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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 OPENING BRIEF

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IN THE SUPREME COURT OF VIRGINIA

STEVEN C. GRAY Appellant v. FRANCES BINDER, et al. Appellees	Record No. 161419

APPELLANT'S OPENING BRIEF

Appellant Steven C. Gray respectfully represents as follows.

NATURE OF THE CASE & MATERIAL PROCEEDINGS BELOW

This case involves the subject matter jurisdiction of the Commissioner of Accounts ("the Commissioner") for the Circuit Court of Fairfax County ("the Court") to hear a Petition for Aid and Direction filed directly with him seeking the construction of the Last Will and Testament of Albert F. Bahnfleth, Jr. dated August 8, 1966 ("the Will") and the determination of the intestate heirs of Albert F. Bahnfleth, Jr. ("Bahnfleth"). The material proceedings below are set forth in the statement of facts.

ASSIGNMENT OF ERROR

The Court erred in ruling that the Commissioner of Accounts had subject matter jurisdiction to hear a Petition for Aid and Direction filed directly with him seeking the construction of the Will and the determination of the intestate heirs of Bahnfleth. *See* Joint Appendix ("J.A.") at 150-152, 162.

STATEMENT OF FACTS[1]

Bahnfleth died in 2012, a resident of Fairfax County. On November 26, 2012, Richard E. Knight ("the Administrator") qualified as Administrator of Bahnfleth's Estate before the Clerk of the Court. Subsequently, the Administrator discovered a copy of Bahnfleth's Will in a safe deposit box and, in September of 2013, the Administrator filed a motion with the Court to admit the copy of the Will to probate. On October 18, 2013, the Court entered an order admitting the Will to probate.

On January 31, 2014, the Administrator filed a "Petition for Aide and Direction" [sic] ("the Petition") directly with the

---

[1]*See* Statement of Facts, J.A. at 156 *et seq*.

Commissioner. The Administrator did not file the Petition with the Court and did not seek a decree from the Court referring the Petition to the Commissioner. In his Petition, the Administrator sought the following relief:

> ... that the Commissioner of Accounts provide the administrator with the aide [sic] and direction in determining the following:
>
> A. The construction of the decedent's Will;
>
> B. The determination of the rightful beneficiaries of the Will, if any; the determination if any of the dispositions under the Will have lapsed; and the determination of the beneficiaries' respective share of the estate under the Will, if any.
>
> C. The determination of the intestate heirs of the decedent's estate, if any, and the determination of the rightful shares of the decedent's estate for each intestate heir, if any.
>
> D. That the validity of the assignments between 27 paternal heirs and Kemp and Associates be established and that the administrator be authorized to make distribution in accordance with said assignments.
>
> E. That the administrator may proceed and conclude the administration of this estate under the direction and protection of the Commissioner of Accounts.

On April 9, 2014, the Commissioner held an evidentiary hearing on the Petition pursuant to Virginia Code § 64.2-1209.

On January 5, 2015, the Commissioner issued his Report on the issues, opining that all of the provisions of the Will failed and that Bahnfleth died intestate, and reporting on Bahnfleth's intestate heirs.[2]

On January 15, 2015, Appellant Steven C. Gray ("Gray") filed his Exceptions to the Commissioner's Report.

On January 30, 2015, the Court entered an order confirming the Commissioner's Report. The Court conducted no hearing on the Exceptions.

On February 3, 2015, after the entry of the January 30th order, the Commissioner delivered exhibits and other papers for the Court's review related to Gray's Exceptions.

---

[2]In his Report, the Commissioner also addressed a separate request by the Administrator for compensation beyond the court schedule for personal representatives. J.A. at 19-21. The Appellant does not challenge that portion of the Report since the Commissioner clearly had authority to address the compensation of the Administrator under Virginia Code §64.2-1208.

On February 10, 2015, Gray filed a Motion for Reconsideration regarding the confirmation of Commissioner's Report. Gray also filed a Motion to Supplement the Record concerning a brief filed with the Commissioner not included in the record transmitted by the Commissioner to the Court.

On March 10, 2015, the Court heard the Motions for Reconsideration and to Supplement: Gray's counsel and the Commissioner presented arguments; the Administrator and counsel for certain intestate heirs also appeared at the hearing.

On March 13, 2015, the Court entered an Order denying the Motion for Reconsideration and granting the Motion to Supplement Record.

