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IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of John Edward Threlfall, Deceased | Commissioner's Report
Fiduciary No. FI-2007-0000875

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

At the request of John N. Rodock, attorney for Joan Threlfall, a person interested in the above estate, the undersigned provided notice setting the 9th day of April, 2010, at 1:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for hearing objections to accounts filed by the executor of the above estate pursuant to Virginia Code § 26-29. At the said time and place, Veronica Threlfall Wyss, executor for the estate, appeared together with the counsel for the estate, Sean Anthony Dunston, to substantiate the executor's accounts. Joan Threlfall appeared together with her counsel, John N. Rodock, to raise the following objections to the executor's accounts:

- 1) Whether legal fees paid to Patton Boggs, William Babcock, and Sean Anthony Dunston are proper expenses of the estate;
- 2) Whether the executor should be held personally liable for investment losses totaling \$169,852.39;
- 3) Whether payments made to the Department of Treasury and Virginia Department of Taxation are proper debts of the estate; and
- 4) Whether expenses totaling \$93,743.65 marked as "executor expenses" on the second account are proper expenses of the estate.

No other person appeared at the hearing. Your commissioner convened the hearing on the above date and took testimony and exhibits from those present. Your commissioner recessed the hearing and held the record open to allow the estate time to determine outstanding tax issues and other debts and demands against the estate prior to issuing his report.

At the request of Sean Anthony Dunston, counsel for the estate, your commissioner held a further hearing pursuant to Virginia Code § 64.1-171 on November 16, 2010 at 10:00 a.m. to receive proof of debts and demands against the estate. Your commissioner provided notice of the hearing as required by Virginia Code § 64.1-171. At that time, Mr. Dunston appeared on behalf of the estate. No one appeared to offer proof of any debts or demands against said estate.

John T. Frey



Legal Fees:

When the decedent died, CitiGroup held an IRA account in the name of the decedent with a total value of approximately \$1,600,000. Prior to his death, the decedent and Ms. Joan Threlfall were divorced. Ms. Threlfall was named as the beneficiary of the CitiGroup IRA account. Virginia Code § 20-111.1 provides that "Upon the entry of a decree of annulment or divorce from the bond of matrimony on and after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked." Ms. Threlfall asserted that New York law governed the disposition of the IRA account. She also maintained that under New York law she remained the beneficiary of the account. Ms Threlfall filed suit against the estate over the disposition of the IRA account. The parties eventually settled the case. The estate received \$525,094.47. Ms. Threlfall received the balance of the IRA account.

On its second account, the estate showed disbursement for legal fees paid to Patton Boggs in connection with the litigation in the amount of \$128,644.96. Joan Threlfall alleges that the fees of Patton Boggs are excessive and not otherwise proper expenses of the estate. She makes her claim based upon her guardianship of the decedent's child, who would have received the IRA account under Virginia law and who was the sole beneficiary of the estate. The executor testified that she engaged Patton Boggs based upon recommendations she received, the firm's reputation for competence in litigation matters; and, as the firm had offices located in both Washington, D.C. and New York. The executor testified that the total fees the estate paid to Patton Boggs in connection with the litigation were approximately \$205,000.

Litigation is not a matter within the expertise of a fiduciary. The estate was required to defend the litigation which Ms. Threlfall filed or to abandon the IRA account. If the estate were to defend the litigation, it was required to engage counsel. Patton Boggs charged the estate at its normal hourly rate. The estate elected to defend its claim to the retirement account. That defense resulted in the receipt of \$525,094.47, which the estate would otherwise have lost. Your commissioner is of the opinion that the expenses of Patton Boggs, though extraordinary, were reasonably necessary expenses for the administration of the estate.

The second account also reflects disbursement to William Babcock for legal fees totaling \$2,410.07 and disbursements to Sean Dunston for legal fees totaling \$9,233.07. Ms. Threlfall objects to the payment of such fees on the grounds the

fees were for services generally performed by a fiduciary and should therefore be deducted from the fiduciary's compensation amount.

