SCV: Submitted on 05-18-2017 12:23:03 EDT for filing on 05-18-2017

IN THE

SUPREME COURT OF VIRGINIA

Record No. 161419

STEVEN C. GRAY
Appellant,

v.

FRANCES BINDER, et al.
Appellees.

In Re: Estate of Albert F. Bahnfleth, Jr., Deceased

On Petition for Appeal from the
Circuit Court of Fairfax County
Hon. Brett A. Kassabian, Judge

APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT OF VIRGINIA

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REPLY BRIEF

Appellant Steven C. Gray (Gray) respectfully replies to the Appellees' Brief and the Brief *Amicus Curiae*[1] as follows.

AUTHORITIES AND ARGUMENT

I. A Commissioner of Accounts Lacks Subject Matter Jurisdiction to Hear a Petition for Aid and Direction.

The Appellees argue that the court below correctly overruled Gray's exceptions to the Commissioner's Reports, because a) Virginia Code § 64.2-1200 gives "broad, concurrent jurisdiction to commissioners of accounts to provide general supervision of fiduciaries," and b) Virginia Code § 64.2-1209

[1]As of this writing, the Court has not yet granted the Motion for Leave to File Brief Amicus Curiae.

"allows a commissioner to act upon any issue insisted upon or objected to by any interested person." Reply Brief at 5 & 8.

A. *A Commissioners of Accounts' Jurisdiction is Not "Broad," But Determined and Limited by Statute*.

The Appellees rely on *Nicholas v. Nicholas*, 169 Va. 399, 193 S.E. 689 (1937), and *Carter's Administrator v. Skillman*, 108 Va. 204, 60 S.E. 775, 779 (1908), for the proposition that a commissioner of accounts "has concurrent jurisdiction with the circuit court over fiduciaries and can make determinations in fulfillment of his duties just as a circuit court judge can do if a formal petition is filed." Reply Brief at 7.

Nicholas involved a chancery suit against an administrator by a creditor of a decedent, asking that the court require the administrator to account for all the assets of the estate, determine the debts of the estate, and pay his debt. 169 Va. at 401; 193 S.E. at 689. The trial court granted the administrator's demurrer to the suit on the ground that the creditor had an adequate remedy at law. *Id*. In affirming the trial court's decision, the Court found that the Virginia statutes concerning

estates offered "[a] full method for the settlement of fiduciary accounts," including a means to determine debts and to challenge a fiduciary accounting, without recourse to equity. 169 Va. at 403, 193 S.E. at 690 (emphasis added).

Carter's Administrator involved a chancery suit by certain heirs of the decedent alleging that the administrator had distributed to only one of several heirs and seeking to hold the administrator liable for failing to make distributions to them. 108 Va. at 205, 60 S.E. at 776. In reversing the trial court's judgment, which granted the heirs' relief, the Court observed that the administrator had properly settled his accounts and obtained an order of distribution from the court, that he had no knowledge or reason to know of the decedent's other heirs, and that those heirs filed their suit several years after the estate was settled. This Court held that, under these circumstances, the administrator could not be held personally liable for distributions.

Neither of these decisions support the Appellees' claim that a commissioner of accounts has the same jurisdiction as the

circuit court in matters affecting decedent's estate, much less that a commissioner of accounts has original subject matter jurisdiction to hear a petition for aid and direction to construe a will and determine intestate heirs. In both cases, the Court considered equitable suits seeking to override or circumvent the probate process. *Nicholas* Court quoted *Carter's Administrator* at length to "show how sufficient is the provision made by our statute law for the settlement of the accounts," as opposed to the old, equitable pleadings. 169 Va. at 403, 193 S.E. at 690. The Court in *Carter's Administrator* conceded that, while the probate jurisdiction of the court and the commissioner was "limited," it was sufficient to shield an administrator from an equitable challenge where he complied with the statutes. 108 Va. at 215-16, 60 S.E. at 779-80.

