

IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

In Re: Estate of Anne E. Wyllie, deceased Fiduciary No. FI-2009-0002111

Commissioner's Report

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

At the request of George O. Peterson, attorney for Cathy A. Alfant, Karen Hitaffer, Clifford W. Wyllie and David K. Wyllie, four of the five beneficiaries of the Estate of Ann E. Wyllie, the undersigned gave notice pursuant to Virginia Code § 26-29, setting the 27th day of May, 2011, at 1:00 p.m. at the office of your commissioner in Fairfax, Virginia, as the time and place for a hearing upon objections to accounts filed by the executor of the above estate. At the said time and place, George O. Peterson appeared on behalf of the said beneficiaries to raise objections to accounts filed by the fiduciary. Allison K. Noll, attorney for Laura A. Wyllie, the executrix and one of the five beneficiaries of the above estate, appeared to substantiate the accounts filed with your commissioner's office. No other person appeared at the hearing.

Laura A. Wyllie qualified as executrix of the above estate on December 17, 2009. The fiduciary filed an inventory with your commissioner wherein she reported personal property totaling \$17,170.22 and two pieces of real property over which the fiduciary had power of sale: a parcel of land in Page County, Virginia valued at \$7,500.00 and a house and lot in Alexandria, Virginia valued at \$319,460.00. The decedent's will directs that the house and real property in Alexandria be distributed to David K. Wyllie, with the condition that if and when he marries the property shall be sold with the proceeds divided among the decedent's surviving children, per stirpes. The will further directs that the residue of the estate shall be distributed among the decedent's surviving children, per stirpes.

The fiduciary filed one account with your commissioner wherein she reports disbursements of \$3,223.45 and losses of \$2,094.29. The beneficiaries object to a \$2,000 "Good Faith Advance to Peterson Noll & Goodman PLC for legal services" and to the sale of the Page County parcel of land for \$5,405.71. The counsel for the non-fiduciary beneficiaries represented that the estate's counsel indicated that the estate owes attorney's fees in excess of \$35,000.00 and that the non-fiduciary beneficiaries have



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Date 10/17/2011

Estate WYLLIE, ANNE E

Recorded in

FAIRFAX COUNTY CIRCUIT COURT

TESTE JOHN T FREY

Fiduciary #: FI-2009-0002111

repeatedly requested copies of the invoices of those fees. The beneficiaries allege that most of the attorney's fees were incurred in representing the individual interests of the fiduciary rather than the estate's interests. In regard to the sale of the Page County property, the beneficiaries object to attorney's fees associated with the sale.

Disclosure of Attorney's Fees

At the hearing before your commissioner, the beneficiaries requested that the estate be compelled to provide them with the invoices of the attorney fees because the non-fiduciary beneficiaries would bear 4/5 of the burden of such fees. The estate's attorney argues that the invoices are privileged communications and that she should not be compelled to produce the bills. Your commissioner indicated that if an account were to include disbursements for such fees, the estate would be required to provide the invoices that accompanied those fees. The estate noted its objection to providing the invoices but nevertheless provided copies of the attorney invoices for services rendered from January 8, 2010 to April 25, 2011.

A fiduciary has a requirement to provide the beneficiary with reasonable information about the property held for the beneficiary which the fiduciary administers.

The trustee is under a duty to the beneficiary to give him upon his request at reasonable times complete and accurate information as to the nature and amount of the trust property, and to permit him or a person duly authorized by him to inspect the subject matter of the trust and the accounts and vouchers and other documents relating to the trust.

This proposition has been affirmed by the Virginia Supreme Court in *Fletcher v. Fletcher*. In *Fletcher*, the plaintiff was a trust beneficiary who requested details about the trust and its assets and the defendant trustees failed to comply with the plaintiff's request. In holding that the trustees must disclose the information to the plaintiff, the court found that a "beneficiary is the equitable owner of the trust property in whole or in part

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¹ Restatement (Second) of Trusts § 173 (1959).

