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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of William H. Spears, Sr.,)
Deceased,) Fiduciary No. FI-2002-0068679

Deborah A. Spears, Administrator of the)
Estate of William H. Spears, Sr.,)
Petitioner,)
v.) Chancery No. 05-5347
)
Deborah A. Spears, et al.,)
Respondents.)

COMMISSIONER'S REPORT

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

By decree of reference entered in the above-referenced matter on September 13, 2007, the Circuit Court of Fairfax County referred to your Commissioner such matters raised in the Bill of Complaint for Aid and Direction filed by Petitioner Deborah A. Spears, as Administrator of the Estate of William H. Spears, Sr., the Respondent Spears Children's Answer and Cross-Bill of Complaint, Petitioner's Answer to the Cross-Bill of Complaint, and the Spears Children's Letters to your Commissioner dated August 29, 2005, and March 5, 2007, together with any objections to the accounts filed with your Commissioner, for hearing before your Commissioner pursuant to § 26-29 of the 1950 Code of Virginia, as amended. Pursuant to the aforesaid decree, your Commissioner took evidence upon the aforesaid matters beginning on October 8, 2007, at 9:30 a.m. in his office at 10555 Main Street, Suite 500, Fairfax, Virginia 22030. The hearing continued on October 9, 2007 and concluded on October 10, 2007.

At the said time and place, there appeared Deborah A. Spears, together with her counsel, George O. Peterson and Thomas Yates, the Spears children, William H. Spears, Jr., Donna K. Haass, Michael D. Spears, and Sharon L. Nalls, together with their counsel, Mark E. Kellogg and Lynn E. Berry. Also appearing were Christy Nasatka, daughter of Deborah A. Spears, and Carla Spears, spouse of William H. Spears, Jr. Ellen Angalone and Stephanie Bonta, daughters of Deborah A. Spears, appeared during portions of the hearing.

Fiduciary #: FI-2002-0068679
Date: 06/18/2008
Estate: SPEARS, WILLIAM H SR
Recorded in
FAIRFAX COUNTY CIRCUIT COURT
TESTE: JOHN T. FREY

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John T. Frey

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Your Commissioner took testimony from Deborah A. Spears, the administrator of the above estate and the widow of the decedent; Leon Duncan, a commercial real estate appraiser employed by R.L. Kane Co., Thomas Burdette, CPA; William H. Spears, Jr.; Munford Yates, an attorney representing the estate; Thomas Yates, an attorney representing the estate; and Michael D. Spears. At the conclusion of the evidence, your Commissioner set forth the issues upon which he requested specific argument, and established a briefing schedule for the parties, which was extended by mutual agreement thereafter. On November 13, 2007, counsel for Deborah A. Spears filed a trial brief on her behalf. On December 4, 2007, counsel for the Spears children filed a trial brief on their behalf. On December 11, 2007, counsel for Deborah A. Spears filed a reply to the trial brief filed on behalf of the Spears children.

On or about November 23, 2005, Deborah A. Spears, Administrator of the Estate of William H. Spears, Jr. filed a bill of complaint for aid and direction in the Circuit Court of Fairfax County, Virginia, which matter is styled *Deborah A. Spears, Administrator v. Deborah A. Spears et al.*, CL 2005-7327. The heirs at law of William H. Spears, Sr., were named as respondents in the suit, to-wit: the said Deborah A. Spears, the decedent's spouse, and his four children by a prior marriage, Sharon Leigh Nalls, William Henry Spears, Jr., Donna Kaye Haass, and Michael Dwayne Spears. In the complaint, Ms. Spears sought approval of (1) her sale of Double Diamond Transport, Inc. ("Double Diamond"), a corporate business owned in part by the decedent, to Donna K. Haass and Robert D. Haass, (2) her operation of Bill's Seamless Aluminum Gutters, Inc. ("Bill's"), another corporate business wholly-owned by the decedent, including the payment of rent from Bill's to Ms. Spears as the surviving tenant by the entirety and sole owner of the warehouse at 8817 Telegraph Road, Lorton, Virginia that Bill's occupied, (3) her occupancy during the administration of the estate of the decedent's residence at 9609 Scorpio Court, Burke, Virginia 22015, (4) her claim for contribution from the estate for one-half the debt secured upon the warehouse property, (5) her claim as an accommodation maker of the indebtedness secured on the decedent's residence; (6) her claim to family and exempt property allowances provided by statute; (7) her claim to certain rights in the decedent's residence pursuant to § 64.1-16.4 of the Virginia Code; and (8) her proposed scheme of distribution of the estate. She also sought the grant of powers under § 64.1-57 of the Virginia Code to carry out her proposed distribution. The Spears children, Sharon Leigh Nalls, William Henry Spears, Jr., Donna Kaye Haass, and Michael Dwayne Spears,

answered, contesting the valuation of certain assets, denying the various claims of Ms. Spears, and protesting the failure of Ms. Spears to make any distributions to the Spears children for almost four years after the death of the decedent. The Spears children filed a cross-bill of complaint, alleging that Ms. Spears breached her fiduciary duty to them and that she converted and misappropriated assets. The Spears children requested additional surety and sought to surcharge Ms. Spears and to falsify the accounts which have been filed in the above-styled matter. The Spears children further contested the payment of attorney's fees incurred in the litigation for and on behalf of Ms. Spears from the estate assets and sought payment of their own attorney's fees from the estate.

In addition to the matters raised in the bill of complaint and the cross-bill, the Spears children wrote to your commissioner on August 29, 2005, and March 5, 2007, seeking redress for certain grievances, which matters were specifically referred to your commissioner in the aforesaid decree of reference. In their letter of August 29, 2005, the Spears children objected to specific matters in the accounts filed before your commissioner, including the valuation of Bill's, the failure to include Bill's Snow Removal Service, another alleged business enterprise of the decedent, in the accounts, the payment of the entire amount of debts joint between the decedent and Ms. Spears from the estate assets, the failure to include personal property in the inventory, the valuation of the decedent's residence, the alleged sale of certain stock in Bill's to Ms. Spears, the alleged self-dealing and conflicts of interest by Ms. Spears in the operations of the decedent's business enterprises, and the waste or diminution of the assets of the estate, her occupancy of the decedent's residence, and the lack of communications between the heirs and Ms. Spears. In their letter of March 5, 2007, the Spears children reiterated many of the foregoing complaints and gave more specific examples of the failure of the administrator to communicate with them concerning the estate. They requested a § 26-29 hearing to address their concerns.

Your commissioner gave notice of the requested hearing on March 30, 2007. Counsel for Ms. Spears objected on the grounds that the matters were already before the Court in the litigation seeking aid and direction. On April 24, 2007, your commissioner advised the parties that the objection of Ms. Spears to the § 26-29 hearing was well-taken, and that your commissioner would defer any dealing with these issues until after the Court had made its determination of the issues. Thereafter, the Court entered the decree of reference directing that your commissioner address such issues.

In the three days of hearings, the parties presented extensive testimony and exhibits to your commissioner. Based upon this testimony and exhibits, your commissioner has made a number of findings of fact, which will be incorporated throughout this report as the individual issues are discussed. As a preliminary discussion, your commissioner makes the following findings of fact: William H. Spears, Sr. died intestate on February 1, 2002. He was survived by his wife, Deborah A. Spears, and by his four children from a prior marriage, Sharon Leigh Nalls, William Henry Spears, Jr., Donna Kaye Haass, and Michael Dwayne Spears. Pursuant to § 64.1-1 of the Virginia Code, his wife and children were his heirs-at-law, with one-third of the estate passing to his surviving spouse and two-thirds of the estate passing to his children. Deborah A. Spears qualified as administrator of the decedent's estate on March 5, 2002. She entered into a surety bond in the amount of \$200,000, which bond was later increased to \$210,000 on December 9, 2002. The bond was further increased to \$500,000 on August 2, 2006. Ms. Spears filed elections for the family allowance and the exempt property allowance in proper form in the Clerk's office on March 5, 2002.

On August 12, 2002, Ms. Spears filed an inventory for the decedent's estate showing probate assets of \$209,312.6, consisting principally of the shares of stock in Bill's. Your commissioner approved the inventory on November 23, 2002. On January 23, 2002, Ms. Spears filed an amended inventory for the decedent's estate showing probate assets of \$167,348.63. The inventory included the value of 100 shares of Double Diamond Transport shown as \$22,500 and reflected a substantial reduction in the value of Bill's to \$137,142, described as an "appraised value." Your commissioner approved the amended inventory on July 14, 2003.

