IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

| | |
|---|---|
| In Re: The Estate of Robert William MacFarlane, Deceased<br>Fiduciary Number FI-2003-0072218 | Commissioner's Report |



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

At the request of Gene D. Robinson, attorney for the American Heart Association ("AHA"), a beneficiary of said estate, the undersigned gave the notice required under Virginia Code § 26-29, setting the 4th day of June, 2009, at 10:00 a.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for a hearing upon: 1) distributions made to the estate beneficiaries; 2) compensation disbursed for fiduciary and professional fees; and 3) losses incurred on the fiduciary's investments of the estate assets. At the said time and place, Gene D. Robinson, counsel for AHA appeared, together with his paralegal Susan Collins, seeking to support AHA's objections to the distributions, disbursements, and losses which the estate has reported. Agnew Chris Swynford, executor for the estate, appeared on behalf of the estate. Donna Ricks, a beneficiary of the estate, appeared along with her attorney, John McGavin, to support the proprietary of the distributions to Ms. Ricks. By letter from its associate corporation counsel, The American Cancer Society joined in the petition of AHA.

Mr. Swynford concurs with AHA that there were excessive distributions to Donna Ricks, a beneficiary of the estate, to the detriment of the estate's charitable beneficiaries. Mr. Swynford defended the estate's fiduciary fee disbursements, the employment of tax and investment professionals, and asserts that he should not be personally liable for investment losses that the estate has incurred.

***Distributions to the Beneficiaries***

The decedent's Last Will and Testament directs the distribution of the residue of the estate as follows: the decedent's home, car, and one-half of the residue of the estate to Donna Ricks; one-fourth of the residue of the estate to the American Cancer Society; and one-fourth of the residue of the estate to the

American Heart Association.[1] The Codicil to the Will provides that if the disposition of the decedent's estate is subject to wealth transfer taxes, then the executor should pay additional funds to the charities in order to lower the taxable value of the estate to an amount that would no longer be subject to a wealth transfer tax; the remaining amount of the estate would then be distributed according to the proportions expressed above.[2]

The executor reported the gross probate estate on the inventory as $941,850.01, below the threshold amount for imposition of the Federal estate tax.[3] The gross taxable estate also included the decedent's house, appraised at $445,000.00. Fifty percent of the decedent's residuary estate was left to charitable beneficiaries, reducing the net taxable estate below the $1,000,000 threshold for imposition of the Federal estate tax. Your commissioner finds that the estate is not subject to any wealth transfer taxes and therefore should be distributed according to the terms of the decedent's will without reference to the additional provisions contained in the codicil.

After the payment of the estate's debts and expenses, the executor distributed $863,912.66 to the beneficiaries from the decedent's residual estate. Your commissioner finds, therefore, that Ms. Ricks is entitled to a distribution of $431,956.33 and the American Cancer Society and the American Heart Association are each entitled to a distribution of $215,978.16. The executor in fact distributed $534,253.41 to Ms. Ricks, $164,829.62 to the American Cancer Society, and $164,829.63 to the American Heart Association. The executor based this distribution upon the assumption that the codicil required that Ms. Ricks receive the maximum amount exempt from Federal estate taxation. In the opinion of your commissioner this interpretation of the will and codicil is in error, as the codicil in fact only provides for an increase in the distributions to the charitable beneficiaries if necessary to avoid taxation. In the opinion of your commissioner, the codicil does not contemplate any increase in the distribution to Ms. Ricks, and your commissioner so finds. Based upon the foregoing, your commissioner finds that The American Cancer Society and the American Heart Association are each entitled to an additional distribution in the amount of $51,148.54.

---

[1] Last Will and Testament of Robert William MacFarlane executed August 12, 1997, §Third through Fifth.
[2] First Codicil to Last Will and Testament of Robert William MacFarlane executed April 8, 2003, § 3.
[3] *See* First Account. The decedent passed away on December 13, 2003, at which time the exemption from Federal estate taxes was $1,000,000.

Your commissioner is of the opinion that the executor is personally liable to make distribution of such amounts to the American Cancer Society and the American Heart Association. In Virginia, a fiduciary has personal responsibility for overpayment of creditors or incorrect distribution of the estate to the heirs.[4] While in the instant case the fiduciary may seek reimbursement to the estate from Ms. Ricks in the amount of $102,297.08; your commissioner finds that Agnew Swynford is personally liable to the charitable beneficiaries for $102,297.08, the amounts inappropriately paid to Ms. Ricks.