The Manual for Commissioners of Accounts, published by Standing Committee on Commissioners of Accounts of the Judicial Council of Virginia, summarizes the statutory authorization and jurisdiction of commissioners of accounts:

> Appointed by Circuit Courts, Commissioners are notified by the Clerks of the Circuit Courts who have appointed them of fiduciary administrations they are expected to oversee. As a general rule, a fiduciary files an inventory with the supervising Commissioner within a relatively brief period after the fiduciary's appointment. ... During some period of time after the deadline for filing an inventory ..., the fiduciary must file an account with the Commissioner. The Commissioner then audits the account, obtains all additional information and documents required, sees that the account is final and in approvable form, ascertains that it has been signed by all fiduciaries, and files it with the Clerk of Court. Aggrieved parties have a right to except to the account for fifteen days after it is filed. If no exceptions have been filed within the fifteen-day period, the account stands confirmed. If exceptions are filed, the account is considered settled after the Court rules on the exceptions and either the time for appeal has expired or all appeals have been exhausted.

MANUAL FOR COMMISSIONERS OF ACCOUNTS (Fifth Edition, 2014), § 1.202. This succinctly describes the authority and the jurisdiction of a commissioner (and, in part, the court), and the Manual goes on to review the governing statute. *Id*, § 1.203.

The case at bar, however, involves a petition for aid and direction seeking construction of a decedent's will and

determination of his heirs at law, filed directly with a commissioner. In its 22 chapters and 359 pages (exclusive of appendices), the Manual for Commissioners of Accounts covers every aspect of a commissioner's duties in significant detail. But, it makes no mention whatsoever of a commissioner's supposed authority to construe a decedent's will or to determine heirs.

Instead such matters are plainly the province of the court. HARRISON ON WILLS & ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA (4th Ed., 2014), § 28.03. Judge Brockenbrough Lamb, the noted commentator on probate and other legal issues, addresses suits for aid and direction as follows:

> In most cases there is no doubt about the identity, the shares and the status ... of the next of kin and heirs at law of an intestate decedent. The administrator is able without risk to effect complete administration and distribution without requiring or seeking the aid, and the protection, of a court. The settlement of his final accounts before the Commissioner of Accounts, followed by their approval and recordation is a safe procedure....
>
> In plain cases an administrator would not be justified in seeking any further aid, guidance or protection from the court. The estate should not be subjected to this unnecessary expense, which is generally quite

> substantial; *because such aid of a court can only be obtained in a plenary suit in equity*, with all persons interested in the point of doubt regularly convened as parties. ***The converse of the plain case, however, often arises. When genuine doubt and difficulty confront the administrator... he needs, and is entitled to, the aid and protection of a court of equity in a plenary suit.

LAMB ON VIRGINIA PROBATE PRACTICE (1957), § 133 (emphasis in original).[2] Hence, contrary to the Appellees' assertion, a petition for aid and direction invokes the equitable jurisdiction of a circuit court, in contrast to the limited probate jurisdiction of a commissioner to settle accounts of court-appointed fiduciaries.

B. *Virginia Code §64.2-1209 Grants Limited Jurisdiction Regarding Objections to Fiduciary Accountings.*

The Appellees insist that Virginia Code § 64.2-1209 is a "broad grant of jurisdiction, which allows an interested party to 'insist upon or object to anything' before the commissioner." Appellees' Brief at 8. The *amicus*, the Virginia Conference of

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[2]Judge Lamb also notes that a personal representative, not a beneficiary of the estate, brings the suit for aid and direction and such suits most commonly seek help in construing a decedent's will or determining heirs at law. *Id*, at §§ 130, 131, and 133; *accord* HARRISON, § 28.03.

Commissioners of Accounts, makes the same claim: "Under the express terms of Virginia Code § 64.2-1209, the commissioner may hear any matter which the court has authority to refer, upon the request of an interested person and without a separate referral from the court." Brief Amicus Curiae at 7.