On August 5, 2003, Ms. Spears filed her first account with your commissioner, showing beginning assets of \$452,348.63 (the decedent's residence was erroneously included among the probate assets), and showing disbursements of \$137,076.68. These disbursements included payment of the family allowance to Deborah Spears in the amount of \$18,000, payment to Deborah Spears in reimbursement for one-half her payment of mortgage payments on the warehouse property in the amount of \$24,184.86, payment to Deborah Spears in reimbursement for her payment of the mortgage on the decedent's residence in the amount of \$13,349.76, payment to MBNA to pay-off the decedent's credit card in the amount of \$24,545.85, payment to American Express to pay-off charges by Double Diamond in the amount of \$5,654.60, further loans to Double Diamond in

the amount of \$2,611.47, payment to American Express to pay-off the decedent's charges in the amount of \$2,896.40, payments to Deborah Spears in reimbursement for one-half her payment of a car lease in the amount of \$3,728.66, and payments to Deborah Spears in reimbursement for her payment of 2001 state and federal income taxes in the amount of \$7,945. In addition, the estate paid legal fees in the amount of \$12,747.20 to the firm of Yates, Campbell & Yates, LLP. The account also shows the redemption of 69.2714 shares of Bill's for the sum of \$95,000. It further showed dividends of \$30,000 from Bill's to the estate, subsequent to the redemption of more than 69% of the company. The account showed assets on hand of \$373,516.68, including 30.7286 shares of Bill's and 100 shares of Double Diamond. Your commissioner approved the account on March 22, 2004.

The account also included corporate documents reflecting distributions from Bill's to the estate as follows: \$75,000 March 6, 2002; \$20,000 March 29, 2002; \$20,000 May 30, 2002; \$20,000 August 22, 2002; and \$10,000 January 24, 2003. The documents included a promissory note from the estate to Bill's for \$75,000 dated March 5, 2002, a promissory note from the estate to Bill's for \$20,000 dated January 31, 2003, but bearing interest from March 5, 2002, which note "supercedes the Note dated March 5, 2002," and a corporate resolution authorizing the loan of \$20,000 to the estate, the redemption of \$95,000 in stock pursuant to Internal Revenue Code § 303, based upon Bill's valuation at \$137,142, and a dividend of \$30,000. Based upon the testimony and exhibits, your commissioner finds that the estate received \$95,000 for the redemption of 69.2714 shares of Bill's, \$30,000 in dividend distributions from Bill's, and \$20,000 in a loan from Bill's.

On July 27, 2004, Ms. Spears filed a second account with your commissioner, showing disbursements of \$20,134.92 and losses on asset sales of \$4,586.35. The disbursements included payments to Deborah Spears for one mortgage payment on the decedent's residence in the amount of \$1,112.48, one-half of one mortgage payment on the warehouse property in the amount of \$2,015.40, and one-half of one car lease payment in the amount of \$310.72. In addition the estate paid legal fees in the amount of \$15,429.40 to the firm of Yates, Campbell & Yates, LLP. The loss on asset sales consisted of the sale of 100 shares of Double Diamond for \$17,913.65. Your commissioner approved the second account on May 23, 2005.

The Spears children have raised issues concerning the propriety of the Double Diamond sale. Evidence presented to your commissioner at the hearing

and in the accounts demonstrates that Double Diamond was owned 50% by the decedent and 50% by Deborah A. Spears, pursuant to stock certificates 1 and 2, issued for 100 shares each. The business was sold to Robert D. Haass and Donna K. Haass for the sum of approximately \$80,000. The purchasers paid at closing the debts of Double Diamond: Citicapital in the amount of \$28,726.32, Bill's in the amount of \$5,357.60, and the estate in the amount of \$8,815.11. The shareholders received \$35,827.29, which was divided between them. In the second account, the estate reports its receipt of \$17,913.65, representing its one-half share. There was tendered a settlement sheet executed by the parties showing a sales price of \$80,000 and an net amount remaining due to the shareholders of \$1,273.68; however, the actual payment to the shareholders was set as \$35,827.29 in the Stock Purchase Agreement executed by all the parties. The only variable function in the agreement was the balance due upon the indebtedness the purchasers were to pay at closing. Your commissioner finds that the estate received its proper share of the sales proceeds for Double Diamond and that the sale is reported accurately in the second account.

On August 24, 2005, Ms. Spears filed an amended third account with your commissioner, replacing a prior filing that had not been approved. The account showed adjustments of \$285,000 and disbursements of \$4,915.53. The adjustment reflected the removal of the decedent's residence from the probate assets, an appropriate change as the administrator did not have the power of sale. The disbursements were usual and customary estate expenses, including the payment of legal fees in the amount of \$3,669.50 to the firm of Yates, Campbell & Yates, LLP. Your commissioner has not yet approved the third account.

On May 19, 2006, Ms. Spears filed a fourth account with your commissioner, showing disbursements of \$8,645.47. The disbursements were usual and customary estate expenses, including the payment of legal fees in the amount of \$6,684.97 to the firm of Yates, Campbell & Yates, LLP. Your commissioner has not yet approved the fourth account. On July 20, 2007, Ms. Spears filed a fifth account with your commissioner, showing disbursements of \$3,756. The disbursements were usual and customary estate expenses, including the payment of legal fees in the amount of \$3,105 to the firm of Yates, Campbell & Yates, LLP. Your commissioner has not yet approved the fifth account.

Statutory Allowances

Ms. Spears has claimed a family allowance in the amount of \$18,000 and an exempt property allowance in the amount of \$15,000. The original claims were filed with the Clerk's office on March 5, 2002, within one year of the decedent's death. These claims appear to be in order and Ms. Spears is entitled to both statutory allowances. She received payment in full of the family allowance in the first account. She has not received any payment of the exempt property allowance. Ms. Spears has also claimed a right to reimbursement for certain household expenses in the amount of \$20,635.21, pursuant to § 64.1-16.4 of the Virginia Code. She has not received any payment in connection with this claim.

Prior to 1990, in Virginia the surviving spouse was entitled to dower or curtesy interests in the family residence.

At common law, dower was assigned by the deceased husband's heirs or devisees. As leverage to force a prompt assignment, and to make temporary provision for her welfare, the widow had the right of quarantine -- the right to hold and occupy the marital residence and to be provided with all necessities until dower was assigned her. (This right has been expanded by § 64.1-33.) The heirs or devisees of the husband's lands had the right and duty to assign dower. If the heirs refused to assign dower within the period of quarantine, the widow could be turned out of possession and put to her action for recovery of dower under a writ of dower. In no event, however, could the widow designate her own dower or the lands from which she wished dower assigned.¹

Virginia continued this common law right by statute. See former § 64.1-33 of the Virginia Code. Virginia Code § 64.1-16.4 was enacted in 1990 as a part of the abolition of dower and curtesy in Virginia. See VA. CODE ANN. § 64.1-19.2 (C. 831, 1990 Virginia Acts of Assembly). The new code section was intended to replace former § 64.1-33 and to continue some form of quarantine in Virginia. Under most uniform acts, when dower and curtesy were abolished, the right of quarantine was replaced by the statutory provisions establishing a family allowance. See 25 AM. JUR. 2d *Dower and Curtesy* § 5 (2008). In Virginia, the

¹ *Sovran Bank v. Shannon*, 1988 WL 619254 (Va.Cir.Ct.).

legislature in its wisdom elected to both retain the right of quarantine as set forth in § 64.1-16.4 and to establish a family allowance as provided in § 64.1-151.1. Thus, under Virginia law, Ms. Spears is entitled to both a family allowance and to occupy the decedent's residence "without charge for rent, repairs, taxes, or insurance." VA. CODE ANN. § 64.1-16.4. To the extent that Ms. Spears has advanced funds for any such expenses, she is entitled to reimbursement for those payments. *See Simmons v. Lyle's Adm'r*, 32 Gratt. (73 Va.) 752 (1880).

§ 64.1-16.4 grants to the surviving spouse the right to occupy the family home until the spouse's "rights in the principal family residence have been determined and satisfied by an agreement between the parties or a final court decree." Your commissioner is aware that there has not been a serious dispute among the heirs over Ms. Spears' right to one-third of the decedent's residence pursuant to § 64.1-1 of the Virginia Code; however, § 64.1-16.4 calls for both the determination and satisfaction of those rights. While Ms. Spears' right is not at issue, it has not yet been satisfied. Your commissioner is also aware that Ms. Spears, in her dual role as administrator and surviving spouse, has the capacity to delay satisfaction of the statutory conditions for so long as it is in her self-interest. Your commissioner finds that, absent a court decree, the statute expressly requires mutual agreement; thus, Ms. Spears has no greater ability to delay resolution than any other surviving spouse. Moreover, your commissioner notes that Ms. Spears did bring the complaint for aid and direction before this Court in fulfillment of her fiduciary duties. Your commissioner finds that Ms. Spears' has properly handled her fiduciary duties in connection with her claim for expenses under § 64.1-16.4 of the Virginia Code.