² 253 Va. 30, 480 S.E.2d 488 (1997).

[and that a] trustee is a mere representative whose function is to attend to the safety of the trust property. . . ."³

Furthermore, this issue is not one of first impression in this Court. In *Dotson v. Lillard*, ⁴ Judge Wooldridge found that "although [a] trustee's counsel owes no fiduciary duty to the beneficiaries, the trustee does owe such a duty The advice and counsel received by the trustee in his representative capacity becomes part of the trust corpus" and as such, the beneficiaries have a right to access the "advice and counsel received by the trustee." It is general rule in the United States that such fiduciary duty extends not only from a trustee to the trust beneficiaries, but also from an executor or administrator of an estate to the estate beneficiaries.⁶

In the instant case, the estate indicates that it hired the attorney to represent the estate's interests and to provide counsel to the estate. The beneficiaries have a right to review and, if necessary, object to the expenses purportedly paid on behalf of the estate. Thus, your commissioner finds that the beneficiaries have a right to examine the attorney's invoices and no privilege attached to such invoices with respect to the beneficiaries. The invoices must be disclosed to the estate beneficiaries.

Reasonableness of Attorney's Fees

The exhibits provided by the estate indicate that from January 8, 2010 to April 31, 2011, the estate incurred attorneys' fees totaling \$37,369.00. The estate provided your commissioner with a breakdown of the fees into twelve different categories:

Defending the Clifford Wyllie lawsuit

\$2,417.50

³ *Id.* at 35-37, 480 S.E.2d at 491-92 (quoting Bogert, The Law of Trusts and Trustees § 961, at 2 (Rev. 2nd ed. 1983)).

⁴ No. 135209, 1994 WL 1031449, at *3 (Cir. Ct. Fairfax County Nov. 23, 1994).

⁵ *Id*.

⁶ See e.g. Huie v. DeShazo, 922 S.W.2d 920 (Texas 1996); Bodman v. Bodman, 674 So.2d 1245 (Miss. 1996); Latimer v. Mechling, 301 S.E.2d 819 (W. Va. 1983); Pair v. Queen, 2 A.3d 1063 (D.C. 2010); In re Estate of Talty, 877 N.E.2d 1195 (III. App. Ct. 2007); In re Estate of Ladd, 247 S.W.3d 628 (Tenn. Ct. App. 2007); Jonas v. Jonas, 633 S.E.2d 544 (Ga. Ct. App. 2006); Punts v. Wilson, 137 S.W.3d 889 (Tex. Ct. App. 2004); Vrendenburgh v. Jones, 349 A.2d 22 (Del. Ch. 1975). See also, 34 C.J.S. Executors and Administrators, § 213 (2011); 1 Horner Probate Prac. & Estates § 6:7 (2011).

Responding to Estate Administration Objections	\$3,000.00
Tangible Personal Property	\$6,852.50
Interpretation of Decedent's Will	\$2,075.00
Real Estate Tax Bill	\$1,347.50
Misc. Estate Administration	\$4,177.50
Inventory	\$ 490.00
First Accounting	\$1,489.00
Settlement Negotiations	\$5,725.00
Page County Real Estate	\$4,380.00
Aid and Direction Lawsuit	\$3,505.00
Motion to Intervene	\$1,970.00

The estate argues that the attorneys' fees are reasonable and prudent in the specific situation because the estate was complex and that many of the fees incurred stemmed from actions of the beneficiaries themselves. Conversely, the beneficiaries allege that (a) the attorney's fees are not properly chargeable to the estate as the fees were incurred in connection with a dispute between the beneficiaries of the estate and (b) the fees were unreasonable in amount given the size and nature of the estate. The beneficiaries further argue that they presented several offers to settle the estate in an effort to curtail further attorney's fees and that the fiduciary was unwilling to accept any of the offers. Thus, the issues before your commissioner are whether the attorneys' fees are reasonably chargeable to the estate and, if so, whether the fees are reasonable.