But, these assertions invite the Court to read out the limiting provision of this statute, and ignore other provisions. § 64.2-1209 actually reads, in pertinent part:

> Any 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.

(emphasis added). The "settlement of a fiduciary's accounts" refers to a commissioner's audit and approval of a fiduciary's annual accounting for an estate. *See* the detailed treatments of settlement of accounts in MANUAL, Chapters 6, 7, 8 & 9; HARRISON, § 26.02 *et seq.;* LAMB, § 107. A commissioner is charged to "make all *ex parte* settlements of the fiduciaries' accounts."

§ 64.2-1200. § 64.2-1209 simply allows an interested party objecting to an *ex parte* settlement of accounts to force an *inter partes* hearing regarding the settlement. *See* MANUAL, §15.1 ("As a part of the statutory scheme creating the Commissioner system, the General Assembly authorized Commissioners of Accounts to conduct ... hearings on: ... [o]bjections to accounts before the Commissioner of Accounts pursuant to Va. Code § 64.2-1209 ...."); BROWN, VIRGINIA PROBATE HANDBOOK (2016-17 Edition), § 15:8 ("§ 64.2-1209 provides a quick and inexpensive method by which a beneficiary or any party 'interested in' the account can object to an accounting.")

Objections to a fiduciary's accounting, *per force*, relate to the contents of the accounting – that is, the statement of assets, receipts, gains, losses, disbursements, or distributions of an estate – and how those contents reflect what a fiduciary has done or failed to do. By contrast, a petition for aid and direction filed by a fiduciary invokes the court's equitable powers: it is different

in kind than a "quick and inexpensive" proceeding concerning a fiduciary's statement of accounts.

At bottom, neither the Appellees nor the *amicus* cite any decision or other authority supporting the claim that a commissioner of accounts has subject matter jurisdiction to hear such a petition. Virginia authority on this issue is to the contrary. Such a petition is within the equitable jurisdiction of a circuit court, and § 64.2-1209 simply does not confer such jurisdiction on a commissioner of accounts.[3]

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[3]The Appellees and *amicus* also argue that a fiduciary is an interested party who may "object or insist" to their own account under § 64.2-1209. Appellee's Brief at 8; Amicus Brief at 7. For this claim, both rely on three circuit court decisions: *In re Estate of Moore*, 55 Va. Cir. 78 (2001); *In re Trust of Southall*, 49 Va. Cir. 169 (1999); *Coulter v. Herring*, 42 Va. Cir. 308 (1997). *Moore* involved a commissioner who disapproved some of a guardian's expenditures, as part of his normal reporting requirements under Virginia Code § 64.2-1210 (formerly § 26-31). *Southall* involved a trustee who noted exceptions to a commissioner's report, which found deficiencies in the trustee's account. Both *Moore* and *Southall* involve reports of a commissioner based on reviews of *ex parte* accounts, not hearings requested by a fiduciary under § 64.2-1209 or it's precursors. *Coulter v. Herring* involved a suit for accounting brought by an executor against the attorney-in-fact for the decedent: it did not involve the commissioner of accounts at all.

C. *A Circuit Court's Jurisdiction Under Virginia Code § 64.2-1212 is Derivative of Commissioner's Jurisdiction.*

The Appellees and *amicus* argue that, in the case at bar, the circuit court's jurisdiction was not derivative of the commissioner's. Appellees Brief at 11; Amicus Brief at 8. The Appellees also argue that even if the court's jurisdiction were derivative, "the jurisdiction of a commissioner of accounts regarding the settlement of a fiduciary's accounts is so broad that the circuit court's derivative jurisdiction would be broad enough to allow it to decide any estate issues presented to it at an exception hearing." Appellees Brief at 12.