Virginia Code § 26-30 sets forth that “[t]he commissioner, in stating and settling the account, shall allow the fiduciary any reasonable expenses incurred by him as such; and also, except in cases in which it is otherwise provided, a reasonable compensation, in the form of a commission on receipts, or otherwise.” Conversely, the Court’s fiduciary fee schedule provides that “If the fiduciary employs an attorney or accountant to perform duties that should be performed by the fiduciary, the fees of those persons should be deducted from the compensation due the fiduciary.” As noted in the Court’s fee schedule, this rule “does not apply to reasonable fees paid to attorneys or accountants for tax work or litigation or other legal services reasonably necessary for the orderly administration of the estate. The reasonable expense of such services will be allowed in addition to the fiduciary fee.” Your commissioner further finds that the fees of William Babcock and Sean Dunston are proper expenses of the estate and should not be deducted from the fiduciary’s compensation amount as the administration of this estate required legal expertise above and beyond that generally required by a lay fiduciary.

Investment Losses:

The fiduciary’s second account reflects an investment loss of \$169,852.39 resulting from the sale of stocks held in the decedent’s IRA account. Ms. Threlfall claims the executor failed to make reasonable investment decisions during her administration and should be held personally liable for the losses. The executor testified that she initially sought investment advice on the sale of the stocks held in the IRA account from Goodman and Company, who recommended the estate continue to hold the stocks in the IRA account; however, she further testified that the estate had no liquidity to pay its debts and that she had no alternative other than to liquidate the stocks to pay the debts of the estate. The executor sold the entire IRA account within six months of gaining control of the assets in order to pay creditors of the estate.

In Virginia, all fiduciaries must comply with the Prudent Investor Rule.¹ The rule sets forth that a fiduciary:

“shall invest and manage [estate] assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other

¹ Va. Code Ann. § 26-45.13 (The prudent Investor Rule applies to the personal representative of an estate).

circumstances of the trust. In satisfying this standard, the [fiduciary] shall exercise reasonable care, skill and caution. A [fiduciary's] investment and management decisions respecting individual assets shall be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the estate.”²

Furthermore, “compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of the [fiduciary's] decision or action and not by hindsight.”³ Where a fiduciary acts in good faith in the exercise of fair discretion, and in the same manner in which a prudent man would act in regard to his own property, the courts generally will not hold the fiduciary liable for any loss that occurs.⁴

Ms. Threlfall has the burden of producing evidence that the executor's investments were unreasonable or inappropriate. Such proof generally must come from an expert witness.⁵ Ms. Threlfall failed to produce expert testimony that the executor's investments were unreasonable or inappropriate. Your commissioner is of the opinion that the executor's investment decisions were reasonable, particularly given the demands of creditors of the estate. Therefore, your commissioner declines to hold the fiduciary personally liable for the losses incurred as a result of liquidation of the IRA account during the executor's administration of the estate.

Income Taxes:

The second account lists disbursements to the Department of Treasury for federal taxes due totaling \$61,726.52, and disbursements to the Virginia Department of Taxation for state taxes due totaling \$ 8,933.23. Ms. Threlfall objected to the payments and questioned whether the executor should be held personally liable for any interest or penalty due from late payment of the taxes and whether the executor should be held liable for failing to dispute the amounts owed against the Internal Revenue Service.

The estate provided documentation showing the tax authorities assessing such taxes against the estate. The executor testified that the estate's tax advisor

² Va. Code Ann. § 26-45.4.

³ Va. Code Ann. §26-45.9.

⁴ See *Clemons v. Dennis*, 165 Va. 18, 181 S.E. 387 (1935) (Fiduciary not liable for losses on investments in an insolvent bank when fiduciary did not know the bank was insolvent at the time of investment.)

⁵ See *Feld v. Priebe*, 2004 WL 2999114 (Va.Cir.Ct.) (Without expert testimony, the beneficiary failed to prove the investments made by the fiduciary were inappropriate).

recommended that the estate not dispute the taxes owed. She also testified that late fees and penalties accrued because the estate had no liquidity to pay the taxes when the amounts became due in light of the litigation over the IRA account. The executor testified that she paid the taxes within a few months of gaining control of liquid assets. Based on the testimony provided, your commissioner finds the taxes to be valid debts of the estate. Your commissioner will not disturb the reasonable judgment of the executor not to dispute the taxes assessed against the estate. Your commissioner further finds that the interest and penalties asserted against the estate accrued as a result of the estate's inability to pay its debts without the funds in the IRA account, which was embroiled in the litigation which Ms. Threlfall instituted.⁶ Your commissioner declines to hold the fiduciary responsible for such penalties and interest.