Ms. Spears presented evidence of advances in the amount of \$20,635.21 in connection with the decedent's residence. These advances consist principally of lawn maintenance, pest control, and cleaning expenses. Statutory rights of quarantine are to be liberally construed. *See, e.g. Matter of Estate of Stroh*, 151 Mich. App. 513, 392 N.W.2d 192 (1986). Your commissioner is of the opinion that such expenses are within the intended terms of § 64.1-16.4 and should be allowed. Ms. Spears claim does not include any reimbursement for taxes or insurance charges that she may have paid. The statute provides express protection from such costs. As a part of the evidence presented in this matter, Ms. Spears provided information which showed her payments for taxes and insurance in her monthly mortgage escrow payments. Your commissioner finds that from the decedent's death until September 2007 (the limit of the data provided), Ms. Spears

paid real estate taxes in the amount of \$19,838.71 and insurance premiums in the amount of \$6,304.00 related to the decedent's residence. In the opinion of your commissioner, her claim for reimbursement under § 64.1-16.4 of the Virginia Code should be increased by the amount of such payments. It should be noted, however, that the estate reimbursed Ms. Spears for the thirteen mortgage payments she made from the decedent's death until February 2003. In that period, the lender received \$3,975.60 in escrow payments. As Ms. Spears has already been reimbursed for such payments, this amount should be credited against the amounts otherwise due to Ms. Spears pursuant to § 64.1-16.4. Based upon the foregoing, your commissioner is of the opinion that Ms. Spears is entitled to a claim of \$42,802.32 against the estate pursuant to § 64.1-16.4 of the Virginia Code, calculated as follows:

Maintenance and repair expenses	\$20,635.21
Real estate taxes paid	\$19,838.71
Insurance premiums paid	\$ 6,304.00
<u>Less reimbursement received</u>	<u>(\$3,975.60)</u>
Allowed § 64.1-16.4 claim	\$42,802.32

Ms. Spears also made a claim at the hearing for an annual payment from the estate of \$18,000 as an additional family allowance beyond the initial \$18,000 payment. § 64.1-151.1 of the Virginia Code provides that the surviving spouse and minor children of the decedent are "entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge all allowed claims." Thus, the statute appears to contemplate the potential for a multi-year family allowance if the estate is otherwise solvent; however, this section is further limited by the provisions of § 64.1-151.4 which limits the authority of the personal representative to determine "the family allowance in a lump sum not exceeding \$18,000, or periodic installments not exceeding \$1,500 per month for one year." Thus, Ms. Spears has received the maximum family allowance which the personal representative may approve.

If a further or additional family allowance is required, § 64.1-151.4 permits the personal representative, or any other person aggrieved, to petition the court to "provide a family allowance larger or smaller than that which the personal representative determined or could have determined." To the extent that the complaint for aid and direction may be interpreted to include such a petition, your

commissioner is of the opinion that a further family allowance is not appropriate in this case. Where the spouse has independent resources and income, it is the opinion of your commissioner that the grant of a family allowance in excess of \$18,000 is not appropriate.

The persons eligible for payment of a family allowance are only those “whom the decedent was obligated to support.” VA. CODE ANN. § 64.1-151.1. The Virginia statute is substantially similar to the family allowance provisions of the Uniform Probate Code. *See* U.P.C. §§ 2-404 and 2-405. The comments relating to § 2-404 state that “account should be taken of both the previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and assets distributed.” In the case of *In re Hoffman's Estate*, 213 Cal. App. 2d 635, 29 Cal. Rptr. 60 (1st Dist. 1963), the California Court of Appeals summed up the review of the financial affairs of a surviving spouse as follows:

[W]hile a widow may not be deprived of a family allowance merely because she has property other than her interest in the estate, the nature and extent of such other property is material and relevant to the following issues: (1) Is any sum necessary for the support and maintenance of the petitioner during the period of the administration of decedent's estate?; and (2) If a sum is necessary for her support and maintenance, what is a reasonable amount to allow the petitioner? In making such determination the matter rests in the sound discretion of the trial court. 29 Cal. Rptr. at 65-66 (citations omitted).

In such a review, it is appropriate to take into account the non-probate assets flowing to the spouse. *Matter of Estate of Caffrey*, 120 Ill.App.3d 917, 458 N.E.2d 1147 (1983). In addition, the court may consider any independent source of income available to the spouse. *Matter of Estate of Spurgeon*, 572 N.W.2d 595 (Iowa 1998).

In the instant case, Ms. Spears has significant independent income in the rental receipts from the warehouse property, and she has been a salaried employee of Bill's throughout the duration of administration. Prior to the decedent's death, she received a salary of \$50,000 from Bill's. After the decedent's death, she took action to increase her salary to \$78,000 based upon her authority as administrator of the decedent's estate and the representative of the sole stockholder of Bill's,

thus providing her with \$28,000 additional annual compensation during the period of administration. It is therefore the recommendation of your commissioner that the Court grant no additional or further family allowance to Ms. Spears.

Warehouse Property

Ms. Spears has asserted a claim for contribution from the estate for the balance due under a deed of trust note on the warehouse property located at 8817 Telegraph Road, Lorton, Virginia which she and the decedent held as tenants by the entirety. R.L. Kane, Inc. appraised the property at a value of \$640,000 as at February 21, 2002, shortly after the decedent's date of death on February 1, 2002. Your commissioner finds the same to be the fair market value of the warehouse property as at the decedent's date of death. As of that date, the property was encumbered deed of trust securing a promissory note with a principal balance of \$362,923.64. The decedent and Ms. Spears were co-makers of that promissory note. On June 7, 2004, the note was paid in full in connection with the refinancing of the property. At that time, its principal balance was \$310,281.56. On June 28, 2007, some three years after the refinance, Ms. Spears sold the warehouse property and the debt secured thereby was paid in full. The testimony before your commissioner showed that at all times during the administration of this estate until the sale of the warehouse property, the decedent's business interests leased the warehouse property, paying rents to Ms. Spears as the surviving tenant by the entirety that were sufficient to service the indebtedness upon that property.

Ms. Spears seeks contribution from the estate for one-half of the indebtedness paid, including the debt service payments which she made from the decedent's date of death until the pay-off of the loan. During part of that period the estate paid one-half the mortgage payment and Ms. Spears paid the remaining balance. Ms. Spears testified that she began making the full payment in January 2004, and continued to do so until the refinance in June 2004. The accounts for the estate filed with your commissioner show that Ms. Spears received reimbursements for one-half the mortgage payments for thirteen months, from February 2002 until February 2003, in the total amount of \$26,200.26. As the accounts are supported by vouchers and the checking account records reflect payments as set forth in the accounts, your commissioner finds that Ms. Spears received a total of \$26,200.26 in mortgage payment reimbursements in connection with the warehouse property.

Ms. Spears seeks contribution based upon the doctrine of exoneration. Exoneration is a common law rule holding that the decedent's personal estate is the

primary fund for payment of his debts, even though the decedent may have pledged real estate to secure that debt.² *Brown v. Hargraves*, 198 Va. 748, 96 S.E.2d 788 (1957). The rule applies to property devised or inherited and to property vested in the surviving joint tenant, even though the estate may have no interest in the property. *Id.* See also, *Caine v. Freier*, 264 Va. 251, 564 S.E.2d 122 (2002).³ When the joint tenants are also joint obligors on the indebtedness secured, Virginia allows the surviving joint tenant a right of contribution to the extent that he or she discharges a disproportionate share of the indebtedness secured. *Caine v. Freier, supra*.⁴ Thus, under the Virginia rule, the personal representative is liable for one-half of the indebtedness due at the time contribution is sought. *Id.* at 264 Va. at 260, 564 S.E.2d at 127.

The Spears children rely upon the power granted to the personal representative pursuant to § 64.1-143 to renew or refinance promissory notes and obligations of the decedent, arguing that Ms. Spears' refinance of the decedent's obligation in 2004 relinquished the claim for contribution prior to the assertion of such a claim in the Petition filed November 23, 2005. The case law does not support such an assertion. Under general contribution rules, the right arises when one co-tenant extinguishes the obligation for the benefit of all co-tenants. See, e.g., *Van Winckel v. Carter*, 198 Va. 550, 95 S.E.2d 148 (1956) ("The right to contribution becomes complete and enforceable upon the payment or discharge of the common obligation." 198 Va. at 555). Thus under the general rule, the discharge of the obligation does not relinquish the right to contribution, it establishes that right. In matters of exoneration (unlike the general right to contribution), the case law allows one to pursue a claim for contribution without discharge of the obligation on the grounds that the personal estate is primarily liable for payment of the debts of the decedent. *Caine v. Freier, supra*, 264 Va. at 259-260. Accord, *Brown v. Hargraves, supra*. Thus, in the context of a decedent's estate, discharge of the obligation is not a prerequisite to contribution; however, payment of the obligation is not a bar to recovery.

² The doctrine of exoneration has been abolished under the Uniform Probate Code. See UPC § 2-607. Virginia has taken steps to limit its impact prospectively as well. See VA. CODE ANN. § 64.1-157.1.

³ It should be noted that there is a substantial body of case law that denies exoneration in such cases. See 76 A.L.R. 1004 (1961).

⁴ On the issue of contribution for joint debts where the surviving joint tenant pays more than his or her share of the indebtedness, the majority rule allows contribution; the minority rule denies contribution based upon the connection between the debt and the property, the exclusive ownership of the surviving joint tenant, and the equity of requiring one who receives the benefit of the property to accept its burdens. *Id.*

The Court in *Caine v. Freier* cites in support of its conclusion § 8.01-11.B of the Virginia Code, which provides:

If one person bound either jointly or as a partner with another by a judgment, bond, note, or otherwise for the payment of a debt, or the performance or forbearance of an act, or for any other thing, die in the lifetime of such other, the representative of the decedent may be charged in the same manner as the decedent might have been charged, if those bound jointly or as partners, had been bound severally as well as jointly, otherwise than as partners.

Thus, the obligations of the estate for contribution are determined under the same rules as contribution is determined among co-tenants generally.

