Circuit Court of Fairfax County (Letter opinion dated June 26, 2007)(allowed $70 per hour as "reasonable fee").

To the extent that the fiduciary elects to perform such services through legal professionals, it has a fiduciary duty to the ward not to bill at rates in excess of those rates commercially available for the same services. As the Circuit Court of Warren County decided in the *Estate of Beulah Mae Stokes*,[25] when a fiduciary engages services at a rate significantly above the market rate charges for such services, the fiduciary fails to manage the estate with reasonable prudence. In such cases, the fiduciary will be responsible for the difference between the rates charged to the estate and the market rates for the same services.[26]

In the instant case, the fiduciary billed $6,665.00 for guardianship services at rates 2 to 5 times as high as market rates for the same services. Your commissioner notes that the fiduciary was appointed on August 14, 2009, and the ward died on October 25, 2009. Thus, these fees were incurred in a period of only two months. The fiduciary noted that it had disputes with the ward's neighbors and certain of the ward's relatives which complicated its role; however, your commissioner finds that such conflicts are not unusual or novel in the administration of a conservatorship and there is nothing that the fiduciary has presented that indicates any undue complication in the estate. Your commissioner finds that the charges for guardian services in this estate are unreasonable and not a prudent management of the ward's estate notwithstanding the Court's authorization that the fiduciary may bill for guardian services at its usual and customary hourly rate. In the opinion of your commissioner, a fee of $1,500 is a reasonable fee for the guardian services that the fiduciary rendered to the ward as reported on the second account. The fiduciary is directed to reduce its claim for services to the ward's estate by the sum of $5,165.

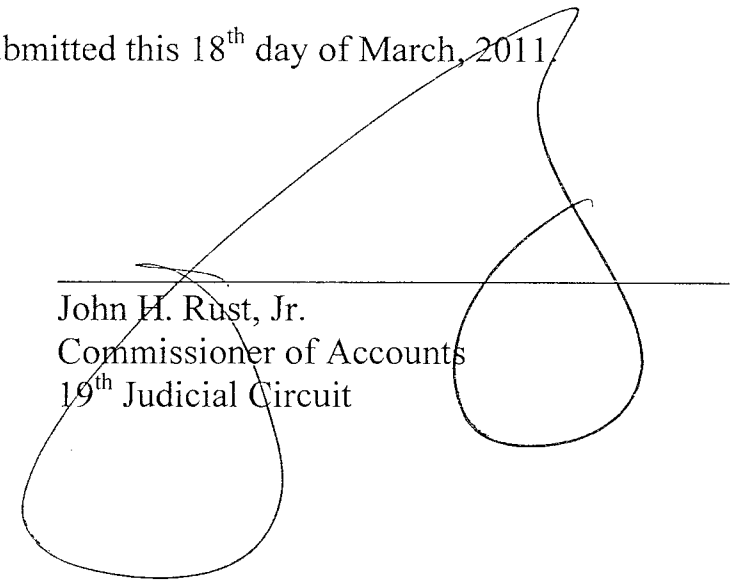
In summary, your commissioner finds that the fiduciary is entitled to reasonable compensation as follows: for legal services rendered to the above estate: $3,700; for conservator services rendered to the above estate: $3,500; and for guardian services rendered to the above estate: $1,500. Of this sum, the fiduciary has been paid $6,000.00. Your commissioner finds that the fiduciary may pursue a claim against the decedent's estate of the ward in an amount not to exceed $2,700.00. Based upon the fiduciary compensation actually received in the above estate, your commissioner is of the opinion that the payments to the fiduciary in the first and final account

[25] In re Estate of Beulah Mae Stokes, 37 Va. Cir. 3 (Warren County 1995).
[26] *Accord*, In re Larry Banton, FI-2004-72484, CL-2006-999, Circuit Court of Fairfax County (Letter opinion dated June 26, 2007).

may be approved. Nevertheless, there remain outstanding exceptions to the account that prevent the approval of the account at this time.

Your commissioner is of the further opinion that any fees, costs or expenses incurred in any objection to the findings in this report as to the reasonableness of the fiduciary fees are not properly expenses of the estate. Your commissioner directs that the fiduciary may not bill for its time or for any expense it may incur with respect to any exception to this report or other objection to the determination of reasonable fees herein without the express authorization of the Court or your commissioner.

Respectfully submitted this 18th day of March, 2011.



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

CERTIFICATE OF MAILING

I hereby certify that on this 18th day of March, 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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RLI Insurance Company
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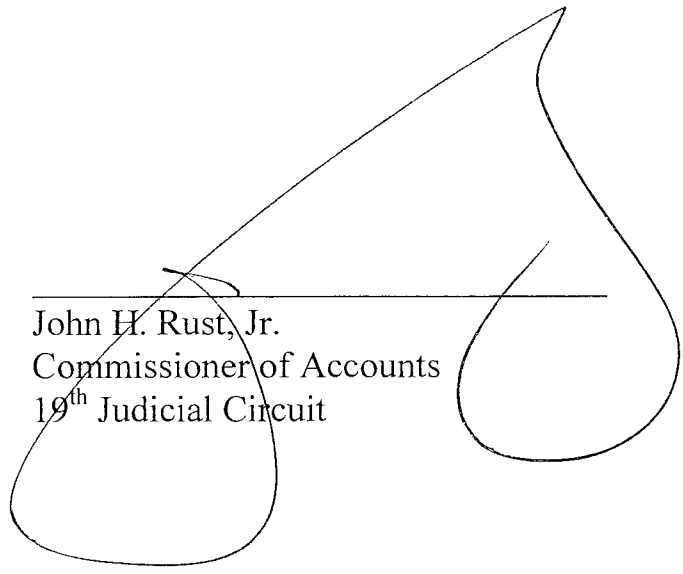

John H. Rust, Jr.
Commissioner of Accounts
19th Judicial Circuit