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. In *Gaymon v. 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.⁸

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⁷ 63 Va. Cir. 264 (2003).

⁸ 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).

Similarily, in Henrico County, Judge Hammond ruled that "[c]ounsel 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."9

Fees Relating to Litigation

In the instant case, the estate provided documentation indicating that it incurred legal fees totaling \$3,505.00 related to a suit for aid and direction seeking to determine who would take from the decedent's estate in the event the real property had to be sold to pay estate expenses. The four beneficiaries demurred the suit arguing that it was not, in fact, an aid and direction suit but litigation seeking to resolve an issue among the beneficiaries and that a separate suit had already been filed. 10 Judge Ney sustained the demurrer finding that the disposition of the real property is between the five beneficiaries and that a separate action was already before the court.¹¹ Therefore, as the issue merely involved a question of who would take from the decedent's estate, your commissioner finds that the fees totaling \$3,505.00 associated with the aid and direction suit were incurred not for the benefit of the estate but for the benefit of Laura Wyllie individually and are not properly chargeable against the estate.

Prior to filing the aid and direction suit, the estate provided documentation indicating that it incurred \$1,970.00 in legal fees relating to a motion to intervene in a declaratory judgment action brought by the four beneficiaries against Laura Wyllie individually. The court dismissed the estate's motion to intervene. Similar to the finding in the aid and direction suit, the estate did not have an interest in the litigation, as it was an issue among the beneficiaries. Therefore, as the issue involved the beneficiaries and not the estate, your commissioner finds that the \$1,970.00 in fees associated with the motion to intervene were incurred, not for the benefit of the estate, but for the benefit of Laura Wyllie individually and are not properly chargeable against the estate.

⁹ In re Estate of Wicker, 58 Va. Cir. 331, 333 (Hammond, J. Henrico County, 2002).

¹⁰ See infra Page 5.

¹¹ Transcript of Motion Hearing at 21, Estate of Ann E. Wyllie v. Alfant, No. 2010-12774 (Va. Cir. Ct.)(Cnty of Fairfax).

Fees Relating to Will Interpretation

The estate also provided documentation indicating that it incurred \$2,075.00 in legal fees relating to research regarding the interpretation of the decedent's will. These charges included reviewing memoranda, strategy conferences and research related to whether the beneficiary David owned a fee simple or a life estate. At the hearing, your commissioner asked the estate's attorney how these issues benefited the estate. The estate responded that the estate required the research to administer the estate properly and that was also the reason the estate brought suit for aid and direction. The estate's attorney testified that the estate did not share any of the products of this research with the non-fiduciary beneficiaries. The estate had power to sell the real estate if required; however, absent such a sale, the disposition of the real estate in the will was a matter solely among the individual beneficiaries. Your commissioner finds that the estate did not have a beneficial interest in determining how the real estate passed under the will. The fees associated with research regarding the interpretation of the will in the amount of \$2,075.00 were incurred for the benefit of Laura Wyllie individually and are not properly chargeable against the estate.

Fees Relating to Estate Interests

While a fiduciary may not use estate funds to pay legal fees that advance his individual interest, a fiduciary may certainly use estate assets "in good faith, [to] seek the aid of counsel in the 'execution of his duties." Such an expense requires that "there [] be some reasonable ground that renders the employment of counsel reasonably necessary to aid the executor in the performance of his duties. . . . [additionally] *reasonable* expenses incurred by such employment are assessable against the estate." (emphasis added). Thus, in order to determine whether fees that were incurred to advance the estate's interest are chargeable against the estate, your commissioner must determine whether the fiduciary (1) acted in good faith, (2) whether the assistance of counsel was reasonably necessary and (3) whether the fees are themselves reasonable.

