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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of Patricia J. O'Brien, Deceased | Commissioner's Report
Fiduciary No. FI-2008-0001763 | of Debts and Demands

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

At the request of Michael H. Doherty, administrator for the above estate, the undersigned gave the notice required by Virginia Code § 64.1-171, setting the 7th day of July, 2010 at 1:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for receiving proof of debts and demands against the estate of Patricia J. O'Brien. At the said time and place, Michael H. Doherty appeared on behalf of the estate. John O'Hara appeared, along with counsel, Giancarlo Campagnaro, in support of his claim against the estate. Beneficiaries Nancy Alexander, Kevin O'Brien, Maryanne Boster and Timothy O'Brien appeared, along with counsel, William F. Krebs. Also in attendance were Patricia O'Brien, Jane O'Hara, Christine Kiely Wilkerson, Nancy Yonehiro, Maryanne Boster and Philip Boster. Upon hearing the testimony of Mr. and Mrs. O'Hara, the hearing was continued to August 11, 2010 at 9:30 a.m. At said time, all of the above named parties again appeared. In addition, Bridget Czapiewski appeared.

At the conclusion of the hearing, the parties agreed to submit closing briefs in lieu of closing arguments. The claimant's brief was submitted on September 7, 2010. Mr. Doherty submitted a brief on behalf of the estate on September 21, 2010. The objecting beneficiaries submitted a brief on September 21, 2010.

On July 27, 2009, John O'Hara filed a claim against the estate of Patricia J. O'Brien in the amount of \$60,157.18, representing one-third of the costs associated with "the addition to my home for mother-in-law accommodations." On June 15, 2010, the administrator notified Mr. O'Hara that the estate was disputing his claim. Your commissioner notes that Mrs. O'Hara was one of the original fiduciaries for this estate, qualifying with her two sisters on November 19, 2008. At no time during her administration of the estate did she advise her sisters of her husband's claim nor was any claim filed during her administration.

At the hearing before your commissioner, the claimant testified that there was not a written contact between himself and the decedent regarding the home renovations and no other written agreement upon cost sharing. His claim stems from an alleged oral agreement whereby the decedent would pay one-third of the costs associated with renovations to his residence. At the hearing, the claimant's

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wife, Jane O'Hara, testified that Mrs. O'Brien had often spoken of her desire to move in with the O'Haras and in the fall of 2005 "she decided she was ready." Mrs. O'Hara testified that she and her mother agreed that the O'Haras would get their house ready for Mrs. O'Brien to move in and Mrs. O'Brien would pay one-third of the costs associated with the needed renovations. Mrs. O'Brien was to pay the O'Haras when she sold her home.

On December 24, 2005, Mr. O'Hara entered into a contract with a building contractor to begin renovations on his home. The renovations began in May 2006. Mrs. O'Hara testified that she and her husband often brought Mrs. O'Brien to their home while the renovations were being done and that she and her mother had "more than a few" discussions about the renovation designs. Mrs. O'Hara testified that the O'Haras planned that Mrs. O'Brien would move into the O'Haras' former master bedroom on the main floor of the home. The contractor built a second story with a new master bedroom and bathroom for the O'Haras to occupy. Mrs. O'Hara stated that it was necessary to renovate most of the main floor of the home in order to make it wheelchair accessible, as her mother used a wheelchair most of the time. Mrs. O'Hara also stated that the bedroom on the main floor was expanded in order to accommodate her mother's desire to have her own washer and dryer. In the main floor master bathroom, Mrs. O'Hara testified that they removed the old bathtub and put in a rain shower "so [Mrs. O'Brien] could have a chair in there with a door that opened out." The O'Haras also contracted to have renovations made to the front porch and rear deck. The claimant presented invoices evidencing total renovation costs of \$227,587.30.