In Virginia, it is well-settled that a co-tenant can be required to account for rents and profits in an action seeking contribution from the other co-tenants. *See, e.g. Naccash v. Naccash*, 212 Va. 763, 188 S.E.2d 83 (1972); *Adkins v. Adkins*, 117 Va. 445, 85 S.E. 490 (1915); *Schroeder v. Woodward*, 116 Va. 506, 82 S.E. 192 (1914); *Early v. Friend*, 57 Va. (16. Gratt.) 21 (1860); *Gaynor v. Hird*, 15 Va. App. 379, 424 S.E.2d 240 (1992); *Langabeer v. Bestani*, 1995 WL 1056017 (Va. Cir. Ct.); *Cole v. Cole*, 27 Va. Cir. 225, 1992 WL 884581. By statute in Virginia, “[a]n accounting in equity may be had against any fiduciary or by one joint tenant, tenant in common, or coparcener for receiving more than comes to his just share or proportion, or against the personal representative of any such party.” VA. CODE ANN. § 8.01-31. In the instant case, the decedent and Ms. Spears had leased the warehouse property to the decedent’s business interests on a triple net basis from 1988 until the death of the decedent. After the decedent’s death, commencing in March 2002, Ms. Spears raised the rent to \$5,500, an amount in excess of the debt service costs of \$4,030.18 per month. Thus, Ms. Spears received rents upon the warehouse property in an amount sufficient to pay the debt service costs throughout the administration of the estate. In addition, she received excess rents of \$1,469.82 per month during the administration as well. Finally, for eleven months of 2002 and two months of 2003, Ms. Spears was reimbursed for one-half the mortgage payment from the estate. On June 7, 2004, Ms. Spears refinanced the warehouse property, extinguishing the debt upon which the decedent was liable. On June 28, 2007, she sold the warehouse property, paying off all debt thereon.

In an accounting for rents and profits in connection with a claim for contribution upon joint debt, one must determine what rents and profits are to be

considered. It is apparent in the instant case that the rents and profits from the warehouse property continued long after the extinguishment of the decedent's debt. Moreover, it appears clear that such rents and profits could be projected to continue into the foreseeable future until the retirement of the decedent's death, based upon the 14 year history of triple net rents received prior to the decedent's death. However, in the opinion of your commissioner, speculation upon future rents and profits is inappropriate in an accounting. There are market factors, such as the failure of the decedent's business interests or general economic circumstances that can affect the continuation of such rents. In addition, such rents and profits are only relevant to the consideration of the appropriate contribution from the decedent's estate to the payment of the joint debt. The warehouse property and the income from the warehouse is solely the property of Ms. Spears. She need not account to any other person for such rents except in the context of a claim for contribution. Therefore, it is the opinion of your commissioner that an accounting for the rents and profits in connection with Ms. Spears' claim for contribution includes only the period from the death of the decedent until the refinancing of the warehouse property extinguished his debt on June 7, 2004.

During this period, the rents received fully paid the mortgage payments. Ms. Spears is not entitled to claim contribution for the interest which she paid during 2002, 2003 and 2004, or for curtail of the principal balance of the loan during that period, as the same was fully paid from the rents and profits received from the warehouse property. Notwithstanding her receipt of the rental income, Ms. Spears also received from the estate 13 payments totaling \$26,200.26, representing one-half the mortgage payment which was otherwise paid by the rents and profits from the warehouse property. The estate is entitled to a credit in such amount against any contribution due. In addition, Ms. Spears received 29 payments of \$1,469.19, representing monthly rent in excess of expenses, which payments she retained for her own use rather than applying the same to the mortgage debt. The total of these 29 payments is \$42,606.61. The estate is entitled to a credit against any contribution due of one-half the aggregate amounts received, or \$21,303.26. The aggregate amount to be credited to the estate for the mortgage payment reimbursement and rents in excess of expenses is \$47,503.52, consisting of \$26,200.26 in reimbursements received and \$21,303.26 representing one half the rents in excess of expenses received.

On June 7, 2004, Ms. Spears refinanced the warehouse property. At that time, the remaining joint debt of the decedent and Ms. Spears in the amount of \$310,281.56 was extinguished. In accordance with the findings and law cited

above, Ms. Spears is entitled to contribution in the amount of \$155,140.78 representing one-half the joint debt with the decedent, less the aforesaid credit in the amount of \$47,503.52 for rents and profits from the warehouse property which Ms. Spears had received in derogation of the estate. It is, therefore, the opinion of your commissioner that Ms. Spears should receive the amount of \$107,637.26 as and for her claim for contribution from the estate to the debts of the decedent.

Decedent's Residence

At the hearing before your commissioner, Ms. Spears asserted that she was an accommodation maker of the promissory note secured by the decedent's residence and therefore was entitled to exoneration of the entire amount. An accommodation maker is one who executes an obligation as a principal; however, the use of and benefit from that obligation is vested solely in the co-maker or endorser. The accommodation maker's true role is that of a surety and he or she receives no benefit from the transaction and is expected to make no payments thereon absent default by the primary maker. *See, e.g., Cooper v. Greenberg*, 191 Va. 495, 61 S.E.2d 875 (1950).

The evidence before your commissioner showed that the indebtedness upon the decedent's residence was incurred in September, 1998. At that time, the decedent and Ms. Spears refinanced existing purchase money indebtedness in the amount of \$25,186.96, paid-off a home equity loan that the decedent and Ms. Spears had both used for gambling expenses, and took an additional \$31,938.38 out in cash, to renovate the home and pay credit cards and other bills of both parties. Based upon the evidence presented to your commissioner, your commissioner is of the opinion that Ms. Spears was in a joint enterprise with the decedent and she benefited directly from the funds advanced, both in the payment of her prior debts and in the use of the renovated residence. She was jointly and severally liable upon the promissory note. In the opinion of your commissioner, Ms. Spears was not an accommodation maker. Rather, she bears equal responsibility for the debt with the decedent. The indebtedness encumbers an asset of the estate. As of the date of the decedent's death, the principal balance due upon the decedent's residence was \$77,582.11. The estate is entitled to contribution from Ms. Spears in the one-half that amount, or \$38,791.06.

Ms. Spears presented evidence of her payment of mortgage payments from the date of the decedent's death until September 2007. At that time, the principal

balance of the mortgage was \$47,828.34. The mortgage payments on the decedent's residence were \$803.56 per month. Ms. Spears received reimbursement for the entire amount of such payments for 13 months through February 2003, for which the estate is entitled to contribution for one-half of the principal and interest amount paid.⁵ Therefore, the estate is entitled to an additional contribution of \$5,223.14. Ms. Spears paid the entire mortgage amount from March 2003 until September 2007. Therefore, she is entitled to credit against her contribution obligation in one-half the amount of the 56 mortgage payments she made for which she received no reimbursement, or \$22,499.68. Based upon the foregoing, the estate is entitled to a net contribution from Ms. Spears of \$12,477.23.

Operation of the Decedent's Business

Much of the testimony before your commissioner was focused upon Ms. Spears' operation of the business enterprises of the decedent. Based upon the testimony and evidence presented to your commissioner, your commissioner finds the following facts: Prior to the decedent's death, Ms. Spears and the decedent's two male children were employed at Bill's. William H. Spears, Jr. had managed the day-to-day operations of the business. Michael D. Spears worked as one of the crew chiefs for Bill's workforce. Deborah A. Spears had worked as the secretary treasurer of the company, but also had duties in connection with the business operations of Double Diamond. Deborah A. Spears qualified as the administrator of the estate of William H. Spears, Sr. on March 5, 2002. On that date, without notice to the other heirs at law, Ms. Spears took action as the administrator of the estate, acting as the sole shareholder of Bill's, to elect herself as the sole director and registered agent of Bill's. As sole director, on March 5, 2002, she elected herself as president, secretary and treasurer of the corporation. There were no other officers of the corporation. Acting as both the landlord and the tenant, she increased the rent paid by Bill's upon the warehouse space which she owned from a triple net lease based upon the actual expenses and mortgage payment to a triple net lease at \$5,500 per month, thus increasing her personal income \$1,469.19 each month at the expense of Bill's. She immediately increased her annual salary at Bill's from \$50,000 to \$78,000. She did not consult with any of the other heirs prior to taking such actions and did not advise them of the actions after she had taken them.

⁵ Escrow payments for taxes and insurance have been previously dealt with in connection with the claim under § 64.1-16.4.

Conflicts with the decedent's sons over the operation of the business began immediately. By the end of 2002, the parties were not speaking. On Friday, January 3, 2003, Ms. Spears delivered employment contracts to the decedent's two sons which provided, in pertinent part, "the Employee's employment with the Employer was terminated as of midnight the day before the date of this Agreement, and the Employer wishes to hire the Employee to render services for it on the terms, conditions and covenants as set forth herein." The employment contracts contained handwritten dates of January 3, 2003.

The decedent's sons previously did not have employment contracts. The proposed contract purported to be for a one-year term but expressly stated that the employment was "at will" and the employer could terminate the employee "with or without cause and with or without notice at any time." It granted the employer "the absolute right to veto, in its sole and absolute discretion, whether with or without cause, as it deems fit, necessary or proper, any and all actions taken or to be taken by the Employee on behalf of the Employer." It further stated that the employer "shall have the sole and exclusive right of management of the Employee's affairs." It contained non-competition, non-solicitation and non-disclosure provisions for a one year period after termination and established a \$50,000 liquidated damage provision for breach of any of these restrictions, together with the requirement to pay attorney's fees expended by the employer to enforce the Agreement. The liquidated damages provision was equal to the annual salary set in the contract.