Clare v. Grasty, 213 Va. 165,170, 191 S.E.2d 184, 188 (1972) (citing Stull v. Harvey, 112 Va. 816, 822, 72 S.E. 701, 703 (1911)).
 Id

Fees Relating to the Sale of the Page County Property

At the hearing before your commissioner, the estate provided documentation indicating that the estate incurred a total of \$4,380.00 in legal fees associated with the sale of the Page County real estate. The real estate was valued on the inventory filed with your commissioner at \$7,500.00 and was eventually sold for a total of \$5,500.00.¹⁴ The fiduciary delegated all aspects of the sale of the real property to her attorney. While the estate's attorney testified at the hearing that she was concerned with the cost of the services in relation to the value of the assets, there is no evidence that the fiduciary or her attorney took any steps to reduce the legal fees. It is certainly reasonable for the fiduciary to hire counsel to assist her in selling real estate and your commissioner finds that the fiduciary engaged counsel in good faith. However, the attorney's fees associated with the sale of the real estate totaled 79.63% of the proceeds realized from the sale. Such a charge is disproportionate to the net proceeds associated with the sale of real property and unreasonable.

The estate's attorney testified at the hearing that a significant portion of the real estate legal fees were related to dealing with the beneficiaries' counsel. In a review of the estate's exhibits, it appears that approximately \$1,000 worth of time was allocated to dealing with the beneficiaries' counsel. The remaining portion of the attorney fees associated with the sale of the real estate were incurred for communications with the client, realtor and eventual purchaser; in inter-office communications and "strategy conferences" and for reviewing and preparing sale documents. It is the opinion of your commissioner that an attorney fee of approximately 25% of the value of the proceeds of the real estate would be reasonable as a cost of selling the property. It is also the opinion of your commissioner that it is

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¹⁴ Clifford Wyllie offered to purchase the Page County property for \$7,500 as part of a global offer to settle the estate. Such offer was rejected by the estate.

Several of the entries on the attorney invoices included multiple services bundled into a single time entry. Where the invoices included multiple entries, your commissioner divided the total amount billed equally among the recorded services. i.e. where the total billed was \$330.00 and the services provided were: Drafted letter to Attorney Peterson; drafted land sales contract; drafted bill of sale, your commissioner allocated \$110 to each of the services provided.

reasonable that the estate be responsible for the attorney fees associated with communicating with the beneficiaries' counsel. Thus, your commissioner finds that a total fee of \$2,375.00 is properly chargeable against the estate for attorney fees associated with the sale of the Page County property.

Fees Relating to Tangible Personal Property

At the hearing before your commissioner, the estate provided documentation indicating that it incurred legal fees totaling \$6,852.50 relating to tangible personal property. The tangible personal property was valued on the inventory filed with your commissioner at \$12,684.72. The fiduciary delegated all aspects of the sale of the personal property to her attorney. While the estate's attorney testified at the hearing that she was concerned with the cost of the services in relation to the value of the assets, there is no evidence that the fiduciary or her attorney took any steps to reduce the legal fees. It is certainly reasonable for the fiduciary to hire counsel to assist her in selling the estate property and your commissioner finds that the fiduciary engaged counsel in good faith to this end. However, the attorney's fees associated with dealing with the tangible personal property totaled 54.02% of the property's assessed value. Such a charge is disproportionate to the net proceeds associated with the sale of the tangible personal property and unreasonable.

The estate's attorney testified at the hearing that a significant portion of the fees were related to dealing with the beneficiaries' counsel. In a review of the estate's exhibits, it appears that approximately \$1,200 worth of time was allocated to dealing with the beneficiaries' counsel. The remaining portion of the attorney fees associated with the tangible personal property were incurred for communications with the client and the appraiser; in inter-office communications and "strategy conferences" and for reviewing and preparing sale documents. It is the opinion of your commissioner that an attorney fee of approximately 25% of the value of the tangible personal property would be reasonable as a cost of dealing with the property. It is also the opinion of your commissioner that it is reasonable that the estate be responsible for the attorney fees associated with communicating with the beneficiaries' counsel. Thus, your commissioner finds that a total fee of

¹⁶ Clifford Wyllie offered to purchase the tangible personal property at its inventory valuation as part of a global offer to settle the estate. Such offer was rejected by the estate.

