



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse  
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April 11, 2022

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RE: *In Re Estate of Eric Witt Wilder*, Case Nos. CL-2021-11578 & FI-2018-1980

Dear Counsel:

The issue before the Court is whether the Commissioner of Accounts can hold a hearing pursuant to Va. Code §64.2-1209 based on information received from a non-interested party. This letter states the findings and the decision of the Court.

### ***FACTS***

Mr. Eric Witt Wilder (“decedent”) was determined an incapacitated adult on November 16, 2018. His granddaughter, Kishna Minor, was appointed his conservator (“Ms. Minor”). As part of her appointment, she was required to post a bond of \$1,200,000 with surety provided by Liberty Mutual Insurance Company. Mr. Wilder died intestate on August 5, 2019.

On December 18, 2019, decedent’s son, Eric R. Wilder (“Son”) wrote to the Commissioner of Accounts (“the Commissioner”) expressing his concern about Ms. Minor’s management of his father’s finances. He asserted that Ms. Minor should have given his mother, decedent’s sole heir, more funds. The son and the son’s wife requested that the Commissioner hold a hearing pursuant

# OPINION LETTER

to Va. Code §64.2-1209 (“1209 Hearing”).<sup>1</sup> The Commissioner held such hearing on December 1, 2020, January 15, 2021 and February 3, 2021 and learned that Ms. Minor failed to disclose an account in her filings, (“Account ██████”). Through subpoenas, the Commissioner discovered \$574,539.45 in unexplained transactions from Account ██████. The Commissioner’s Report claims that Ms. Minor “has failed to provide any documentation or evidence (including testimony) to support the propriety of the transactions, thus leaving the second and final account unapprovable.”

### **PROCEDURAL HISTORY**

During the 1209 Hearing, Ms. Minor’s Counsel, Mr. Stuart argued the decedent’s son and daughter-in-law did not have standing to bring this objection because he is not an interested party and therefore this matter should be dismissed. In response, the Commissioner stated that she had standing under Va. Code §64.2-1200. Mr. Stuart objected, saying that the Commissioner’s role in these hearings was to be a neutral arbiter, and cannot act as an adversary to a fiduciary in this matter. The Commissioner disagreed with Mr. Stuart’s argument and decided to proceed with the case.

On April 13, 2021, the Commissioner issued a summons to the conservator for the filing of a proper final account. On May 24, 2021, the Court entered an order requiring Ms. Minor to appear on August 13, 2021, to show cause why she had not filed a proper account. The Court heard the Show Cause Order and directed the Commissioner to hold a hearing in her office.

Ms. Minor objected to entry of the August 13th Order on the basis that Mr. Wilder’s son who requested the 1209 hearing lacked standing and that the Commissioner was not an impartial adjudicator. Over Ms. Minor’s objections, this Court entered the August 13th Order. In response, Ms. Minor’s counsel filed a motion requesting a certificate for interlocutory appeal. The motion was denied. *See* Order Sept. 3, 2021.

On September 29, 2021, the Commissioner held the hearing pursuant to this Court’s Order to determine whether and what amount, if any, of Ms. Minor’s bond should be forfeited. Ms. Minor did not appear. The Commissioner concluded that Ms. Minor and Liberty Mutual should be jointly and severally liable for nearly the full amount of the unexplained transactions from Account ██████, specifically \$574,462.27.

The parties appeared before this Court on January 21, 2022, for a Summons to Show Cause. Ms. Minor’s counsel again argued that the Commissioner is not an impartial adjudicator and therefore this was a violation of Ms. Minor’s due process rights.

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<sup>1</sup> “Any interested person, or the next friend of an interested person, may, before the commissioner of accounts, insist upon or object to anything which could be insisted upon or objected to by such interested person if the commissioner of accounts were acting under an order of a circuit court for the settlement of a fiduciary’s accounts made in a suit to which such interested person was a party.” Va. Code §64.2-1209.