AHA requested, in their correspondence of June 17, 2009, an award of interest on their unpaid residual share from the date on which the correct distribution should have been paid until such date as the correct distribution is actually paid. Pursuant to Virginia Code § 64.1-68 interest at 6% (*see* Virginia Code § 6.1-330.53) begins to run on monetary bequests which are paid more than one year after a testator's death. In the instant case, your commissioner is not presented with the delinquent payment of a specific monetary bequest, rather the fiduciary made a mistake in the payment of distributive shares from the residuary of an estate. Virginia Code § 64.1-68 does not apply to distributions of residual shares. Therefore, one must look to general law to determine the availability of interest prior to the determination of the claims of the charitable beneficiaries as set forth in this hearing report.

In Virginia, interest upon a judgment award is mandatory post-judgment; whether pre-judgment interest is allowed is in the discretion of the trier of fact.[5] In fiduciary matters, it is generally held that the fiduciary is free from personal liability for interest where the delay is reasonable and chargeable with interest where the delay is determined to be unreasonable.[6] Your commissioner notes that some courts of other states have held personal representatives liable to beneficiaries for interest when distributions were made erroneously due to a

---

[4] *See Herelick v. Southern Dry Goods & Notion Co., Inc.*, 139 Va. 121, 123 S.E. 529 (1924) (A fiduciary is personally liable for overpayment to creditors beyond their pro rata share of an estate.); *Lawrason v. Davenport*, 6 Va. 95, 1799 WL 376 (Va.) (After an administrator has made distribution of all the estate, if others, who are entitled to distribution appear, he will be liable to them for their shares of the fund, though he made distribution without knowledge of their existence.). *See generally* 31 AM. JUR. 2d *Executors and Administrators* § 963 (When an administrator negligently fails to ascertain the identity of heirs entitled to share the estate and as a consequence makes distribution to the wrong persons, the administrator and surety are personally liable to the beneficiaries legally entitled to receive the assets, even if distribution was made in good faith and in ignorance of the existence of the person omitted, and in reliance on counsel. However, he may recover back amounts erroneously paid.)

[5] *Upper Occoquan Sewage Authority v. Blake Construction, Inc.*, 275 Va. 41, 655 S.E.2d 10 (2008). *See generally* Virginia Code 8.01-382.

[6] Harrison, WILLS AND ADMINISTRATION § 517 (3d. ed. 1989).

mistake of either law or fact from the time when the distribution would otherwise have been made.[7]

In the instant case, the fiduciary made residual distributions to Ms. Ricks in the amount of $212,958.46 on October 29, 2004, $236,294.95 on October 26, 2005, and $75,000 on December 19, 2005. He made distribution of the balance of the estate to the charities on December 29, 2005. AHA first made a claim to your commissioner on March 23, 2007, received on March 27, 2007, for payment of the amount it was otherwise due if the distributions had been correct. The fiduciary received a copy of that correspondence. The American Cancer Society joined AHA in its claim on April 2, 2007. The parties attempted to negotiate a settlement of the matter from the spring of 2007 until AHA requested the hearing before your commissioner on May 27, 2009.

Your commissioner is of the opinion that the fiduciary made the incorrect distributions acting in good faith reliance upon an incorrect interpretation of the will and your commissioner so finds. The claimants delayed seeking redress for the incorrect distributions for more than two years after initially asserting their claim. The fiduciary faced significant legal issues if he sought recovery of the excess distributions from Ms. Ricks, absent a definitive determination whether his interpretation of the will and codicil was correct. Your commissioner finds that the fiduciary was not unreasonable to delay distribution to the charities until such time as there was such a definitive determination. For those reasons, your commissioner declines to impose an award of pre-judgment interest against the fiduciary. Interest shall run upon the amount of the incorrect distributions at the judgment rate from the date of this report.

