

FC

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

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In Re: Trusts under the will of Louis Thomas Pape
FBO Michael J. Pape
FBO Kyle T. Pape

Commissioner's Report

Fiduciary Number FI-2006-0001182

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

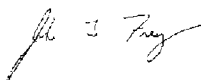
At the request of Teresa Sekhon, trustee of said trust, the undersigned gave the notice required under Virginia Code § 26-29, setting the 26th day of August, 2009, at 1:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for a hearing upon: 1) whether the trustee has a duty to make disbursements from the Trust FBO Michael Pape to Michael's ex-wife, Joan Pape, for unpaid child support; 2) whether the trustee has a duty to make disbursements from the Trust FBO Kyle T. Pape for his college tuition; and 3) whether the trustee has a duty to honor Kyle Pape's assignment of his interest in the trust to his mother, Joan Pape.

At the said time and place, the claimant, Joan Pape, appeared along with her husband, Randy Nelson, seeking to establish her right to distributions from the trusts based upon a child support order stemming from her divorce from Michael Pape, and an assignment from her son, Kyle Pape. Theresa Sekhon, trustee of said trust, appeared, along with her husband, Baljinder Sekhon, and her sister, Mary Murray, objecting to Ms. Pape's claims against the trusts.

Trust for the benefit of Michael J. Pape

Michael Pape and Joan Pape divorced on February 14, 1994. Their divorce decree, from the Circuit Court for the County of Prince William, states that Michael shall pay Joan \$125.00 per week in child support. Michael is also ordered to pay Joan \$100.00 per month toward an existing arrearage and to provide health insurance for the children. The decree further states that "the support obligation as it becomes due and unpaid creates a judgment by operation of law."

Ms. Pape testified that Michael had not made any child support payments since December 2004, that he had failed to provide health insurance for the children, and that he had never made any payments toward the arrearage which existed at the time of the divorce decree. Based upon these facts, Ms. Pape presented a spreadsheet calculating the amount of child support due her to be \$124,113.00.



The decedent's Last Will and Testament directs 11% of his residual estate to be held in trust for Michael Pape.¹ Distributions are to be made solely at the discretion of the trustee.² Theresa Sekhon qualified as trustee of the trust on February 19, 2008. The inventory listed assets totaling \$35,112.20 and was approved by your commissioner on July 1, 2008. The first account filed April 21, 2009 showed remaining assets on hand of \$21,762.10. Said account has not yet been approved by your commissioner.

Joan Pape asserts that based upon Michael's failure to make the required child support payments she is entitled to attach present or future distributions from the trust pursuant to Virginia Code § 55-545.01. Ms. Pape further asserts that the Court should order a distribution from the trust, pursuant to Virginia Code § 55-545.04, "to satisfy a judgment against the beneficiary for support or maintenance of the beneficiary's child." In the alternative, Ms. Pape asserts that the trust should be terminated as an uneconomic trust, pursuant to Virginia Code § 55-544.14, and that upon termination she would be entitled to the final distribution. The trustee acknowledged the existence of the child support order, but indicated she had no knowledge of that order prior to the hearing before your commissioner. The trustee stated that she could not comment on nor refute the amount of arrearages that Ms. Pape claims.

Virginia Code § 55-545.01 states:

To the extent a beneficiary's interest is not subject to a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means.

Your commissioner finds no indication in the will that the trust is subject to a spendthrift provision. Therefore, your commissioner is of the opinion that Virginia Code § 55-545.01 is applicable to distributions from the trust for Michael Pape. That Code section grants the Court discretion to authorize a creditor to reach present or future distributions. Your commissioner is of the opinion that there is no basis upon which Ms. Pape may reach any distributions made prior to the trustee having knowledge of the child support order. However, pursuant to Virginia Code § 55-545.01, your commissioner is of the opinion that Ms. Pape is entitled to attachment of any distributions from the trust to or for the benefit of Michael Pape after the date of

¹ Last Will and Testament of Louis T. Pape, executed June 8, 2005, § 4(d)

² Last Will and Testament of Louis T. Pape, executed June 8, 2005, § 4(d)(1)

the hearing before your commissioner until such time as the arrearage is satisfied or the beneficial interest in the trust passes to others.

This finding, however, does not obligate the trustee to make any such distributions, which are within the trustee's discretion. Ms. Pape contends that a distribution in her favor should be ordered pursuant to Virginia Code § 55-545.04 (C) (1), which states:

To the extent a trustee has not complied with a standard of distribution or has abused a discretion, a distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child.

Your commissioner has received no evidence that would support a finding that the trustee "has not complied with a standard of distribution or has abused a discretion." The terms of the trust make distributions subject to the complete discretion of the trustee. Your commissioner is therefore of the opinion that there is no basis to require the trustee to make distributions to Ms. Pape.

Ms. Pape asserts that the trust should be terminated as an uneconomic trust. Virginia Code § 55-544.14(b) states that "the court may modify or terminate a trust ... if it determines that the value of the trust property is insufficient to justify the cost of administration." Your commissioner has received no evidence that would support a finding that the value of the trust is insufficient to justify the cost of administration. Your commissioner therefore declines to require termination of the trust, without prejudice to the ability of the trustee to request such termination at a later date.