On April 10, 2015, Gray filed a Notice of Appeal regarding the March 13, 2015 Order, and, subsequently, a corrected Notice of Appeal. On May 11, 2015, Gray filed the transcript of the March 10th hearing. On June 9, 2015, Gray filed a Petition for Appeal regarding the March 13, 2015 Order with the Virginia

Supreme Court. Gray did not raise the issue of subject matter jurisdiction at that time.

On November 30, 2015, the Supreme Court refused the Petition. On December 14, 2015, Gray filed a Petition for Rehearing. On February 5, 2016, the Supreme Court denied the Petition for Rehearing.

On May 4, 2016, the Commissioner filed a Report pursuant to a request for a hearing of debts and demands against the Estate and gave notice to Gray and the intestate heirs.[3]

On May 19, 2016, Gray filed Exceptions to the Commissioner's Report related to the subject matter jurisdiction of the Commissioner.

On June 9, 2016, the Court entered an order confirming the Commissioner's Report. The Court conducted no hearing on Gray's Exceptions.

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[3]The Appellant took exception only to the portion of the Commissioner's Report that would authorize the Administrator to distribute the Estate to the beneficiaries previously determined – *i.e.,* Banfleth's intestate heirs. *See* J.A. at 117.

On June 24, 2016, Gray filed a Motion for Reconsideration with the Court with regard to the June 9, 2016 Order and a Motion to Vacate Report & Orders. On July 7, 2016, the Commissioner filed a Response and a proposed Order with the Court.

On July 8, 2016, the Court entered the Commissioner's proposed Order denying the Motion for Reconsideration. The Court conducted no hearing on the Motion for Reconsideration or the Motion to Vacate. In the July 8, 2016 Order, the Court ruled that the Commissioner had authority to hear the matter pursuant to Virginia Code § 64.2-1209. On July 13, 2016, Gray filed Objections to the July 8, 2016 Order.

AUTHORITIES AND ARGUMENT

I. The Court Erred in Ruling That the Commissioner of Accounts Had Subject Matter Jurisdiction to Hear a Petition for Aid and Direction Filed Directly with Him Seeking the Construction of the Will and the Determination of the Intestate Heirs of Bahnfleth.

This appeal turns on the subject matter jurisdiction of a commissioner of accounts and, by derivation, a circuit court, to

hear a petition for aid and direction seeking the construction of a decedent's will and determination of his heirs. Because this is a question of law, the standard of review is *de novo*. *Glasser & Glasser, PLC v. Jack Bays, Inc.*, 285 Va. 358, 369, 741 S.E.2d 599, 604 (2013). The jurisdictional elements of a commissioner's office and a circuit court's review of his reports are set forth under Virginia Code § 64.2-1200 *et seq.*

A. *Statutory Authority of Commissioners of Accounts*.

A commissioner of accounts is a statutory officer appointed by the judges of a circuit court, with general supervision of fiduciaries qualified before the court or the court's clerk and authority to make e*x parte* settlements of the fiduciaries' accounts. Virginia Code § 64.2-1200. A fiduciary qualified by the court has a general obligation to keep his accounts for the estate in such a condition that both the fiduciary and the beneficiaries can always be informed as to the true condition of the estate, and to render to the proper judicial tribunal a faithful, periodic statement of the fiduciary's accounts. Virginia Code

§ 64.2-1206; HARRISON ON WILLS & ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA (4th Ed., 2014), § 26.02. The settlement of these accounts – that is, the review and approval of the accounts submitted by the fiduciary – has long been within the probate or equitable powers of the circuit courts; by statute, a commissioner of accounts appointed by the circuit court has the authority to review, on behalf of the court, the accounts submitted by fiduciary. HARRISON ON WILLS , § 26.03; Virginia Code § 64.2-1200.

In the context of a decedent's estate, an account involves an annual statement by the personal representative of the beginning assets from the inventory or prior account, receipts, gains on sale of assets, adjustments, disbursements for debts and expenses, losses on assets sales, distributions to beneficiaries, and assets on hand at the end of the period. Virginia Code § 64.2-1304 (accounts of personal representative); § 64.2-1308 (forms for inventories and accounts); Form CC-1680 10/12, Account for Decedent's Estate.