\$4,371.18 is properly chargeable against the estate for attorney fees associated with the tangible personal property.

Fees Related to Inventory, Accounting and Misc. Estate Administration

At the hearing before your commissioner the estate indicated that it incurred legal fees totaling \$6,096.50 relating to the preparation of the Inventory and First Account and to miscellaneous estate administration services. The estate administration services included: communicating with the client, financial institutions, appraisers and beneficiaries; strategy conferences and inter-office communications; and other fiduciary responsibilities. Where a fiduciary employs the services of a professional to perform services that are typically the duty of the fiduciary, the fiduciary's compensation shall be reduced by the amount paid to the professional.¹⁷ It is the opinion of your commissioner that the preparation of the inventory and accountings is traditionally a duty of the fiduciary. Other fiduciary duties include: marshaling assets, communicating with beneficiaries and disposing of assets of the estate. In the instant case, the fiduciary hired an attorney to handle the administration of the estate. According to invoices provided by the estate, it appears that the attorney performed nearly all of the fiduciary responsibilities. For an estate of this size, the court's adopted guidelines of fiduciary compensation recommend a fiduciary fee of \$1,233.51. As the fiduciary has paid an attorney more than the recommended fiduciary fee, your commissioner finds that the executor shall not be personally entitled to any fiduciary compensation. However, as the fiduciary has the ability to enter into reasonable contracts on behalf of the estate, your commissioner finds that attorney fees totaling \$6,096.50 associated with the Inventory, Account and miscellaneous estate administration are properly chargeable against the estate.

Remainder of Fees

The remainder of the attorney services were categorized as defending Clifford Wyllie's lawsuit, responding to beneficiary complaints, real estate tax relief and settlement negotiations and totaled \$12,490.00. The legal fees in each of these categories stemmed from the contentious relationship

¹⁷ Fiduciary Compensation Schedule, Executors and Administrators *available at* http://www.fairfaxcommissionerofaccounts.org/open/page.htm?shortname=resource.fidc omp.estatefidcomp

between the fiduciary and the other beneficiaries; a significant portion of the fees were charged in connection with communicating with the beneficiaries' attorney. The beneficiaries provided documentation that as of May 7, 2010, the estate had communicated to the beneficiaries that the debts of the estate totaled \$19,909.50. Several pieces of correspondence were sent back and forth between the parties' counsel discussing attorneys' invoices, possibilities of purchasing estate assets and real estate and the propriety of estate expenses. On June 25, 2010, the beneficiaries' attorney provided an offer to purchase the appraised tangible personal property at the appraised value, two pieces of artwork for \$360 and the Page County property for \$7,500 thereby providing the estate with a total of \$18,142.00 in liquid assets. The estate rejected the offer stating it was "not made in the minimally acceptable form and omit[ed] essential terms."

Thereafter, on July 16, 2010, the beneficiaries offered to pay \$22,234.57 into the estate in exchange for conveyance of the Page County property to Clifford Wyllie, transfer of all tangible personal property to Clifford Wyllie and that the estate be immediately closed as promptly as possible with no assertion by the Executor that additional property need[] be sold to pay debts and claims of the estate. On July 22, 2010, the estate responded with a counter-offer indicating that the beneficiaries would provide \$27,406.06 and the fiduciary would be allowed to retain certain items of tangible personal property valued at approximately \$225. The estate explained that this would be the exact amount of cash needed to cover the debts of the estate (including attorney fees) to date.