***Fiduciary and Professional Fees:***

Under the fiduciary fee guidelines that this Court has established, an executor is entitled to a fee of approximately $44,210.61 when administrating an estate this size. The accounts submitted for the estate demonstrate that the executor took compensation of only $34,829.61. In addition, the accounts show that the estate paid an accountant for the preparation of the first and second accounts of the estate and for tax work. The estate also paid an advisor for

[7] *See e.g. St. Mary's Hospital v. Perry*, 152 Cal. 338, 92 P. 864 (1907) (Where an executor arbitrarily refuses to pay money over to a legatee, even though under a mistaken belief of right, interest is properly allowable from the time when the payment should have been made.) *See generally*, 18 A.L.R.2d 1384, *Personal liability of executor or administrator for interest on legacies or distributive shares where payment is delayed.*

investment advisory services. AHA alleges that these professional services provided to the estate for accounting services, tax work and investment advice should be deducted from the executor's 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." Conversely, when a fiduciary employs a professional to perform duties that should be discharged by the fiduciary, the fees of such a professional should be deducted from the compensation due the fiduciary. In your commissioner's opinion, this rule does not apply to reasonable and necessary fees paid to an accountant or to an attorney or to another professional for tax work that is both beyond the capability of a lay fiduciary and that is reasonably necessary for the orderly administration of the estate. As Virginia Code §26-30 makes clear, reasonable expenses of such services are allowed in addition to the fiduciary fee.

In the instant case, the executor paid an accountant $6,300.00 for the preparation of the estate's accounts and $7,100.00 for the estate's tax work. As preparing and filing accounts are generally duties performed by a fiduciary, such payment should typically be deducted from the fiduciary's compensation; however, a review of the accounts shows that the executor did in fact deduct these fees from his total fiduciary compensation. Furthermore, your commissioner finds that a tax specialist was both reasonable and necessary for the orderly administration of the estate and is of the opinion that the accountant's fee for tax work should be allowed in addition to the fiduciary's compensation. Therefore, your commissioner finds that has been no double payment of fiduciary compensation and that the executor does not owe the estate any reimbursement for such fees.

In addition, the executor expended $12,358.00 employing an investment advisor to assist in the prudent investment of the estate's assets during the administration of the estate. When a fiduciary employs an investment advisor, the advisor's fees, if reasonable, are generally not deducted from the fiduciary's compensation. Your commissioner finds that the estate employed the decedent's personal investment advisor and that the estate paid the advisor on the same schedule at which the decedent had paid the advisor during his life. Your commissioner is of the opinion that retaining a decedent's investment advisor during the course of administrating his estate is reasonable and that

therefore the fees for such services should not be deducted from the fiduciary's compensation.

***Capital Losses:***

The estate incurred a net capital loss of $10,650.62 after the fiduciary purchased and sold stocks subsequent to the decedent's death. In Virginia, all fiduciaries must comply with the Prudent Investor Rule.[8] The rule sets forth that a fiduciary:

> "shall invest and manage [estate] assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the [fiduciary] shall exercise reasonable care, skill and caution. A [fiduciary's] investment and management decisions respecting individual assts shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the estate."[9]

Furthermore, "compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of the [fiduciary's] decision or action and not by hindsight.[10] Where a fiduciary acts in good faith in the exercise of fair discretion, and in the same manner in which a prudent man would act in regard to his own property, a court will not hold the fiduciary liable for any loss that occurs.[11]

AHA alleges the fiduciary failed to make reasonable investments during his time of administration. AHA has the burden of producing evidence that the fiduciary's investments were unreasonable or inappropriate. Such proof generally must come from an expert witness.[12] Your commissioner finds that AHA failed to produce sufficient evidence that the fiduciary's investments were unreasonable or inappropriate. Therefore, your commissioner is of the opinion

---

[8] Va. Code Ann. § 26-45.13 (The prudent Investor Rule applies to the personal representative of an estate).
[9] Va. Code Ann. § 26-45.4.
[10] Va. Code Ann. §26-45.9.
[11] *See Clemons v. Dennis*, 165 Va. 18, 181 S.E. 387 (1935) (Fiduciary was not held liable for losses on investments in an insolvent bank when fiduciary did not know the bank was insolvent at the time of investment.)
[12] See: *Feld v. Priebe*, 2004 WL 2999114, Not Reported in S.E.2d (Va.Cir.Ct.) (Without expert testimony, the beneficiary failed to prove the investments made by the fiduciary were inappropriate.)

that the fiduciary should not be held personally liable for losses incurred as a result of investments made during the fiduciary's administration of the estate.

Respectfully submitted this 4th day of September, 2009.

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

Commissioner's Fee for this Report $350.00 - UNPAID

cc: Agnew Chris Swynford, Executor
John McGavin, Esquire
Gene Robinson, Esquire
Bill M. Roberts, Esquire

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

9/24/09
Date

By: _____
Deputy Clerk