The claimant submitted copies of two \$10,000 checks that Mrs. O'Brien had written him on January 3, 2007. According to Mr. O'Hara's testimony, Mrs. O'Brien gave him the checks in order to expedite the home renovations. Mr. O'Hara further testified that a few days later, Mrs. O'Brien asked that he give her \$5,000 back because she was running low on money. When questioned about the amount, Mrs. O'Hara testified that \$20,000 was "mother's standard" and that she had been known to give her children \$20,000 checks as gifts on numerous occasions. Mr. O'Hara also testified that the heating system in the house failed about the same time as the checks were written and among the invoices presented for improvements were payments of \$3,400 on January 5, 2007 to replace the furnace.

In support of his claim, Mr. O'Hara presented the testimony of the decedent's daughter, Patricia Walsh, the decedent's granddaughter, Christine Kiely Wilkerson and the O'Haras' friend, Bridget Chapiewski. Ms. Walsh testified that

in January 2005, Mrs. O'Brien told her that she was "going to live with Jane and give her all my money." She further testified that in March 2007 she remembered her mother saying that she wanted to "buy a room in John's house and give him about \$42,000." However, Ms. Walsh acknowledged that she was not aware of the particular details of her mother's agreement with the O'Haras. Ms. Wilkerson testified that her grandmother had often mentioned her desire to move in with the O'Haras and that, based on conversations with her, she believed that Mrs. O'Brien was to pay one-third of the renovation costs. She further testified that she could not recall any specific numbers being mentioned in regards to the costs of the renovations. Ms. Chapiewski testified that during visits to the O'Haras' home she had had discussions with Mrs. O'Brien regarding her desire to move in the O'Haras. Ms. Chaiewski stated that Mrs. O'Brien told her that "if John would take care of getting it done, she was going to pay for it," but that Mrs. O'Brien never mentioned a specific dollar amount or percentage that she had agreed to pay the O'Haras.

The decedent's daughters, Maryann Boster and Nancy Alexander, testified that their mother often spoke of moving in with one of her children. They each stated that their mother had talked about moving in with them at various times after their father passed away, and that at one point, Mrs. O'Brien had paid to have an architect prepare some drawings of an addition to Nancy's home that would allow Mrs. O'Brien to move in with her. Ms. Boster and Ms. Alexander each testified that, although they were aware that the O'Haras were renovating their home, they did not have any knowledge of the alleged agreement between the O'Haras and Mrs. O'Brien.

The decedent's sons, Timothy O'Brien and Kevin O'Brien each testified that they did not have any knowledge of the alleged agreement between the O'Haras and Mrs. O'Brien. Kevin O'Brien stated that he had visited the O'Haras' home during the renovations and had reviewed the renovation of the main floor master bathroom with Mr. O'Hara. He testified that, in his opinion, the bathroom was not handicapped accessible. When asked for the basis of his opinion, Mr. O'Brien stated that he is the Deputy Director of Building Services at Nassau Community College and that, as a part of his job, he oversees the ADA access for forty-nine buildings. Mr. O'Brien went on to describe a number of features that must be present in order for a bathroom to be wheelchair accessible, including a sufficient turning radius, grab bars, a front approach sink and insulated pipes. He stated that none of these features were present in the O'Hara's main floor master bathroom.

Testimony at the hearing reflects that sometime between January and March 2007, Mrs. O'Hara and Mrs. O'Brien had an argument and did not speak again until just prior to Mrs. O'Brien's death in October 2008. On March 17, 2007, Mrs. O'Hara sent her siblings an e-mail stating "we will not be taking Patricia O'Brien into our home." Mrs. O'Hara stated that she sent the email because her siblings had taken complete control of her mother's finances, that they would not share any information about the finances with her, and that she "could not afford to take care of [Mrs. O'Brien] without the money." In July 2007, Mrs. O'Brien moved into an assisted living facility. Mrs. O'Brien never moved into the O'Haras' home. After Mrs. O'Brien moved into the assisted living facility, she placed her home on the market. It did not sell until July 2008. At that time, the decedent made no payment to the O'Haras and the O'Haras made no claim for any such payment.

As the claimant seeks to enforce an alleged oral contract entered into with a party who is now deceased, his testimony must be viewed in accordance with the corroboration requirements set forth in Virginia Code § 8.01-397, which provides that in an action against 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." Therefore, in order for Mr. O'Hara's claim to be allowed, he must provide sufficient corroborative evidence to support his assertion that he and the decedent had entered into a legally enforceable oral contract.