The contracts were delivered to the decedent's sons without discussion. A prior draft had been presented to Michael D. Spears but had never been shown to William H. Spears, Jr. Ms. Spears testified that she offered the employment contracts to the decedent's two sons to establish a more formal relationship and did not intend the contracts to be taken as termination notices. The sons testified that they took the contracts at face value and thought that they had been fired. Your commissioner finds it significant that Ms. Spears had her attorney forward a settlement proposal to the Spears children in connection with the distribution of the estate on the same day that the contracts were delivered. The settlement agreement proposed to distribute \$8,700 apiece to each of the Spears children in complete settlement of an estate then valued at \$452,348.63. The Spears children called the proposal "outrageous" in their testimony. In addition, Ms. Spears had the locks changed on the warehouse location on Saturday, January 4, 2003, prior to hearing

any response from either son and she did not personally enter into an employment agreement with the company.

Ms. Spears testified that under her control the revenues of Bill's had risen, but the costs had risen more rapidly. Her assumptions are borne out by the books and records of the company. The records show that the company had average annual sales of approximately \$775,000 from 2000 to 2006, with the highest sales years in 2003 and 2005. The records further demonstrate a deterioration of both equity and earnings in the company after 2001. Thomas E. Burdette, CPA testified on behalf of Ms. Spears as an expert in business valuation. His reports show that in 2002, Bill's weighted five year average earnings was \$41,110. By 2007, Bill's weighted six year average loss was (\$27,423). The net book value of the company in 2002 was \$150,250. In 2007, the net book value of the company was (\$147,189), a difference of nearly \$300,000.

Mr. Burdette performed three valuations of Bill's. In September 19, 2002, he computed the estimated value of the company as at March 31, 2002. The data as of that date reflected both the company's receipt of the proceeds of insurance upon the life of the decedent in the amount of \$150,216.16 and the advance of \$95,000 to the estate. Based upon his analysis, Mr. Burdette found the estimated business value as at March 31, 2002, to be \$274,285. He then applied a 50% discount to that value for lack of marketability. He found the value of the business after discount to be \$137,142. This value was carried forward in the amended inventory filed by Ms. Spears. On January 10, 2005, Mr. Burdette provided a further opinion of value as at March 31, 2004. He found the estimated value of the business to be \$115,180, to which he applied a 50% discount for marketability, reducing the value of the business after discount to \$57,590. On October 1, 2007, Mr. Burdette completed his final opinion of value as at March 31, 2007. Based upon his analysis, he found that the company had no value, and he therefore did not apply any discount for marketability.

The Spears children raised a number of issues concerning Ms. Spears' operation of Bill's. They were concerned about Ms. Spears hiring and firing practices, including the discharge of the two sons of the decedent and her hiring of relatives in replacement of the sons. They raised issues concerning the receipts from a snow plowing business operated through Bill's and the disposition of life insurance proceeds payable on the decedent's life. They believed that the business operations were jeopardized in light of Ms. Spears' failure to maintain Bill's

qualification for a Class A contractor's license. They were continually concerned by the self-dealing aspects of Ms. Spears' operation, to-wit: increasing her personal salary \$28,000, increasing the rent upon the warehouse property she owned by \$17,630.28 annually, and the payment of her personal expenses through the company. Based upon the testimony and evidence presented, your commissioner finds that the receipts from the snow plowing business and the life insurance policy were reflected in the books and records of the company. If Ms. Spears were subject to no duty other than that applicable to corporate officers and directors, she might be protected under the business judgment rule provided her actions were taken in good faith based upon her business judgment. *Lake Monticello Owners' Ass'n v. Lake*, 250 Va. 565, 463 S.E.2d 652 (1995). See VA. CODE ANN. § 13.1-690. However, the business judgment rule provides no shield against a breach of fiduciary duty owed to the corporation or its shareholders. *Flippo v. CSC Associates III, L.L.C.*, 262 Va. 48, 547 S.E.2d 216 (2001) Therefore, it is important to determine the proper standard to which Ms. Spears is to be held when she assumes control of the decedent's business under her fiduciary authority as administrator of his estate.

Ms. Spears' actions with respect to her salary, the rent upon the warehouse, and the operations of the decedent's business constituted self-dealing at the expense of the other beneficiaries of the estate. She acknowledged in her testimony that these factors had led her to continue to operate the business despite the objections of the heirs. Virginia has always dealt harshly with such behavior. In *Kitchen v. Throckmorton*, 223 Va. 164, 286 S.E.2d 673 (1982), the beneficiaries brought suit against the administrator distributing the estate in a manner contrary to the law. The court held that

the personal representative of a decedent holds a position of trust and confidence. He is deemed a trustee, exercising a continuing trust as to legatees and distributes of his decedent's estate. ... He must exercise the highest fidelity and utmost good faith in dealing with the estate. In the discharge of his fiduciary obligations, he is required to use the same measure of care which a careful and prudent person would ordinarily use under like circumstances in his own personal affairs." 223 Va. at 171-172 (citations omitted).

In *Swineford v. Virginia Trust Co.*, 154 Va. 751, 759, 152 S.E. 350, 353, the Supreme Court quoted the Restatement of Contract Law with approval, noting

Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage himself in dealings with the trust estate. He shall not be allowed to serve himself under the pretense of serving his *cestui que trust*.

Accord, Richardson v. AMRESKO Residential Mortg. Corp., 267 Va. 43, 592 S.E.2d 65 (2004); *Smith v. Credico Indus. Loan Co.*, 234 Va. 514, 362 S.E.2d 735 (1987), *Whitlow v. Mountain Trust Bank*, 215 Va. 149, 207 S.E.2d 837 (1974); *Owens v. Owens*, 196 Va. 966, 86 S.E.2d 181 (1955).

In Virginia, a fiduciary is personally liable for the loss of any debt or other money through his negligence or improper conduct. VA. CODE ANN. § 26-5. Similarly, a Virginia fiduciary may be sued personally for “waste, destruction of, or damage to any estate of ... the decedent, whether such damage be direct or indirect.” VA. CODE ANN. § 64.1-145. An administrator of an estate is not generally expected or empowered to operate a decedent’s business. *In re Estate of Carl J Kurkowski*, 487 Pa. 295, 409 A.2d 357 (1979). *See generally*, 31 AM.JUR.2d *Executors and Administrators* § 525 (2008). The Supreme Court of Pennsylvania surcharged a fiduciary \$119,999 when she operated the decedent’s business for 20 months of losses before shutting it down. *Kurkowski, supra*. The same court surcharged fiduciaries where they took over farm operations of the decedent and withheld the property from the heirs for twelve years. *In re McCrea's Estate*, 475 Pa. 383, 380 A.2d 773 (1977). The Supreme Court of North Carolina in *Poindexter v. First National Bank of Winston-Salem*, 244 N.C. 191, 92 S.E.2d 773 (1956), found that it was not part of the duty of a fiduciary to carry on the business of a decedent, and remanded a claim against a bank fiduciary for a jury’s consideration when the fiduciary’s operation of the decedent’s furniture business reduced it to insolvency. The general rule in the United States is that that an executor or administrator who continues the decedent’s business without the appropriate authority⁶ becomes personally liable for all debts of the business and any losses incurred. *See, e.g., Poindexter v. First National Bank of Winston-Salem*,

⁶ Proper authority can flow from statute, court order, consent of all interested parties, or express authorization under the will. *See, Kurkowski, supra*, 409 A.2d at 361; *Poindexter, supra*, 92 S.E.2d at 775-76; 31 AM. JUR. 2d *Executors and Administrators* § 525. In the instant case, Ms. Spears was the administrator of an intestate estate. There is neither statutory authority, court direction nor instruction in a will to undertake the operation of a business. She operated without consultation with the other heirs and without their consent, as discussed above. Ms. Spears’ undertook the operation and control of Bill’s without authority.

244 N.C. 191, 92 S.E.2d 773 (1956); *Deschenes v. Deschenes*, 109 N.H. 389, 254 A.2d 278 (1969); *In the matter of the Estate of Leo KinReich*, 137 Misc. 735, 244 N.Y.S 357 (1930); *Kurkowski, supra*. See generally, 31 AM.JUR.2d *Executors and Administrators* § 534 (2008).

Ms. Spears argues that the Spears children consented to her operation of the business when they agreed that the decedent's business enterprises should continue rather than being liquidated or sold. It is not surprising that the Spears children agreed to continue the businesses enterprises that employed most of the family; however, agreement to continue a business is not agreement to the operation and control of that business by the administrator of the estate. The Spears children in their testimony and their actions made it clear that they did not approve of Ms. Spears' actions. Rather than acting with the consent of the interested parties, Ms. Spears acted in the face of their express objections to her actions. The burden of demonstrating consent from all interested parties is on the administrator. *Kurkowski, supra*, 409 A.2d at 361; *Deschenes, supra*, 254 A.2d at 280; *KinReich, supra*, 137 Misc. at 738. Based upon the testimony and evidence presented, your commissioner finds that the Spears children did not consent to Ms. Spears' operation of the decedent's business enterprises and that they made their objections to her actions known to the administrator.