[3 cont.] Clearly, a fiduciary may file exceptions to a commissioner's report under Virginia Code § 64.2-1212. By implication, a fiduciary may also ask commissioner of accounts for approval of an expense (including his or her own compensation) prior to disbursement under Virginia Code § 64.2-1208. But, nothing under Virginia law supports the assertion that a fiduciary may request a hearing under § 64.2-1209: by its own terms, that provision is reserved for an objecting interested party, such as a legatee, heir, creditor, or other person who interests are affected by a fiduciary's account. The notion that a fiduciary could object to his or her own accounting is, of course, self-defeating. But, even if a fiduciary could invoke § 64.2-1209, it would be limited to issues presented by his or her own accounting – not the construction of a will or the determination of heirs.

For these points, the Appellees rely on the *Nicholas* and *Carter's Administrator* decisions. We have shown, above, that neither of these cases support these assertions.

We have addressed the court's jurisdiction at length, with reference to the governing statutes. *See* Opening Brief at 17-22. Where a commissioner hears objections to an accounting under § 64.2-1209 and files his or her report, the court's jurisdiction in reviewing any exceptions to the report is derived from the commissioner, because that is what the statute explicitly provides: if no party files exceptions to the report within 15 days, the report stands confirmed; if a party does file exceptions, the court reviews the exceptions and corrects the report as necessary. § 64.2-1212. It is precisely in the nature of an appeal. In the case at bar, the court never heard the petition, it only reviewed the commissioner's report on the petition. If the commissioner lacked subject matter jurisdiction to hear the petition, his report is a nullity, and no amount of careful review or attention on the part of the court adds to that "nothing."

II. Subject Matter Jurisdiction May be Raised Directly or Collaterally by All Persons, Anywhere, at Any Time.

The Appellees also argue that "Gray's failure to challenge subject matter jurisdiction until May 19, 2016, when Gray no longer qualified as an interested person in the Bahnfleth Estate, is an abuse of the judicial process and a violation of Rule 5:25." Appellees' Brief at 14. This assertion does not address the long-standing, and oft-cited, rule in Virginia, which is to the contrary:

> To the extent... that the court exceeded its authority, or its jurisdiction, over the subject-matter embraced in the decrees, they are absolute nullities, and may be impeached directly or collaterally by all persons, anywhere, at any time, or in any manner, and may be declared void by every court in which they are called in question.

Barnes v. Am. Fertilizer Co., 144 Va. 692, 705, 130 S.E. 902 906 (1925). In making their argument, the Appellees beg the very question before this Court in the case at bar: that is, whether the Commissioner of Accounts had subject matter jurisdiction to hear the petition for aid and direction. If he did not, then his report, and the court's orders confirming his report, are nullities.

CONCLUSION

For these reasons, Appellant Steven C. Gray prays that this honorable Court will grant the relief set forth in his Opening Brief, for such other or further relief this Court deems just and proper.

Respectfully submitted,
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CERTIFICATE

Pursuant to the Rules of the Supreme Court of Virginia, counsel for the Appellant certifies as follows:

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(b) The appellees are the putative intestate heirs of Albert Bahnfleth:

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iv) the Administrator of the Estate is Richard E. Knight, Esq., 2300 Wilson Boulevard, Suite 240, P.O. Box 927, Arlington, Virginia 22216; 703.527.0243 (telephone), 703.522.9017(facsimile); richard@richardeknight.com

v.) Amicus Counsel is: Jeffrey S. Palmore, ReedSmith, LLP, Riverfront Plaza - West Tower, 901 East Byrd Street, Suite 1700, Richmond, VA Jpalmore@reedsmith.com

Counsel for the Virginia Conference of Commissioners of Accounts (Motion pending)

(c) A copy of the foregoing Appellant's Reply Brief was sent, by email to all counsel and the Administrator, and sent postage prepaid, by first class mail, to all the unrepresented intestate heirs.

(d) The word count of the foregoing Appellant's Reply Brief is 2581 words, excluding the cover page, table of contents, table of authorities, and certificate.

Given under my hand this 18TH day of May, 2017.

/s/ *Joseph W. Stuart*

Joseph W. Stuart