Regarding a decedent's estate, a commissioner may conduct hearings, without a court order, on a few matters: the debts or demand of creditors or other claimants against an estate; issues related to the adequacy of a fiduciary's bond or surety on the bond, or whether a fiduciary should be removed for incapacity, misconduct, or other causes; and, objections by an interested person to a fiduciary's account. Virginia Code §§ 64.2-550, 64.2-1204, and 64.2-1209.[4]

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[4]See also Manual for Commissioners of Accounts (Fifth Edition, 2014), §15.1:

> As a part of the statutory scheme creating the Commissioner system, the General Assembly authorized Commissioners of Accounts to conduct a number of different hearings. These include hearings on:
>
> 1. Debts and demands pursuant to Va. Code § 64.2-550;
>
> 2. Objections to accounts before the Commissioner of Accounts pursuant to Va. Code § 64.2-1209; [and,]
>
> 3. Adequacy of the fiduciary's surety bond and whether the fiduciary should be removed pursuant to Va. Code § 64.2-1204....

In the case at bar, the Administrator filed the Petition directly with the Commissioner. *See* J.A. at 129-133, 156-7, ¶ 6. Subsequently, the Commissioner conducted a hearing on the Petition and issued a Report pursuant to Virginia Code § 64.2-1209. J.A. at 5, 148.

§ 64.2-1209 reads as follows:

> 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 section correlates to a commissioner's charge to "make all *ex parte* settlements of the fiduciaries' accounts." § 64.2-1200 & -1206. Since such accounts are filed *ex parte,* § 64.2-1209 gives a person interested in the account – particularly a beneficiary of a decedent's estate who is not also a personal representative – the right to object to one or more aspects of the account.

B. *The Commissioner Lacked Subject Matter Jurisdiction to Hear the Petition for Aid and Direction.*

"Subject matter jurisdiction is the authority granted to a court by constitution or by statute to adjudicate a class of cases or controversies." *Earley v. Landsidle*, 257 Va. 365, 371, 514 S.E.2d 153, 156 (1999). While a commissioner of accounts is not a court, he or she is appointed by the judges of a circuit court and, in that quasi-judicial office, a commissioner may hear certain matters related to fiduciaries qualified before the court. The statutes concerning commissioners of accounts specifically describe those matters: namely, debts and demands against an estate, issues related to the bond, conduct, or capacity of a fiduciary, and objections to a fiduciary's accounting.

In the case at bar, the Administrator, in his Petition filed directly with the Commissioner, sought the construction of Bahnfleth's Will; the determination of the rightful beneficiaries of the Will, if any; the determination if any of the dispositions under the Will have lapsed; the determination of the beneficiaries' respective share of the estate under the Will, if any; the

determination of the intestate heirs of the decedent's estate, if any, and the determination of the rightful shares of the decedent's estate for each intestate heir, if any. J.A. at 132, 157-8, ¶ 7.

None of these prayers related to an objection to the Administrator's accounts. Objections to an account go to one or more aspects of the account itself: whether unreported or undervalued assets or receipts, improper disbursements, negligent losses on asset sales, incorrect distributions, or the like. But, the Petition filed with the Commissioner in the case at bar had nothing to do with any such issues: rather, it went to the construction, validity, or effectiveness of Bahnfleth's Will and a determination of his intestate heirs.

In the proceedings below, Gray argued that the Commissioner lacked subject matter jurisdiction to hear the Petition. J.A. at 123-128. The Commissioner filed a Response, arguing, to the contrary, that he did have jurisdiction:

> Under Virginia Code § 64.2-1209, the commissioner has authority to hear "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." Thus, by statute, the commissioner of accounts has authority to hear any matter that the Circuit Court might refer to the commissioner related to the settlement of a fiduciary's account. That authority to refer is plenary.

J.A. at 141. The Commissioner cited *Raiford v. Raiford*, 193 Va. 221, 68 S.E. 2d 888 (1952) and Virginia Code § 8.01-609 for this proposition; but, *Raiford* involved a referral by a court to a commissioner in chancery, and § 8.01-609 is the statute that allows for such referrals. In *Raiford,* the case <u>was</u> before the court at the outset and later referred; whereas the case at bar <u>was not</u> before the court but before the Commissioner. Notably, *Raiford* did not involve a question of subject matter jurisdiction, rather it involved a party's objection of the court's rule requiring referral of all divorce suits to a commissioner in chancery.