Executor Expenses:

The executor filed together with her second account a list titled "executor expenses" totaling \$93,743.65 for administrative expenses of the estate which she satisfied from personal funds. Ms. Threlfall requested an explanation from the executor as to the expenses incurred and requested your commissioner make a finding whether the payments were proper expenses of the estate. The expenses paid by the executor for which she received reimbursement include the payment of stock transfer fees, cleaning expenses, legal fees, bonding fees, travel expenses, utility bills, and memorial service fees. The executor testified that she personally paid expenses of the estate because the estate was illiquid and unable to pay its debts. Your commissioner finds the expenses to be proper expenses of the estate for which the executor should be reimbursed. Your commissioner notes that the fiduciary disbursed \$35,000 to herself in the second account in partial satisfaction of this amount. During the hearing, the fiduciary notified your commissioner that she has already reimbursed herself the remaining amount and will reflect the same on her third account.

Debts and Demands of the Estate:

Ms. Threlfall requested reimbursement from the estate in the amount of \$851 for paying the expense related to moving expenses and cleaning the decedent's residence. Ms. Threlfall testified that she rented a trailer to move household goods; that she had Chinese carpets professionally cleaned and that she retained those carpets at her home. Ms. Threlfall failed to provide evidence that either the decedent or the estate engaged Ms. Threlfall to provide such services and

⁶ Your commissioner notes that the estate is insolvent and the fiduciary shall be liable for any disbursements not in accordance with the priorities established pursuant to Virginia Code §64.1-157. See discussion *infra*.

she provided no evidence that such expenditures benefited the estate, particularly in light of her retention of the decedent's carpets. Therefore, your commissioner denies Ms. Threlfall's claim for \$851 in its entirety.

Joan Threlfall furthermore claimed child support payment in the amount of \$10,430 for child support expenses of the decedent's minor child, Edward G. Threlfall, that accrued subsequent to the decedent's death. Ms. Threlfall subsequently admitted that the couple's divorce agreement contained no affirmative provision which would make the decedent's estate liable to pay the child support expenses, and therefore, withdrew her claim in the amount of \$10,430 against the estate. Therefore, your commissioner denies Ms. Threlfall's claim for child support in the entirety.

No other creditors filed claims against the estate with your commissioner. The estate notified your commissioner of the following additional claims against the estate:

Veronica Wyss	\$ 1,277.49
Sean Dunston	\$ 4,576.11
Justice Thore and Co., P.A.	\$ 2,615.00
Burke Insurance	\$ 7,572.00
Estate of Muriel Threlfall	\$ 20,000.00
IRS	\$ 27,402.00
IRS	\$ 32,066.00
VA Department of Taxation	\$ 7,142.00
VA Department of Taxation	\$ 5,999.00

The estate did not provide the above claimants with notice of the hearing; however, Virginia Code § 64.1-171 requires such notice only for disputed claims. The estate does not dispute the claims; however, the estate is insolvent and unable to pay such claims in full. Therefore, the claims are allowed in full in the amounts shown, to be distributed pursuant to Virginia Code § 64.1-157 according to the priorities set forth in the statute.

Priorities of Debts and Demands:

Pursuant to Virginia Code § 64.1-157(1), all administrative expenses are to be satisfied as priority 1 claims. The claim of Sean Dunston is for legal fees in addition to those discussed as a part of the Virginia Code §26-29 hearing. The claim of Justice Thore and Co., P.A. is for tax accounting fees. The claim of Burke Insurance is for the fiduciary's bond. The claim of the Estate of Muriel Threlfall is

for reimbursement for advances to Patton Boggs in relation to the IRA litigation. Veronica Wyss's claim is for reimbursement for costs in connection with attending the original hearing on April 9, 2010, and for paying fees for delivering a painting of the estate to a gallery for sale. Said claims shall be satisfied as priority 1 administrative expenses of the estate.