## ARGUMENTS

### ***Ms. Minor's Argument***

Ms. Minor argues that the fiduciary's due process rights were violated because the Commissioner is not a neutral adjudicator. Ms. Minor argues that the Commissioner's actions and positions arise under an *inter partes*<sup>2</sup> matter concerning a fiduciary's accounting. Therefore, she is acting as a quasi-judicial officer empowered to hear certain matters related to estates and fiduciaries appointed by the Circuit Court. Because of this judicial role, "the commissioner should not only be absolutely impartial, but even free from the suspicion of partiality." *Bowers' Adm'r v. Bowers*, 70 Va. (29 Gratt.) 697, 701 (1878). Ms. Minor argues that "it is axiomatic in our legal system that an adverse or interested party in a case cannot serve in a judicial function and that any party to a civil matter has a due process right to an impartial tribunal." *Ward Lumber Co. v. Henderson-White Mfg. Co.*, 107 Va. 626, 630 (1907).

### ***Commissioner of Accounts' Argument***

First, the Commissioner has argued that whether the decedent's son and his wife are "interested persons" under Va. Code §64.2-1209 has no bearing on the Commissioner's enforcement process and does not preclude her from moving forward. Because Ms. Minor failed to file a proper second and final account, the Commissioner, consistent with her obligations, began the enforcement process by issuing a summons to the fiduciary on April 13, 2021, pursuant to Va. Code §64.2-1216(A) and following the procedure set forth in Va. Code §64.2-1215.

Second, the Commissioner says that the argument that she is not impartial in this matter is equally meritless. This argument's basis lies merely in a passing comment made during a previous hearing held on February 3, 2021. The Commissioner hastily stated, "I am an interested party" in response to Ms. Minor's claims that family members requesting the 1209 hearing were not interested parties. The Commissioner's comments were made solely in the context of the 1209 hearing. Further, Ms. Minor has not produced any evidence that the Commissioner lacks neutrality. The Commissioner holds multiple hearings every week regarding fiduciaries' accounts and routinely makes similar recommendations of bond forfeiture to this Court. The Commissioner does not personally know any persons in this matter and has no interest in this estate.

## ANALYSIS

### ***I. The Role of the Commissioner of Accounts***

The Commissioner of Accounts is a position unique to Virginia and West Virginia. *See Gray v. Binder*, 294 Va. 268, 276 (2017). The Commonwealth established the office of the Commissioner of Accounts to help Circuit Courts manage the settlement of fiduciaries' accounts and the distribution of estates. *See id.* (quoting *Carter Adm'r v. Skillman*, 108 Va. 204, 207

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<sup>2</sup> "Inter Partes" means between the parties. *Inter Partes*, Merriam-Webster Dictionary.

(1908)); *see generally* Va. Code §64.2-1200 (West 2012). As aids to the Court, the Commissioners' work is "subject to review of the court." *Gray*, 294 Va. at 276-77 (quoting *Shipman v. Fletcher*, 91 Va. 473, 477 (1895)). The Commissioner is an independent, quasi-judicial officer, appointed by the judges of each circuit court, and serves at their pleasure. *In re Trustee's Sale of Property of Brown*, 67 Va. Cir. 204 (Norfolk Cir. Ct. 2005); *see also Am. Bonding Co. v. Am. Surety Co.*, 127 Va. 209, 218 (1920); *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 159 (1909); *Fayette Land Co. v. Louisville & N. R. Co.*, 93 Va. 274, 284 (1896). The Virginia Supreme Court has stated that "a commissioner's authority to assist the circuit court with the settlement of estates is simply an extension of the circuit court's subject matter jurisdiction to administer estates." *Gray*, 294 Va. at 278.

The Commissioner has general supervision authority over all people admitted to qualify as fiduciaries in the court, and the Commissioner has the authority to make all *ex parte* settlements of the fiduciaries' accounts. *See* Va. Code §64.2-1200 (A); *see also* Va. Code §64.2-1206 (requiring every fiduciary to account before the Commissioner). Every fiduciary must file with the Commissioner an inventory of all the personal estate under his supervision and control. Va. Code §64.2-1300.