Ms. Spears also contends that the general statutes requiring a marshalling of assets and administration of the decedent's estate confer authority upon the administrator to operate the decedent's business. See VA. CODE ANN. § 64.1-139. A fiduciary may temporarily operate a business to close it down or liquidate it, but such temporary action does not justify long-term operation of the business. See generally, 31 AM.JUR.2d *Executors and Administrators* § 527 (2008). Absent a court order or consent of all beneficiaries, the Uniform Probate Code permits a fiduciary to operate a decedent's business for no more than four months. UPC § 3-715 (24). In the instant case, Ms. Spears has operated the decedent's business for more than six years. In that time period, she has reduced the business to insolvency and has dissipated the net worth of the business. Such action is not authorized under Virginia's statutory scheme and far exceeds the authority of the fiduciary to marshal the assets of the decedent and is inconsistent with the fiduciary's duty to promptly distribute the estate to the beneficiaries.⁷

⁷ Public policy favors speedy distribution of probate estates. See, e.g. *Estate of Anderson*, 68 Cal. App. 3d 1010, 137 Cal. Rptr. 727 (1977); *Parshley v. Mott*, 217 A.2d 300 (Md. 1966); *In re McLean's Estate*, 295 N.W. 273 (Neb.

Ms. Spears relies upon the Restatement of Trusts as authorizing her acts. This mistakes the fundamental difference between trust and estate administration. Trust administration involves the long-term management of assets for the benefit of the income and principal beneficiaries. It contemplates ongoing investment and participation in operating businesses. Estate administration, on the other hand, involves the prompt gathering of the decedent's assets, the payment of his debts, and the distribution of those assets to the proper beneficiaries as promptly as possible.⁸ Ms. Spears argues that her decision was whether to liquidate the company or to retain its stock. To the contrary, her decision was whether to liquidate the company or to distribute its stock to the heirs. Had she done the latter, there would be no basis to complain about her actions.

Based upon the foregoing, your commissioner is of the opinion that Ms. Spears' operation of Bill's was unauthorized, improper and a breach of fiduciary duty. It is the further opinion of your commissioner that she is personally responsible for the loss in value of the business during her operation of the company. The issue remains what is the value of the business for which she is responsible.

The testimony of Thomas E. Burdette is the only evidence of value presented at the hearing before your commissioner. The valuation of the business appears to be based largely upon subjective factors. It is subject to a challenge under the decision in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) on its face. Your commissioner gives little weight to the subsequent valuations in light of the static risk and cost of funds factors that the appraiser used and the failure to use the business values consistent with the financial statements and final tax returns. Moreover, the 50% discount applied solely based upon a lack of marketability is at the highest end of the acceptable range of the aggregate discounts allowed, which normally include discounts for minority interests and other matters as well. That being said, Mr. Burdette's valuation of Bill's is the unrebutted expert evidence of value before your commissioner. Your commissioner therefore finds that the value of Bill's as of the date of the

1940); *In re Hanna's Estate*, 286 N.Y.S. 689 (N.Y. Sur. 1936); *Estate of Doyle v. Hunt*, 60 S.W.3d 838 (Tenn. App. 2001).

⁸ The Uniform Probate Code provides that "A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate." UPC § 3-708(a). *Accord*, 31 AM. JUR. 2d *Executors and Administrators* § 915.

decedent's death was \$274,285 and that the present value of Bill's is zero. Your commissioner declines to apply the discount for marketability to such valuation, as it is the opinion of your commissioner that in the distribution of an estate fair value is a better measure of the value than market value. In such circumstances, marketability and minority discounts should not be applied.

The purpose of estate administration is the orderly and expeditious settlement of the decedent's affairs.⁹ Probate exists only to provide an orderly transition from the decedent to his creditors and his heirs. In Virginia, the courts do not assume that the assets of the decedent will be sold where a sale is not necessary to the orderly administration of the estate. *Perrow v. Payne*, 203 Va. 17, 121 S.E.2d 900 (1961); *Pritchett v. First National Bank*, 195 Va. 406, 78 S.E.2d 650 (1953); *Virginia Trust Co. v. Evans*, 193 Va. 425, 432, 69 S.E.2d 409, 414 (1952) ("If there be no requirement or necessity to sell, and the legatees or distributees request distribution in kind, such distribution should be made."). When dealing with closely held corporations, if there is no evidence that a sale of the corporation is necessary or foreseeable, Virginia courts do not permit a discount for marketability. *Howell v. Howell*, 31 Va.App. 332, 523 S.E.2d 514 (2000). *Accord*, *Hoebelheinrich v. Hoebelheinrich*, 43 Va.App. 543, 600 S.E.2d 152 (2004); *Owens v. Owens*, 41 Va.App. 844, 589 S.E.2d 488 (2003). The application of discounts for lack of marketability to an estate distribution where no sale is contemplated creates a windfall for any heir receiving the discounted asset and an unjust diminution in the distributions to the other heirs.

It is the rule in Virginia and generally in the United States that marketability and minority discounts are not appropriate except in extraordinary circumstances in statutory appraisals of dissenting shareholders stock,¹⁰ in the division of marital assets,¹¹ or in other circumstances which do not contemplate a sale between a

⁹ See generally 31 AM. JUR. 2d *Executors and Administrators* § 915.

¹⁰ See, e.g. *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137 (Del. 1989); *Bell v. Kirby Lumber Corp.*, 413 A.2d 137 (Del. Super. Ct. 1980); *In re McLoon Oil Co.*, 565 A.2d 997 (Me. 1989); *Balsamides v. Protameen Chemicals, Inc.*, 160 N.J. 352, 734 A.2d 721 (1999); *Lawson v. Mardon Wheaton, Inc. v. Smith*, 160 N.J. 383, 734 A.2s 738 (1999); *Friedman v. Beway Realty Corp.*, 661 N.E.2d 972 (N.Y. 1995). See also 2 ALI *Principles of Corporate Governance* § 7.22, comment e at 325-26. Judge Kline has adopted the rule in this circuit as well. *U.S. Inspect, Inc. v. McGreevy*, 2000 WL 33232337 (Va. Cir. Ct.)(Kline, J., Fairfax Circuit Court).

¹¹ See, e.g., *Anderson v. Anderson*, 2006 WL 2535393 (Tenn.Ct.App.); *Baltrusis v. Baltrusis*, 113 Wash.App. 1037, 2002 WL 31058365 (2002). Virginia Circuit Courts have adopted the same rule. See, e.g., *Hoebelheinrich v. Hoebelheinrich*, 43 Va.App. 543, 600 S.E.2d 152 (2004); *Owens v. Owens*, 41 Va.App. 844, 589 S.E.2d 488 (2003); *Stephenson v. Stephenson*, 2002 WL 507769 (Va. Cir. Ct.).

willing buyer and seller, such as withdrawals of partnership interests.¹² The rule is also applied in estate distributions, where the same factors are present.¹³

In *Vick v. Albert*, 47 A.D.3d 482, 849 N.Y.S.2d 250 (2008), the New York Appellate Division declined to apply marketability or minority discounts to the decedent's interest in certain partnerships, holding that "application of the discounts sought by defendants would deprive plaintiffs of the value of the decedent's proportionate interest in a going concern, since they would not receive what they would have received had the entire entity been sold on the open market unaffected by a diminution in value as a result of a forced sale." 849 N.Y.S. at 252. The objective of an estate distribution is to fairly divide the estate among the beneficiaries. The purpose of valuing the stock interest is to determine the non-owner's share of other assets, where one beneficiary will receive the shares and the other will receive other assets. The distribution to the beneficiary will not trigger a sale of the shares and the lack of liquidity does not affect the value of the interest. Neither discount is appropriate.

In the instant case, the distribution of the corporate stock does not necessitate the sale of the corporation or any interest in that company; nor is it foreseeable that such a sale would occur. Ms. Spears and the Spears children had agreed to continue the business as a going concern. Therefore, under the Virginia case law, no discount for marketability is appropriate. *Howell v. Howell*, 31 Va.App. 332, 523 S.E.2d 514 (2000). *Accord, Hoebelheinrich v. Hoebelheinrich*, 43 Va.App. 543, 600 S.E.2d 152 (2004); *Owens v. Owens*, 41 Va.App. 844, 589 S.E.2d 488 (2003). In such circumstances, each heir was entitled to his or her proportionate share of the value of that going concern. If the stock in Bill's were distributed to less than all the heirs and the value of that distribution is calculated by applying a 50% discount for lack of marketability to the value of the company, those receiving the shares receive a disproportionate amount of the estate's intrinsic value and those who receive other assets or cash payments in lieu, receive substantially less than the intrinsic value of their share of the estate. Based upon the foregoing, it is the opinion of your commissioner that no discount for marketability is appropriate in the instant case.

¹² *East Park Ltd. Partnership v. Larkin*, 167 Md.App. 599, 893 A.2d 1219 (2006).

¹³ *See, e.g., Demoulas v. Demoulas*, 428 Mass. 555, 703 N.E.2d 1149 (1998).

