

RECEIVED JAN 31 2011

FC

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of Kalilu Jabbie, deceased | Commissioner's Report
Fiduciary Number FI-2008-00001212

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

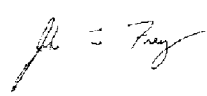
At the request of Kadiatu A. Belmoh and Joseph W. Stuart, co-guardians of the estate of Kawusu Jabbie, an unemancipated minor who is the sole heir at law of the above estate, the undersigned gave notice and, pursuant to Virginia Code § 26-29, setting the 7th day of December, 2010, at 1:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for a hearing upon:

- 1) whether the executor negligently liquidated the decedent's 401(k) incurring unnecessary taxes and penalties;
- 2) whether the executor improperly utilized estate assets for non-estate expenses; and
- 3) whether the executor's claimed compensation fell within the guidelines of this Court.

On November 22, 2010, your commissioner notified the interested parties that the hearing was re-scheduled to the 2nd day of December, 2010, at 1:00 p.m. at the same location.

At the said time and place, Mr. Stuart and Ms. Belmoh, appeared on behalf of the estate of Kawusu Jabbie seeking a determination of the above issues. Ibrahim Keita, administrator of the estate, appeared on behalf of the estate, together with his counsel, Mark E. Kellogg. Phatmata Kande-Kieta, the administrator's wife, also appeared.

On June 18, 2009, Ibrahim Keita filed an inventory for the estate wherein he reported assets totaling \$52,672.94, consisting of a 401(k) account in the amount of \$49,889.16 and a Wachovia checking account worth \$2,783.78. On February 12, 2010, the administrator filed a First Interim Account reporting disbursements of \$784.17 and a loss of \$8,828.36 when liquidating the 401(k). On July 19, 2010, the administrator filed a Second and Final Account reporting disbursements of \$19,863.74 and distributions to the beneficiary of \$23,196.67. On August 9, 2010, your commissioner received correspondence from Mr. Stuart objecting to several disbursements out of the estate account and requesting a hearing in regard to the objections.



Liquidation of the decedent's 401(k)

Mr. Stuart objected to the administrator's treatment of the decedent's 401(k) account. According to the Inventory filed with your commissioner, the decedent died owning a 401(k) account with Town & Country worth \$49,889.16. The administrator cashed in the 401(k) account on September 18, 2008, thereby incurring federal and state income taxes and interest totaling \$18,117.05.

At the hearing before your commissioner, Mr. Kieta testified that, sometime after his qualification as administrator, the decedent's employer called to inquire about the 401(k) account. The employer requested that Mr. Kieta provide a death certificate and a certificate of qualification. Mr. Kieta provided the documents to the employer and the employer liquidated the account on September 18, 2008, for \$41,060.80. The estate paid federal income taxes of \$14,698.00, Virginia income taxes of \$2,318.00 and interest and penalties of \$1,101.05. Mr. Kieta testified that he had no knowledge of the tax ramifications of liquidating the 401(k) account. Mr. Kieta also testified that there was ongoing litigation to determine the proper beneficiary of the estate. Mr. Stuart filed a lawsuit in November 2008 on behalf of the minor heir and against the decedent's companion that sought to clarify the decedent's proper heirs-at-law. The litigation continued until July 2010 when the Supreme Court of Virginia refused to hear the appeal from the decedent's companion.

Mr. Stuart asserts that the administrator did not confer with the beneficiary's guardian prior to cashing out the 401(k) and, had he done so, he could have saved tax liabilities in the amount of \$11,340.95. He based his calculations upon an assumption that distributions from the 401(k) would be made over a three-year period from 2008 to 2010. He further assumed that the taxes would be assessed at the minor heir's assumed individual tax rate with no exemptions. Your commissioner finds, however, that the litigation which Mr. Stuart instituted clearly demonstrated that there was a dispute as to who was the beneficiary of the estate and the estate could not prudently make any distribution until the suit was final and the beneficiary determined. Thus the assets had to remain in the estate and be taxed at the estate's tax rate.