Following these accountings, the Commissioner shall draft a report for every account, as well as draft reports of debts, demands, and "any matters specially stated deemed pertinent by the Commissioner of Accounts or that an interested person may require." Va. Code §64.2-1210; *see also In re Will of Southall*, 49 Va. Cir. 169 (Richmond Cir. Ct. 1999). When a commissioner files a report, it becomes the opinion of the circuit court if no exceptions are filed. *Gray v. Binder*, 294 Va. 268, 278 (2017) (citing Va. Code §64.2-1213). When exceptions are filed, the court can accept or reject the report in whole or in part. *Id.* (citing Va. Code §64.2-1212).

The court has the duty to examine exceptions to a commissioner's report and correct any errors that appear in his or her findings. Va. Code §64.2-1212. Although a court is given discretion to review a commissioner's findings, "...it cannot arbitrarily disturb the report, if it is supported by sufficient proof." *In re Tr.'s Hudson v. Clark*, 200 Va. 325, 329 (1958). This rule applies with particular force to a Commissioner's findings of fact based upon evidence taken in his presence but is not applicable to pure conclusions of law contained in the report. *Hill v. Hill*, 227 Va. 569, 577 (1984) (citations omitted).

## **II. Virginia Code §64.2-1209**

Virginia Code §64.2-1209 codifies who may insist or object before the Commissioner of accounts,

Any interested person, or the next friend of an interested person, may, before the commissioner of accounts, insist upon or object to anything which could be insisted upon or objected to by such interested person if the commissioner of accounts were acting under an order of a circuit court for the settlement of a fiduciary's accounts made in a suit to which such interested person was a party.

This statute immediately precedes four statutes describing why and how the Commissioner files reports with the court. *See* Va. Code §64.2-1210 (describing what the Commissioner reports on); Va. Code §64.2-1211 (where the Commissioner shall file the report); Va. Code §§64.2-1212, -1213 (how the court shall review and treat the report); Va. Code §64.2-1214 (how the reports are recorded). As stated above, as part of her authority, the Commissioner drafts reports to the court on matters of accounting, matters that are deemed important by the Commissioner and matters that are necessary for an interested party to know. *See* Va. Code §64.2-1210.<sup>3</sup> Therefore, it can be surmised that Va. Code §64.2-1209 was intended to describe who can bring matters to the attention of the Commissioner for her to report on.

Ms. Minor argues that Va. Code §64.2-1209 only allows interested person to bring matters to the attention of the Commissioner. The statute does not define an interested person. However, Ms. Minor convincingly argues that an interested party is one who has standing, because §64.2-1209 says that the interested person may “insist upon or object to anything which could be insisted upon or objected to by such interested person if the Commissioner of Accounts were acting under an order of a circuit court for the settlement of a fiduciary’s accounts made in a suit to which such interested person was a party.” *See id.* In *Goldman v. Landsidle*, 262 Va. 364 (2001) the Virginia Supreme Court stated that a party has standing if

... the party has sufficient interest in the subject matter to ensure that the litigants will be actual adversaries and that the issues will be fully and faithfully developed. The purpose of requiring standing is to make certain that a party who asserts a particular position has the legal right to do so and that his rights will be affected by the disposition of the case. Thus, a party claiming standing must demonstrate a personal stake in the outcome of the controversy.

*Id.* at 371.