As stated above, your commissioner is of the opinion that Ms. Spears' operation of Bill's was unauthorized, improper and a breach of fiduciary duty. She is therefore personally responsible for the loss in value of the business during her operation of the company. According to the testimony and evidence presented, that loss is a total loss. Therefore, it is the opinion of your Commissioner that Deborah A. Spears should be surcharged with the value of the decedent's business as of the date of his death to be distributed as a part of the estate to the heirs.

Mr. Burdette determined the value of Bill's to be \$274,285 as of March 31, 2002. At that date, Bill's financial statements reflected the \$95,000 paid to the estate as a loan, a corporate asset which increased the net worth of the company. This amount was later characterized as a redemption of stock, reducing the net equity in the company. Thus the value of the company should be reduced by this direct payment to the estate. Ms. Spears is entitled to a credit against the value of the company for \$95,000.00 that the estate received for the company's redemption of 69.2714 shares of stock. Ms. Spears is also entitled to deduct from the surcharge \$20,000.00 that Bill's loaned to the estate that has not been repaid. Interest accrued on the \$20,000 loan at 2.69% from March 2, 2002. Interest upon the loan amount at such rate to June 2, 2008 amounts to \$3,354.04. Therefore, the total amount due to the estate from Ms. Spears in connection with the operation of Bill's is \$155,930.96, representing the value of Bill's of \$274,285, less the redemption of \$95,000 and less the principal and interest of the loan to the estate of \$23,354.04. Upon satisfaction of such surcharge, the administrator may transfer the remaining 30.7286 shares of Bill's, representing 100% of the issued and outstanding shares of common stock, into her own name.

Attorney's Fees

In this circuit, it is clear that a fiduciary may not use the funds of the estate to engage counsel to advance his own interests. *Gaymon v. Gaymon*, 63 Va. Cir. 264 (2003). In *Gaymon*, Judge Vieregg held that

[I]f the contest merely involves a question of who will take from a decedent's estate, an executor or administrator should leave the interested parties to litigate the issue.... An executor should not seek the aid and direction as to matters where significant expense is involved and such expense is more properly borne by the parties. 63 Va. at 283.

See also In re Dooley Trust, 2005 WL 877937 (Va. Cir. Ct.)(City of Richmond); *Butt v. Murden*, 154 Va. 10, 152 S.E. 330 (1930). Similarly, in Henrico County, Judge Hammond ruled that “Counsel fees are not allowed where the litigation is between co-beneficiaries in the estate. As a general rule, in such cases it is the duty of the personal representative to stand neutral, as the estate is not in any sense interested in such a controversy.” *In re Estate of Wicker*, 58 Va. Cir. 331, 333 (Hammond, J., Henrico County, 2002).

In the instant case, the complaint for aid and direction which the fiduciary has filed involves genuine disputes and issues of law, but it is a dispute between the heirs of the estate. The litigation revolves around the resolution of numerous claims of Ms. Spears in a personal capacity against the estate and the determination whether her proposed scheme of distribution is satisfactory. It is a matter where the fiduciary should stand neutral. It is therefore the opinion of your commissioner that none of the legal fees incurred in the prosecution of this litigation are costs of the estate. The firm of Sands, Anderson, Marks & Miller, P.C., as litigation counsel for the administrator, has billed the estate \$40,133.50. Prior to the engagement of Sands, Anderson, the firm of Kelly, Mayne & Daugherty served as litigation counsel to the estate, and billed the estate \$2,632.50. It is the opinion of your commissioner that the fees of both Sands, Anderson, Marks & Miller, P.C., and of Kelly, Mayne & Daugherty are not chargeable to the estate and that Ms. Spears should pay such amounts personally. Your commissioner is not aware if the estate has paid any of such fees after the date of the filing of the last account. If any such fees have been paid from the estate, Ms. Spears is to reimburse the estate for such amounts from her personal funds.

The same rule would apply to legal fees that the Spears children incurred in the defense of the litigation. In the opinion of your commissioner, each party should bear its own legal fees in this matter.

The estate has also incurred substantial legal fees in the administration of the estate. In the five accounts filed with your commissioner, the estate shows payments of \$41,636.07 in legal fees to the firm of Yates, Campbell & Yates. Since the filing of the last account, the firm has billed the estate an additional \$4,884.57, for a total legal fee of \$46,520.64. This represents approximately 10% of the original value of the probate estate. The legal fees were incurred in the routine duties of the estate, in the provision of legal services to the estate, in the

corporate operations of the decedent's businesses, and in advice and counsel to Ms. Spears in connection with the pending litigation. To some extent, corporate services were billed separately to the corporate entities and are not included in the \$46,520.64 that the estate has paid for legal services. Mr. Thomas Yates testified that while there were separate billings, the separation was based upon what in his opinion benefited the estate as opposed to Ms. Spears. He viewed advice on the operations of Bill's as benefiting the estate and being attributable to it. He estimated that the firm had billed approximately \$4,000 directly to Ms. Spears or to the corporate entities in addition to the \$46,520.64 billed to the estate.

Mr. Munford Yates testified that the law firm provided advice to the fiduciary on the initial assumption of responsibility for the operations of the business and the firm certainly prepared the corporate documents reflecting her election as sole officer and director of Bill's. Your commissioner requested that the firm provide a breakdown of the services it rendered among the routine duties of administration normally charged to the fiduciary, those legal services reasonably necessary for the administration of the estate, and legal services rendered in connection with Ms. Spears disputes with her co-beneficiaries. Mr. Thomas Yates advised that he could not provide such a breakdown. He stated that the firm's invoices did not include charges solely for the benefit of Ms. Spears, that services rendered to the corporate entities benefited the estate and were attributable to it, and that in his view there should be no amount offset from any commission due to the fiduciary for routine services provided by the law firm as the services rendered were necessary to assist an amateur fiduciary.

In the absence of a breakdown of the legal services rendered that the firm prepared, your commissioner has reviewed the time records of the Yates law firm provided to him. Based upon that review, and with the recognition that any such allocation is dependent upon the level of detail provided in the billing records and the judgment of the reviewer, your commissioner finds that the \$46,520.64 in legal services billed to the estate may be divided as follows:

Performance of routine services normally undertaken by the fiduciary	- \$6,665.00
Legal services necessary for the administration of the estate	- \$13,687.50
Legal services for the decedent's business entities	- \$3,176.25
Legal services in connection with the claims of Ms. Spears against her co-beneficiaries	- \$22,905.25

Your commissioner is of the opinion that the charges for routine services should reduce any fiduciary compensation due to Ms. Spears; that the legal services necessary for the administration of the estate are necessary and proper expenses of the estate; that the legal services for the decedent's business entities are obligations of those entities, and Ms. Spears should reimburse the estate \$3,176.25 for these payments and seek recovery from the business entities; that charges for legal services in connection with the claims of Ms. Spears are her personal responsibility, as more fully set forth above, and she should reimburse the estate \$22,905.25 for the payments it made for those amounts. The total amount due from Ms. Spears' to the estate in connection with the attorney's fees paid is \$26,081.50, assuming that the estate has paid the remaining invoices for legal services in the amount of \$4,884.57 not shown as paid in the prior accounts.

Miscellaneous Matters

The estate paid a number of joint expenses of the decedent and Ms. Spears in the first account. Ms. Spears, in her testimony, acknowledged that the credit card payment to MBNA America in the amount of \$24,545.85 represented joint debt of she and the decedent and she agreed to reimburse the estate for one-half of that amount: \$12,272.93. In addition, the estate paid Federal and state income taxes for the joint return filed by Ms. Spears and the decedent for 2001 in the amount of \$7,945. Based upon your commissioner's review of the joint tax returns filed in 2001, such payment represents the entire amount of the payment due. Ms. Spears is responsible for one-half such tax liability: \$3,972.50. Ms. Spears received reimbursements for certain car lease payments in the amount of \$3,728.66. An examination of the leases shows that the same are in the name of Bill's. The company was a solvent and otherwise responsible entity under the control of Ms. Spears. The payments are not properly chargeable to the estate. Therefore, Ms. Spears is to reimburse the estate in the total amount of such payments. Finally, the estate paid the decedent's American Express bill in the amount of \$2,896.40. Ms. Spears represented that to be solely her husband's card and your commissioner so finds. Based upon the foregoing, Ms. Spears is to reimburse the estate for miscellaneous charges in the total amount of \$20,028.09.

Summary of Recommendations and Review of the Estate

In the fifth account for the decedent's estate filed with your commissioner, Ms. Spears showed assets on hand as of January 31, 2007, of \$56,675.66,

consisting of \$42,141.82, representing the remaining carrying value of the stock in Bill's, miscellaneous items of personalty valued at \$2,300, vehicles valued at \$8,415 (including a 1966 Ford Mustang considered a collector's car but not in running condition), and \$62.84 in cash. Based upon the zero current market value assigned to Bill's as previously discussed, it appears that the current value of the probate estate is approximately \$10,777.84.

The Spears children raised issues about the failure to include items of personalty in the inventory, including a coin collection; however, they presented no evidence of such omissions at the hearing. Ms. Spears testified that she had transferred some personal items to the Spears children, which was not rebutted. She further stated that the household goods were owned jointly with the decedent, which, after 17 years of marriage, your commissioner finds to be a reasonable assumption. Your commissioner is of the opinion that the inventory correctly states the probate estate.