Trust for the benefit of Kyle T. Pape

In early 2008, Ms. Pape contacted the trustee via email requesting that trust monies be distributed to pay for Kyle's college tuition. The trustee denied the request. According to the will, the remaining principal of the trust is to be distributed to Kyle when he reaches the age of twenty-two.³ Prior to that time, funds may be expended for his benefit at the discretion of the trustee. In exercising said discretion the will instructs that "the trustee shall always take into account all other sources of income, property, and support available to such child ... and is directed to be liberal ... with respect to the formal education of such child."⁴ Ms. Pape contends that the trustee did not act in accordance with the terms of the will in denying the request for

³ Last Will and Testament of Louis T. Pape, executed June 8, 2005, § 4(d)(2)(c)

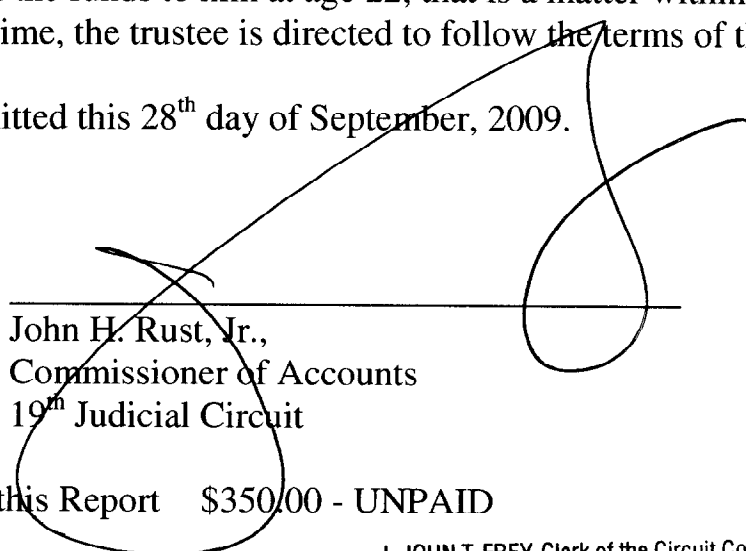
⁴ Last Will and Testament of Louis T. Pape, executed June 8, 2005, § 4(d)(2)(b)

monies for Kyle's college tuition, as the trust states that the trustee is to be liberal with respect to the child's education.

The trustee testified that in denying the request she acted within her discretion as trustee, taking into consideration the "other sources of income, property, and support available" to Kyle at the time. Ms. Pape declined to consent to a distribution of such funds directly to the educational institution that Kyle attends. Your commissioner finds that the trustee acted within her discretion in denying the request.

Ms. Pape further testified that upon learning that the trustee would not be distributing trust monies to pay for Kyle's tuition, she and Kyle entered into an agreement whereby Kyle assigned all of his interest in the trust to Ms. Pape in exchange for her paying for his first semester of college. A copy of the assignment is attached as Exhibit 1. Until Kyle attains twenty-two years of age, any and all trust distributions are subject to the discretion of the trustee. As such, prior to attaining age twenty-two, Kyle has no present enforceable interest in such funds and, therefore, no alienable right in the trust monies⁵. Your commissioner is of the opinion that the purported assignment of Kyle's beneficial interest in the trust monies is a nullity, which the trustee may decline to abide by. If Kyle chooses to pay such monies to Ms. Pape upon distribution of the funds to him at age 22, that is a matter within his discretion. Prior to that time, the trustee is directed to follow the terms of the trust.

Respectfully submitted this 28th day of September, 2009.



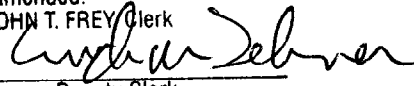
John H. Rust, Jr.,
Commissioner of Accounts
19^m Judicial Circuit

Commissioner's Fee for this Report \$350.00 - UNPAID

cc: Teresa Sekhon, Trustee
Joan Pape
Michael J. Pape
Kyle T. Pape

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


By: _____
Deputy Clerk

~~10-16-09~~
Date
10-22-2009

⁵ See, ie, Bogart, Trusts & Trustees, § 228; Medical Park Hosp. v. Bancorp South Bank of Hope, 166 S.W.3d 19 at 26 (2004).

ASSIGNMENT OF BENEFICIAL INTEREST

FOR VALUE RECEIVED, I Kyle T. Pape, (Assignor), do hereby irrevocably assign, transfer and set over unto Joan C. Pape, (Assignee), all legal and beneficial rights, title, claims, and interest in all Trust(s) created under the last will and testament of Louis T. Pape for which I have a beneficial interest, including all moneys due or to become due to the Assignor thereunder.

Assignor also assigns, transfers and sets over unto Assignee, all legal and beneficial rights, title, claims, and interest in all matters concerning the last will and testament of Louis T. Pape.

Assignor authorizes the Trustee of the Trust to pay directly to the Assignee all moneys or other benefits representing, or arising from, the interest assigned hereby.

Assignor hereby, agrees that if he receives any amount under the Trust he shall promptly deliver to the Assignee any amount received.

Assignor agrees to complete any further documents as may be required, by the assignee.

Assignor
By: Kyle Thomas Pape
Signature
Print Name: Kyle Thomas Pape

Commonwealth Of: VIRGINIA County / City / Town Of: FREDERICKSBURG

Sworn and Subscribed to before me this 11 day of August

Bryan J Candella BRYAN J CANDELLA
(Notary Public) (Printed Name)

My Commission Expires on: 08/31/2011