In Virginia, there is no hard and fast rule to determine what constitutes sufficient corroborative evidence; rather, each case must be decided on its own facts and circumstances;¹ however, it is clear that the corroboration must not come solely from the mouth of the surviving witness.² Rather, such corroboration must be supplied by evidence which tends in some degree to independently support the elements essential to the interested party's case.³ The issue in the present case, therefore, is whether the claimant has provided corroborating evidence sufficient to prove the existence of a legally enforceable oral contract between the decedent and himself.

For an oral contract to be valid and enforceable, the law requires that the terms be "reasonably certain, definite and complete to enable the parties and the courts to give the agreement exact meaning."⁴ Your commissioner is of the

¹ *Davies v. Silvey, Adm'x*, 148 Va. 132 (1927); *Burton's Executor v. Manson*, 142 Va. 500 (1925).

² *Johnson v. Raviotta*, 264 Va. 27 at 36.

³ *Id.* at 32.

⁴ *Smith v. Farrell*, 199 Va. 121, 128 (1957).

opinion that Mr. O’Hara has not provided sufficient corroborative evidence to support a finding that he and the decedent entered into a legally enforceable oral contract with certain and definite terms, as required by law. The strongest corroborative evidence would be written evidence, such as a memorandum or note written by the decedent acknowledging her agreement with the Mr. O’Hara.⁵ The claimant has been unable to present any such written evidence that would support the existence of a contract between himself and the decedent. Although the invoices presented are proof that the claimant paid \$227,587.30 for home renovations between 2006 and 2009, the invoices do not speak to the existence of a contract between the claimant and the decedent in connection with said renovations. Additionally, the two \$10,000.00 checks which Mrs. O’Brien gave Mr. O’Hara in January 2007 do not support the existence of any such contract, particularly in light of Mrs. O’Hara’s testimony that \$20,000.00 was her mother’s standard gift to her children and in view of the emergency need to replace the heating system at that time.

In the absence of written evidence, courts look to testimony of disinterested parties to corroborate the testimony of an interested party; however, Virginia case law makes it clear that the testimony of another interested party is insufficient to meet the corroboration requirement.⁶ Any person with a “direct pecuniary interest in the outcome of [the case]” is deemed an interested party.⁷ Therefore, as a matter of law, Mrs. O’Hara’s testimony is insufficient to corroborate the claimant’s testimony because, as the claimant’s wife, she has a pecuniary interest in common with the claimant.⁸

Therefore, the only evidence which could potentially corroborate Mr. O’Hara’s testimony is the testimonies of the Patricia Walsh, Christine Kiely Wilkerson and Bridget Chapiewski.⁹ None of these witnesses were able to corroborate the essential elements of the alleged contract. Although each witness testified that they had heard the decedent state that she wanted to move in with the O’Haras, the testimony of each varied significantly in regards to the details of the arrangement. Ms. Walsh stated that in 2005 the decedent told her she was “going to live with Jane and give her all my money,” and then later in 2007, the decedent stated that she wanted to “buy a room in John’s house and give him about

⁵ See, e.g. *Purcell v. Purcell*, 188 Va. 91, 93 (1948).

⁶ *Johnson v. Raviotta*, 264 Va. 27, 35 (2002).

⁷ *Id.*

⁸ *Id.*

⁹ Although Patricia Walsh and Christine Kiely Wilkerson are relatives of the claimant, Virginia courts have held that relation alone does not make a witness an “interested party” for the purpose of potentially providing corroborating evidence pursuant to Va Code § 8.01-397. See *Johnson v. Raviotta*, 264 Va. 27, 35 (2002).

\$42,000.” Ms. Wilkerson stated that she hadn’t heard the decedent mention any specific numbers, but that she thought she remembered her saying she would pay one-third of the renovation costs. Ms. Wilkerson’s testimony, although similar to that of the claimant’s was uncertain and vague. She could not state when or where she learned of the agreement. Ms. Chapiewski was also unable to corroborate the specifics of the alleged contract.