In this case, the Decedent’s son and daughter-in-law are not interested persons. In decedents’ estate matters, interested persons are those who are pecuniarily interested in the results of the suit. *Johnson v. Raviotta*, 246 Va. 27, 34 (2002). “In decedents’ estate matters, interested persons are those who ‘have a legally ascertainable, pecuniary interest, which will be impaired by probating a will or benefited by setting aside the will...’”. *Martone v. Martone*, 257 Va. 199, 205 (1999). Interested persons are not people with a “mere expectancy” in the estate. *Id.* In other words, interested persons are heirs, beneficiaries, or those who have very certain or contingent interests in the matter. *See id.* at 206 (quoting *Fitzgibbon v. Barry*, 78 Va. 755, 760 (1884)). Here, decedent’s son was not an heir and so had no pecuniary interest in the matter. Therefore, decedent’s son and daughter-in-law could not request that the Commissioner of Accounts hold a

<sup>3</sup> Va. Code §64.2-1210 (emphasis added).

The commissioner of accounts shall report every account stated under this part, including a statement of the cash on hand and in bank accounts and the investments held by the fiduciary at the terminal date of the account, and, where applicable, reports of debts and demands under § 64.2-551, along with any matters specially stated deemed pertinent by the commissioner of accounts or that an interested person may require.

hearing under Va. Code §64.2-1209. The decedent's widow is the only interested person who could have asked the Commissioner for a hearing under Va. Code §64.2-1209.

However, while the statute does prescribe a method by which the Commissioner can have a hearing, the statute does not say that is the *only* way a commissioner may conduct a hearing.

Although the decedent's son did not have standing to request a hearing be held, the Commissioner has the authority to review and report an accounting under §64.2-1200. A Norfolk City Circuit Court decision seems to be directly on point for this matter. In *In re Trustee's Sale of Property of Brown*, 67 Va. Cir. 204 (Norfolk Cir. Ct. 2005), there were two trustees who were authorized to act either alone or in concert. *See id.* The Commissioner reviewed the trustee's report of sales and disapproved of the reports as null and void because the appointment of one of the substitute trustees violated Va. Code §55-58.1(2). *See id.* The trustees in turn responded that the Commissioner's authority extends only to reviewing and approving the accountings of trustee's sales and cannot invalidate those sales because of an irregularity that the Commissioner found in the foreclosure of the sale. *See id.* The court however, reasoned that the Commissioner needs to ensure that the settlement of accounts is accurate, not just financially sound. *See id.* at \*5. More specifically, the court stated:

To perform his duties on behalf of the court, a commissioner's authority must extend to every aspect of law or fact related to a fiduciary's duties, qualifications, and actions that may affect the rights of a beneficiary of an estate or a fund before him. ... Were a Commissioner of Accounts to be prohibited from considering such matters, how could he accurately and effectively assist the court? It would be an absurd result for a commissioner, knowing that there was a legal defect in the conduct of the sale, the accounting, or the fiduciary's qualifications, to approve an accounting simply because it was mathematically correct. Therefore, the Court holds that a commissioner has the power and, indeed, the duty to reject an accounting if his examination reveals a failure by a fiduciary to comply with a statutory duty. *Id.*

Just as in *In re Trustee's Sale of Property of Brown*, it would have been an absurd result for the Commissioner to approve the trustees' sales knowing that they were legally deficient, it would be just as an absurd result in this case to require the Commissioner to approve Ms. Minor's accounting and not look into a claim brought by an uninterested person that Ms. Minor's accounting was deficient. Therefore, the Commissioner was correct in conducting a hearing after being contacted by the decedent's son.

### **CONCLUSION**

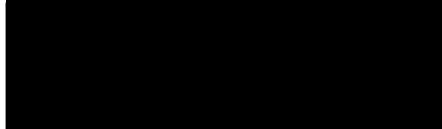
The Court rules that the Commissioner behaved appropriately in conducting a hearing under Va. Code §64.2-1209. Therefore, the Rule to Show Cause will be upheld.

*RE: In Re Estate of Eric Witt Wilder*  
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The Commissioner is directed to draft an order and submit it to the Court after circulating it with opposing counsel.

Please direct any questions you may have to my law clerk, Ms. Noga Baruch at 703-246-5471.

Sincerely,



Robert J. Smith, Judge  
Fairfax County Circuit Court

**OPINION LETTER**