Ms. Spears has served as the administrator of the estate of the decedent for more than six years. In the accounts presented to your commissioner, Ms. Spears has taken no fee for her services to date. The principal value of the estate for purposes of calculating fiduciary fees is \$181,618.11, consisting of the inventory value of \$167,348.63, together with additional principal receipts of \$14,269.48, as follows: Double Diamond loan - \$8,266.07; escrow refund - \$122.22; additional personalty received - \$5,800.00; and a personal property tax refund of \$81.19.¹⁴ Ms. Spears would normally be entitled to a 5% fee upon these assets based upon the adopted fiduciary compensation schedule in the amount of \$9,080.81. In addition, the estate received income receipts of \$30,579.12 during administration, consisting of the following: Bill's dividend payments - \$30,000; interest - \$560.06; and other dividends - 19.06. Ms. Spears would also normally be entitled to compensation based upon 5% of the income receipts, in the amount of \$1,528.96, for total allowable compensation of \$10,609.86.

In the instant case, Ms. Spears dissipated the value of Bill's through her mismanagement and breaches of fiduciary duty. In such circumstances, it is the opinion of your commissioner that no fee should be allowed for the carrying value of that asset in the probate estate. Bill's was valued at \$137,142 on the estate inventory. If that value is removed from the fee base, the total allowable

¹⁴ In the opinion of your commissioner, loan proceeds received do not constitute a principal receipt, as the overall value of the estate is reduced by a corresponding liability to the lender.

compensation would be reduced by \$6,857.10, leaving net allowable compensation of \$3,752.76. In the instant case, your commissioner found that the estate expended \$6,665.00 in legal fees for the performance of the routine duties of the fiduciary, which amounts are to be deducted from any compensation due to the fiduciary. Therefore, as the deduction for legal fees exceeds the net allowable compensation available to Ms. Spears, she would be entitled to no compensation as administrator of this estate. Your commissioner is therefore of the opinion that Ms. Spears should not be allowed any compensation for her services to the estate as its administrator.

In this report, your commissioner has made recommendations upon a number of claims and distributions affecting the estate. The same are summarized below:

Amounts Due To / (From) Deborah A. Spears		
<u>Description</u>	<u>Allowed</u>	<u>Status</u>
Statutory Allowances		
Family Allowance	\$18,000.00	Paid
Exempt Property	\$15,000.00	\$15,000.00
64.1- § 16.4	\$42,802.32	\$42,802.32
Warehouse	\$107,637.27	\$107,637.27
Residence	(\$12,477.23)	(\$12,477.23)
Businesses	(\$155,930.96)	(\$155,930.96)
Attorney's Fees	(\$26,081.50)	(\$26,081.50)
<u>Miscellaneous</u>	<u>(\$20,028.09)</u>	<u>(\$20,028.09)</u>
Total	(\$31,078.19)	(\$49,078.19)

Thus, your commissioner is of the opinion that Ms. Spears must restore \$49,078.19 to the estate, after offsetting all allowances and rights of contribution otherwise granted to her.¹⁵

In addition, the disposition of the decedent's residence, which is not a part of the probate estate, remains in limbo. The Spears children have advised your commissioner by letter that Ms. Spears is no longer living in the residence, but your commissioner has not confirmed that information. At the hearing in this

¹⁵ Please note that Ms. Spears' net amount due to the estate is \$31,078.19; however, she has already received \$18,000 from the estate in payment of the family allowance and such amount cannot be offset against other unpaid balances.

matter, Leon A. Duncan, Sr., a certified residential real estate appraiser employed by R.L. Kane, Inc., testified that the fair market value of the decedent's residence as of January 18, 2007, was \$515,000. Your commissioner is of the opinion that the testimony was both credible and competent, and therefore finds that the decedent's residence at 9609 Scorpio Court, Burke, Virginia 22015 has a fair market value of \$515,000. Based upon the mortgage balance of \$47,828.34 as at September 2007, the house has equity of \$467,171.66 available to the heirs. Thus, it represents the largest remaining portion of the inheritance available to the heirs in this matter.

Thus, if the decedent's residence is sold for its appraised value, less the mortgage balance as of September 2007, the gross estate available for distribution to the heirs would be as follows:

Miscellaneous personalty	-	\$2,300.00
Vehicles	-	\$8,415.00
Cash	-	\$62.84
Receivable from Ms. Spears	-	\$49,078.19
<u>Net equity in residence</u>	-	<u>\$467,171.66</u>
Total	-	\$527,027.69

The heirs at law would be entitled to the following distributions based upon such gross assets:

Deborah A. Spears	-	\$175,675.90
William H. Spears, Jr.	-	\$87,837.95
Donna K. Haass	-	\$87,837.95
Michael Dwayne Spears	-	\$87,837.95
<u>Sharon Leigh Nalls</u>	-	<u>\$87,837.95</u>
Total	-	\$527,027.69

Upon consideration whereof, it is the recommendation of your commissioner that the Court reject the plan of distribution that administrator proposed, as the proposal would unjustly enrich Ms. Spears to the detriment of the remaining heirs.

The assets remaining in the estate are not complex, nor should distribution of those assets require great time or effort. The personalty may have some personal value greater than its liquidation value to certain of the heirs. Your commissioner

recommends that should any heir desire to receive an item of personalty in the possession of the administrator, including any of the motor vehicles or the weapon, the heir may purchase the same from the administrator for the carrying value. In the event that there are multiple heirs seeking the same item of personalty, the administrator should sell the item to the highest bidder among them upon submission of sealed bids. Any value received in excess of the carrying value will increase the gross estate available for distribution. In the event that no heir desires an item of personalty, the administrator should sell the same expeditiously in the open market. The net gain or loss against its carrying value will increase or decrease the gross estate available for distribution.

With respect to decedent's residence, your Commissioner recommends that the Court direct that the decedent's residence be conveyed to the Spears children in exchange for a sum payable to Ms. Spears equal to the net equity in the residence (its market value of \$515,000, as determined above, less the outstanding mortgage balance) less 2/3 of the gross estate available for distribution. Based upon the above assumptions, the sum due from the Spears children to Ms. Spears would be \$115,819.87.

Ms. Spears, for her share of the estate, would retain the cash payment, the stock of Bill's, the remaining cash in her possession as administrator, together with any items of personalty she elects to keep. She would receive no other distributions from the estate and would not be required to make any payments to the estate, as the amount of her liability to the estate is taken into account in computing the gross estate available for distribution. Such a plan of distribution can be carried out rapidly, with a minimum of administrative expense.

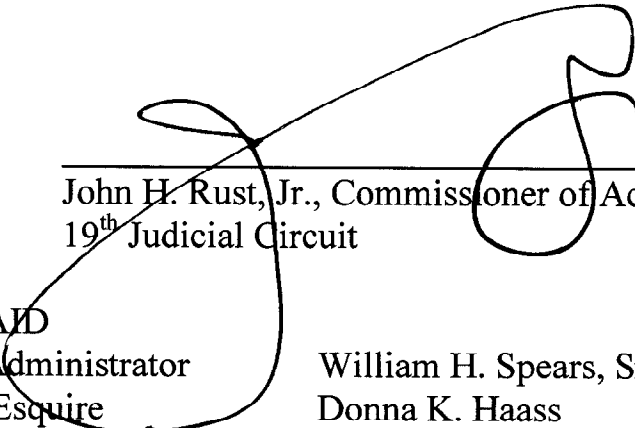
Grant of Fiduciary Powers under Virginia Code § 64.1-57.1

In the complaint for aid and direction, Ms. Spears requests that the Court grant to her the powers set forth in § 64.1-57 of the Virginia Code. In paragraph 11 of the complaint she states that she will need such powers to carry out the proposed scheme of distribution set forth in paragraph 10 of the complaint. That scheme contemplates the distribution of the decedent's residence to her in satisfaction of her claims addressed above. Such a distribution scheme is inconsistent with the findings in this report; however, in light of the relationship among the beneficiaries in this case, your commissioner is concerned that there may be a failure of cooperation among the heirs-at-law that could frustrate any

transfer of the real property in question. Your commissioner does not recommend that the Court grant the administrator powers pursuant to § 64.1-57 for the purpose of carrying out her proposed plan of distribution; rather, your commissioner recommends that the administrator be granted the power to convey real estate for the limited purpose of transferring the decedent's residence to the Spears children in accordance with the plan of distribution recommended above. In the opinion of your commissioner no additional fiduciary compensation should accrue to Ms. Spears' as a result of the grant of such powers.

Your Commissioner's fee for the conduct of the hearing in the above estate and the preparation of this report is \$5,000, unless the Court shall establish another amount therefor.

Respectfully submitted this 2nd day of June, 2008.



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

Hearing Fee - \$5,000 UNPAID

cc: Deborah A. Spears, Administrator
George O. Peterson, Esquire
Munford R. Yates, Jr., Esquire

William H. Spears, Sr.
Donna K. Haass
Michael D. Spears
Sharon L. Nalls
Mark E. Kellogg, 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

6-18-08
Date By: 
Deputy Clerk