The administrator received a lump sum distribution from the 401(k) account. A beneficiary of a 401(k) account may elect to receive distributions from a 401(k) account over a period of years provided that the entire amount is distributed by the end of the fifth calendar year following the decedent's death. I.R.C. §

401(a)(9)(B)(ii). The decedent died in 2006; therefore by law all distributions to the estate must be made by December 31, 2010. The administrator could have taken distributions from the 401(k) in 2008, 2009 and 2010 to reduce the annual income of the estate. Mr. Kellogg provided the following table which outlines the tax consequences of a lump sum distribution vs. three year distribution of the 401(k) assets.

| Year | Income | Federal Withholding | Virginia Withholding | Federal Tax | Virginia Tax |
|---|-------------|---------------------|----------------------|---------------------------|--------------|
| <u>Single Distribution in 2008</u> | | | | | |
| 2008 | \$47,774.00 | \$ 4,777.00 | \$ 1,911.00 | \$14,861.00 | \$ 2,345.00 |
| | | | | \$14,861.00 | \$ 2,345.00 |
| <u>Distribution Spread over Three-year Period</u> | | | | | |
| 2008 | \$15,925.00 | \$ 1,592.00 | \$ 637.00 | \$ 4,160.00 | \$ 604.00 |
| 2009 | \$15,925.00 | \$ 1,592.00 | \$ 637.00 | \$ 4,117.00 | \$ 604.00 |
| 2010 | \$15,924.00 | \$ 1,593.00 | \$ 637.00 | \$ 4,117.00 | \$ 604.00 |
| | | | | \$12,394.00 | \$ 1,812.00 |
| | | | | Difference in Federal Tax | \$ 2,467.00 |
| | | | | Difference in State Tax | \$ 533.00 |
| | | | | Total Difference | \$ 3,000.00 |

Your commissioner finds that had the administrator elected to take distributions spread over the maximum allowed time period, he would have saved approximately \$3,000.00, consisting of \$2,467.00 in federal income tax and \$533.00 in state income tax.

As is demonstrated by the above analysis, these are matters of some complexity, which are not within the experience of most lay fiduciaries. The additional taxes that the estate paid are less than the loss it incurred from the changes in market value of the 401(k) account. The fiduciary qualified almost two years after the decedent's death. He was a stranger to the estate, and stepped into the role because he had been a friend of the decedent. The fiduciary may have been remiss in not consulting competent tax counsel prior to the liquidation of the 401(k) account; however, your commissioner is of the opinion that his failure to engage counsel was not done in bad faith and does not rise to the level of a breach of fiduciary duty. Your commissioner declines to surcharge the fiduciary for the additional taxes the estate paid.

Use of estate assets for non-estate expenses

Mr. Stuart also objected to the administrator's use of estate assets. Specifically, Mr. Stuart alleged that the administrator made nine payments to T-Mobile and 13 payments to unknown payees for a total of \$3,386.76. Mr. Stuart claims that the payments were not made for estate debts and were a misapplication of estate funds.

The administrator did not contest that the payments were made from the estate account. He testified at the hearing before your commissioner that his daughter, Isata Kieta, had found the estate checkbook and used it and the debit card for her personal benefit over a period of several months from August 2009 to April 2010. The administrator's wife, Phatmata Kande-Kieta, testified that she found the checkbook in her daughter's purse in April or May 2010. The administrator testified that he did not discover his daughter's misuse of the funds earlier because he had been out of the country for seven months and no one else opened estate mail or reconciled the bank statements. Mr. Kieta testified that Isata paid back \$800.00 for the misappropriation and that he deposited it into the estate account.

Your commissioner finds that Mr. and Mrs. Kieta's testimony is consistent with the list of expenses provided by Mr. Stuart. The estate bank statements include payments to T-Mobile with Isata Kieta's name noted on the disbursement. The estate bank statements also include a deposit of \$800.00 into the estate account on July 12, 2010, consistent with Mr. Kieta's testimony. Your commissioner finds that a total of \$3,386.76 of estate assets were used for non-estate expenses. Your commissioner also finds that \$800.00 was reimbursed to the estate. Therefore, Mr. Kieta is responsible to reimburse the estate for \$2,586.76 of inappropriate expenses.

Statutory Elections

Kadiatu Kamara, the companion of the decedent, filed elections for a family allowance and for exempt property on October 28, 2008. The decedent died on August 31, 2006. The litigation that Mr. Stuart filed has determined that Ms. Kamara is not a proper party to make such elections; moreover, the elections were filed more than one year after the decedent's death. Based upon the foregoing, your commissioner is of the opinion that the elections are ineffective and are therefore denied.