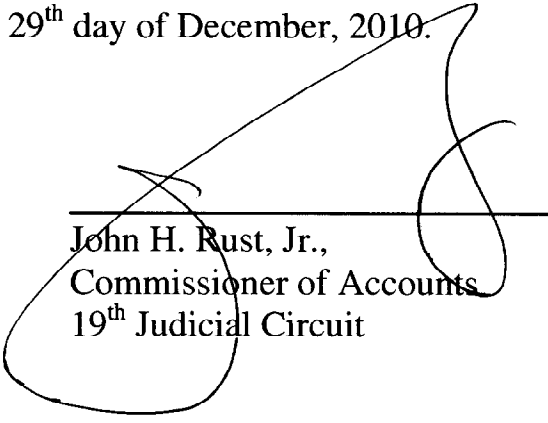
When analyzing evidence in accordance with § 8.01- 397, Virginia courts often examine surrounding circumstances for evidence that would tend to strengthen or weaken the interested parties’ claim. For example, in *Vaughn v. Shank*, 248 Va. 224 (1994), a case involving an alleged oral contract to convey property, the Supreme Court noted that the decedent’s actions after the alleged contract’s date of formation and through her date of death were not consistent with the terms of the alleged contract. The same is true in the case at hand. The claimant testified that he and the decedent entered into the contract in late 2005. However, the record reflects that the decedent moved out of her home and into an assisted living facility in July 2007. This move, as well as the fact that the decedent never moved into the O’Haras’ home, is not consistent with the terms of the alleged contract.

The claimant also took actions inconsistent with the alleged contact. In particular, based on his professional expertise, your commissioner finds Kevin O’Brien’s testimony regarding the lack of handicapped accessible features in the main floor master bathroom especially persuasive. It is the opinion of your commissioner that the lack of said features is inconsistent with the claimant’s testimony that all of the renovations were based upon the alleged contract with the decedent. Additionally, Mrs. O’Hara’s e-mail of March, 2007 stating “we will not be taking Patricia O’Brien into our home,” is inconsistent with the alleged contract and contradicts its basic premise. The decedent’s action moving to an assisted living facility later that year is consistent with Mrs. O’Hara’s refusal to have her mother move into the O’Haras’ home and inconsistent with any continuing agreement.

Based upon the evidence presented, it is clear that between 2006 and 2009 the O’Haras expended monies to renovate their home. It is also clear that between 2005 and 2007 Mrs. O’Brien had multiple discussions with friends and family regarding her desire to move in with the O’Haras. However, it is not clear that Mr. O’Hara and Mrs. O’Brien ever entered into a legally enforceable contract with reasonably certain and definite terms, as required by law. Mr. O’Hara failed to present any evidence to corroborate his testimony that the decedent promised to

pay one-third of the renovation costs when her house sold. In the opinion of your commissioner, the parties never entered into a legally enforceable contract with certain and definite terms, as required by law. Mr. O'Hara's claim is therefore denied.

Respectfully submitted this 29th day of December, 2010.



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

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of December, 2010, 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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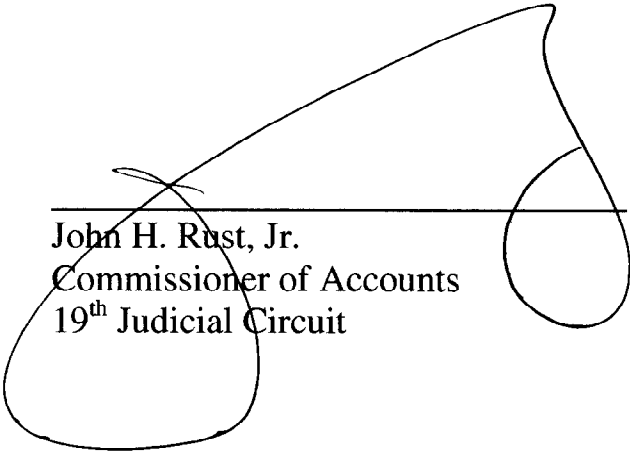
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John H. Rust, Jr.
Commissioner of Accounts
19th Judicial Circuit

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

1-19-11
Date

By: 
Deputy Clerk