It is doubtless true, as quoted by the Commissioner, that "there is no question of law or equity, or of disputed fact, which [a commissioner] may not have to decide, or respecting which he

may not be called upon to report his opinion to the court." *Raiford*, 193 Va. at 226, 68 S.E.2d at 892. But, that begs the question of a commissioner's subject matter jurisdiction. Whether a commissioner has the authority to hear a matter is a threshold question. *See Spencer v. City of Norfolk*, 271 Va. 460, 462, 628 S.E.2d 356, 357 (2006). On referral from a court that has jurisdiction and that has followed the provisions of § 8.01-609, a commissioner in chancery does have authority to hear a matter pursuant to a decree of referral. But, in the case at bar, the Court never referred the matter to the Commissioner because the Petition was not filed with the Court: instead, the Commissioner took up the Petition as filed with him. His authority to hear the Petition was determined by the statute (§ 64.2-1209), which makes no provision for a commissioner to hear such a case.

Virginia law has long held that the construction of wills and determination of heirs is the province of the circuit court.

HARRISON ON WILLS & ADMINISTRATION FOR VIRGINIA AND WEST VIRGINIA (4th Ed., 2014), § 28.03. Suits for Aid and Direction.

> The jurisdiction of equity to entertain bills on behalf of executors and administrators for advice and direction is firmly established.*** The suit for aid and direction may be instituted for many different purposes. For example, the purpose of the suit may be to ascertain the distributees of an estate. Such suits are instituted and parties convened as in other chancery suits. Another example of the suit for aid and direction is the bill to construe a will.... When provisions in a will may be susceptible of differing interpretations, it is prudent and proper for the personal representative to seek the aid and guidance of a court to obtain the correct interpretation. The personal representative does not exceed his authority by initiating an action to determine a question of law which is the proper province of a court.

Id; *see also* Virginia Code § 17.1-513 (general jurisdiction of circuit courts). Virginia jurisprudence includes numerous opinions of this Court reviewing the decisions of trial courts construing wills of decedents but not one ruling originating with a commissioner of accounts on the same issue.

In the case at bar, the Commissioner simply did not have the subject matter jurisdiction to hear the Petition. As a result,

his Reports related to the Petition are nullities. *Virginian-Pilot Media Cos. v. Dow Jones & Co.*, 280 Va. 464, 698 S.E.2d 900 (2010).

C. *Statutory Jurisdiction of Circuit Court on Exceptions to a Commissioner's Report.*

After conducting a hearing on objections to a fiduciary accounting under Virginia Code § 64.2-1209, a commissioner is charged with filing a report on the matter with the circuit court. Virginia Code §§ 64.2-1210 & -1211. When a commissioner issues a report based on such hearings, interested parties may file exceptions to it in the circuit court within fifteen days, otherwise the report stands as confirmed. Virginia Code § 64.2-1212. If an interested party files exceptions, the court

> shall correct any errors that appear on the exceptions and to this end may (i) commit the report to the same or another commissioner of accounts, as often as it sees cause, (ii) cause a jury to be empaneled to inquire into any matter that in its opinion should be ascertained in that way, or (iii) confirm the report in whole or in a qualified manner.

Id. In the case at bar, the Commissioner issued his Report on January 5, 2015; Gray timely filed Exceptions to the Report on January 15, 2015; but, the Court confirmed the Report on January 30, 2015. J.A. at 5-42, 158, ¶¶ 9-11. Gray filed a Motion for Reconsideration of the Court's January 30th confirmation, which the Court heard. Subsequently, the Court entered an Order denying that Motion and again confirming the Commissioner's Report. J.A. at 43-53, 158-9, ¶¶ 13-15.

The following year, the Commissioner filed a second Report, authorizing the fiduciary to distribute the remainder of the Estate to the beneficiaries – *i.e.,* to Bahnfleth's intestate heirs. J.A. at 108-116, 159, ¶ 21. Gray timely filed Exceptions to this second Report. J.A. at 117-119, 159-60, ¶ 22. The Court confirmed the Commissioner's second Report, and, subsequently, denied Gray's Motion for Reconsideration. J.A. at 120, 148-9, 160, ¶ 23-27.