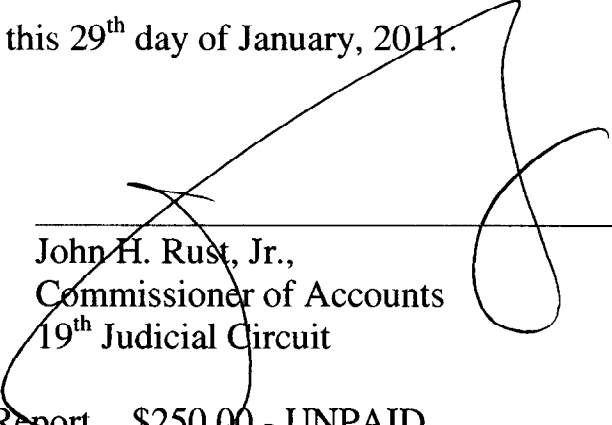
Fiduciary compensation

Lastly, Mr. Stuart objected to the administrator's claimed fiduciary compensation. According to the Second and Final Account for decedent's estate, Mr. Kieta claimed \$2,271.29 in fiduciary compensation. The account also indicates that the estate paid the firm of Becker, Kellogg & Berry, P.C. a total of \$5,133.40 for services related to the administration of the estate. Mr. Stuart states that the inventory and accounts appear to have been prepared by counsel and that due to the impropriety of the use of estate's assets, no fee should be payable to the administrator. Your commissioner finds that the majority of Mr. Kellogg's time involved litigation services or other legal services which are beyond the normal scope of a fiduciary's duties. Based upon your commissioner's review of the legal billing statements submitted, your commissioner finds that the total charges for preparation of the inventory and accounts and other duties of the fiduciary was \$1,770. This court's guidelines provide that "where the . . . Administrator hires an attorney or accountant to perform the routine duties of the . . . Administrator, those fees shall be deducted from the compensation due the . . . Administrator."

This court's guidelines for fiduciary compensation would allow a fiduciary fee of \$2,633.65 for an estate of this size, somewhat more than the fiduciary has taken. Your commissioner further finds that the fiduciary has managed the estate for a number of years and has been required to deal with complex litigation as a part of those responsibilities. Based upon the foregoing, your commissioner is of the opinion that the fiduciary is entitled to a fee of \$2,000 in addition to the payments to Mr. Kellogg's firm to handle routine matters of administration. Your commissioner directs that the fiduciary refund the sum of \$271.29 as excess fiduciary compensation.

In accordance with the findings above, Mr. Kieta is liable to the estate for \$2,858.05, including \$271.29 in excess compensation and \$2,586.76 in inappropriate expenditures. As the estate has been completely distributed, and Kawusu Jabbie is the sole heir-at-law, Mr. Kieta shall pay \$2,858.05 directly to the guardians of the estate of Kawusu Jabbie and shall submit appropriate vouchers evidencing such distribution to your commissioner.

Respectfully submitted this 29th day of January, 2011.



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

Commissioner's Fee for this Report \$250.00 - UNPAID

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of January, 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:

Ibrahim Keita, Executor
12000 Rayborn Creek Drive
Manassas, Virginia 20109

Joseph W. Stuart, Esq.
10427 North Street, Suite 200
Fairfax, Virginia 22030

Mark E. Kellogg, Esq.
5501 Backlick Road, Ste. 220
Springfield, Virginia 22151

Kadiatu A. Belmoah
12 Pierce St.
Staten Island, New York 10304

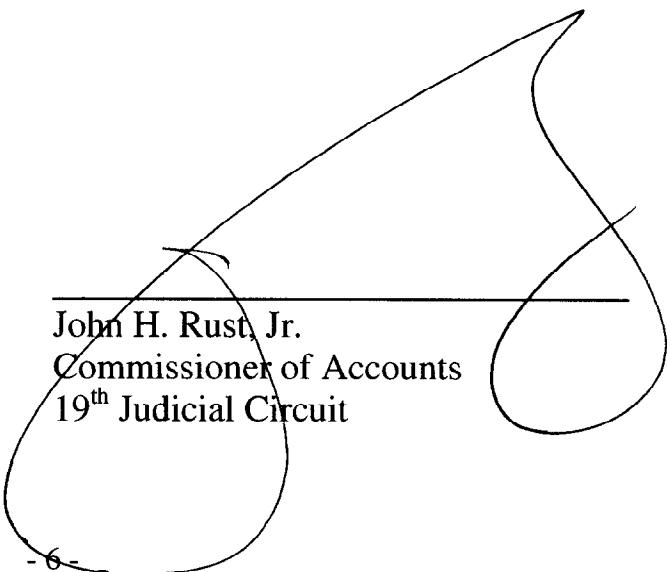
Kawusu S. Jabbie
1406 Merriam Ave., Apt. 3E
Bronx, New York 10452

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

02/16/11
Date

By: 
Deputy Clerk



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