The executor seeks fiduciary compensation for her administration of the estate. The court recommended guideline for a fiduciary compensation fee generally allows a fiduciary to take a fee of \$51,505.60 for an estate of this size, which your commissioner will approve. Nevertheless, your commissioner notes that the fiduciary has disbursed funds of the estate in a manner inconsistent with the priorities established pursuant to Virginia Code § 64.1-157. To the extent that she is required to restore such funds to the estate, these amounts may be offset against the executor's fiduciary fee otherwise due to her.

The claims of the IRS in the amount of \$27,402 and \$32,066 are for federal taxes owed in addition to those already disbursed in the second account. The claims are allowed as priority 4 claims; however, there are not sufficient assets available in the estate to satisfy the remaining priority 4 claims.

The claims of the Virginia Department of Taxation in the amounts of \$7,142 and \$5,999 are for state taxes owed. The amounts are allowed as priority 6 claims; however, there are not sufficient assets available in the estate to satisfy the remaining priority 6 claims.

The estate has sufficient assets only to satisfy priority 1 through priority 3 expenses, and a portion of priority 4 expenses. The executor has paid funeral expenses totaling \$5,468.09. Virginia Code § 64.1-157(3) allows the first \$2,000 of funeral expenses to be satisfied as priority 3 expenses, and the remainder as a priority 9 claim.⁷ The executor has further satisfied federal taxes, which are priority 4 claims, in the amount of \$61,726.52; taxes due this commonwealth, which are priority 6 claims, in the amount of \$8,933.23; and priority 9 creditors in the amount of \$197.72. Furthermore, the fiduciary has made distributions to beneficiaries totaling \$20,000. To the extent there are not enough assets in the estate to satisfy the outstanding claims with higher priorities, the executor is personally liable to pay the outstanding claims.⁸

⁷ Effective July 1, 2008, Virginia Code § 64.1-157(3) was amended to increase such amount to \$3,500. As the decedent died May 8, 2007, the lower limit would apply to this estate.

⁸ *Accord, Bliss v. Spencer*, 99 S.E. 593, 125 Va. 36 (1919) (A fiduciary is personally liable for distributing the personal assets of a decedent when there are insufficient funds for the payment of the estate's debts).

Respectfully submitted this 28th day of March, 2011.

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

Commissioner's Fee for this Report	\$ 500.00	
<u>Publication costs</u>	<u>\$ 10.00</u>	
Total Amount Due	\$ 510.00	- UNPAID

CERTIFICATE OF MAILING

I hereby certify that on this 28th day of March, 2011, a true and correct copy of the above Commissioner's Report was mailed, first-class mail, postage prepaid, to the following persons at the addresses shown below:

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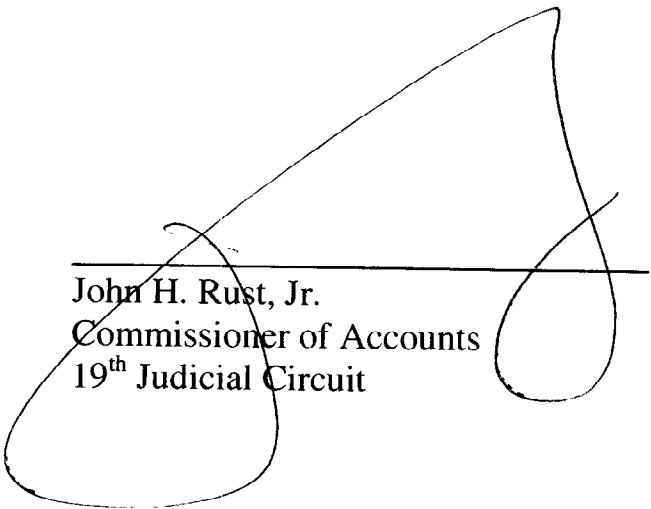
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John H. Rust, Jr.
Commissioner of Accounts
19th Judicial Circuit

I, JOHN T. FREY, Clerk of the Circuit Court of Fairfax County, Virginia, do hereby certify that the foregoing Account or Report has been filed in my office for more than fifteen days, and that no exceptions have been filed thereto, and the same is now recorded pursuant to the provisions of §§26-33 and 26-35 of the Code of Virginia, as amended.

Teste: JOHN T. FREY, Clerk

4-14-11
Date

By: 
Deputy Clerk