In response, on July 27, 2010, the beneficiaries counter-offered with a payment to the estate of \$25,000 in exchange for the conveyance of the Page County property to Clifford, transfer of all tangible personal property to Clifford (not including the items identified by the fiduciary in their counter-offer of July 22), satisfaction of all estate expenses and a release from the estate attorney's firm and a quit claim deed to any interest Laura held in the Eaton place property. The estate responded on July 28, 2010 that a quit claim deed was a "non-starter" and it would not be part of any settlement. Thereafter, on August 16, 2010, the beneficiaries filed the declaratory judgment action seeking a determination that David Wyllie owned the real property in fee simple. This court made such a determination on December 3, 2010.

Your commissioner finds that the attorney fees are not properly chargeable against the estate as the executor did not act in good faith in incurred legal fees that were unnecessary to administer the estate properly. The estate received several offers to close out the administration and pay estate expenses, including an offer to make a cash payment up to \$25,000. It is the opinion of your commissioner that the beneficiaries' offers were reasonable and addressed any legitimate concerns that the estate may have concerning its proper administration. The fiduciary is not required to accept any such offer; however, it is the opinion of your commissioner and he finds that the estate's rejection of such offers related to the ongoing disputes among the beneficiaries and not to any legitimate issue of estate administration. As such, your commissioner finds that none of the attorney's fees relating to defending Clifford Wyllie's lawsuit, responding to beneficiary complaints, real estate tax relief and settlement negotiations shall be chargeable against the estate. Your commissioner includes within such finding any future costs and fees related to these matters not presented at the hearing.

Commissioner's Authority Relating to Power of Sale

The hearing before your commissioner was brought under Virginia Code § 26-29. This statute allows the commissioner to hear any matter that "could be insisted upon or objected to by [an interested person] . . . if the commissioner were acting under an order of a circuit court for the settlement thereof, made in a suit to which [the interested person] or such other was a party." ¹⁸ In other words, the commissioner has the authority to hear any matter, relating to an account before him, which could otherwise be heard in the Circuit Court.

As argued by both parties in their briefs to your commissioner, the fiduciary holds a "naked" power of sale, meaning that the real property passed by operation of law to the beneficiary and the execution of the fiduciary's power of sale would divest the property owner of his interest therein. At the hearing before your commissioner, the beneficiaries' counsel testified that David Wyllie had conveyed the real property to an LLC owned by Clifford and David Wyllie. Thus, the question remains as to whether the fiduciary has the authority to execute her power of sale over real estate that was specifically bequeathed to a devisee and has been subsequently

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¹⁸ Virginia Code § 26-29

conveyed to a third party. Your commissioner does not find that he has the independent authority to limit the fiduciary's power of sale over the real property at issue. However, your commissioner finds, in his general supervisory capacity, that he does have authority to require the fiduciary to comply with the fiduciary duties imposed upon her. Your commissioner finds that exercise of such power of sale to satisfy unauthorized estate expenses is a breach of such fiduciary duties for which the fiduciary shall be personally liable. 19 In the event of any such sale, the fiduciary shall be personally responsible to reimburse the other beneficiaries for any such unauthorized expenses paid and to recompense them for such other damages as they may incur as a result of such sale.

Respectfully submitted this 29th day of September, 20\1.

Commissioner of Accounts

19th Judicial Circuit

Commissioner's Fee for this Report \$500.00 - UNPAID

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. 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

¹⁹ See Pritchett v. First Nat. Bank of Danville, 195 Va. 406, 413, 78 S.E.2d 650, 653 (1953) (holding that a fiduciary has the "duty to exercise the highest fidelity and utmost good faith" in determining whether or not it is in the best interest of the estate to sell property.)

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of September, 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:

George O. Peterson Peterson Saylor, PLC 4163 Chain Bridge Rd. Fairfax, Virginia 22030

Clifford W. Wyllie 5311 Griffith Rd. Laytonsville, MD 20882

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Laura A. Wyllie 6811 Brindle Heath Way Alexandria, Virginia 22315

Karen Hitaffer P.O. Box 105 Occoquan, Virginia 22125

John H. Rust, Jr.

Commissioner of Accounts

19th Judicial Circuit