Hence, all of the Court's proceedings in this matter were based upon § 64.2-1212: that is, reviews of the Exceptions and confirmations of the Commissioner's first and second Reports.[5]

D. *The Court Lacked Subject Matter Jurisdiction to Rule on the Commissioner's Report.*

In the case at bar, the Court's subject matter jurisdiction was completely derived from the Commissioner's jurisdiction: that is, it was entirely based upon § 64.2-1212. The Commissioner heard the Petition under § 64.2-1209; then, the Commissioner filed his first Report under § 64.2-1210; Gray timely filed his first Exceptions under § 64.2-1211; and, the Court examined the Exceptions under § 64.2-1212 and confirmed the Report. The Commissioner plainly did not have the subject matter jurisdiction to hear the Petition in the first place or to

[5]The Court considered two motions for reconsideration related to the Court's confirmation of the report in question: in both instances it denied the motion. The Court conducted one hearing on Gray's first Motion for Reconsideration, but not on the Exceptions or the second Motion for Reconsideration.

issue a Report. Hence, his Report was a nullity; and, hence, the Court did nothing more than confirm a nullity – a nothing.

Even though a circuit court would clearly have jurisdiction to hear a petition for aid and direction seeking construction of a decedent's will or determine a decedent's heirs at law <u>if it were filed directly with the court</u>, a circuit court's jurisdiction under § 64.2-1212 is wholly derivative of a commissioner's jurisdiction under § 64.2-1209. If, as in the case at bar, a commissioner lacked subject matter jurisdiction to hear the matter in the first place, nothing a circuit court does with the commissioner's report thereafter can give substance to this nought. A defect in subject matter jurisdiction cannot be cured; any subsequent proceeding based on such a defective judgment is itself a nullity. *Barnes v. American Fert. Co.,* 144 Va. 692, 130 S.E. 902 (1925); *Ferry Co. v. Commonwealth,* 196 Va. 428, 83 S.E.2d 782 (1954).

This Court's recent opinion in *Parrish v. Federal National Mortgage Association*, 292 Va. 44, 787 S.E.2d 116 (2016), is instructive. In *Parrish*, the Court vacated both the district court

and circuit court rulings in a case where the Court determined that neither the district court nor the circuit court on appeal had subject matter jurisdiction to render a ruling. Citing *Addison v. Salyer*, 185 Va. 644, 651-2, 40 S.E.2d 260, 264 (1946), the Court wrote that "it is well-settled that when exercising its appellate jurisdiction in a de novo appeal, the circuit court's subject matter jurisdiction is derivative of the court not of record from which that appeal is taken." 292 Va. at 49, 787 S.E.2d at 120.

The same principle set forth in *Parrish* applies in the case at bar. Exceptions to the report of a commissioner of account are akin to appeals from a district court to the circuit court. Once a commissioner files his report, interested parties have 15 days to note exceptions, otherwise the report stands as confirmed. §§ 64.2-1211 & 1212. If an interested party files exceptions, the circuit court reviews the basis for the exceptions and either corrects any errors in the Report, confirms the Report, or commits the matter to the same commissioner (or another

commissioner). § 64.2-1212. On review, the commissioner's findings of fact are ordinarily sustained, if supported by the evidence, but this rule does not apply to pure conclusions of law. *Morris v. United Virginia Bank*, 237 Va. 331, 337-8, 377 S.E.2d 611, 614, (1989).

In both the case at bar and in *Parrish*, the circuit court derived it's subject matter jurisdiction from the lower tribunal: in Parrish, from the district court; in this case, from the Commissioner. In both cases, the circuit court would have had jurisdiction to consider all matters if the case had originated there, but it lacked jurisdiction because the case came to the court in the form of an appeal. In both cases, the original rulings were nullities, and the circuit court's later rulings were likewise nullities, by derivation, and subject only to vacation by this Court.[6]

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[6]In the case at bar, because the original appeal of this matter was based on a nullity, it would appear the orders of this Court in Record No. 150899 (*Gray v. Binder et al.)* should likewise be vacated.

CONCLUSION

For these reasons, Steven C. Gray prays that this honorable Court will

a) find that the Commissioner of Accounts lacked subject matter jurisdiction to hear a Petition for Aid and Direction filed directly with him seeking the construction of the will and the determination of the intestate heirs in this matter,

b) vacate the Commissioner's Reports dated January 5, 2015 (except as to issue of fiduciary compensation) and May 4, 2016 (except regarding debts and demands),

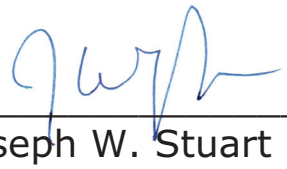
c) vacate all orders of the Circuit Court based on the Commissioner's Reports in this regard, including the Orders dated January 30, 2015, March 13, 2015, June 9, 2016, and July 8, 2016,

d) to the extent this Court deems necessary, vacate it's Orders dated November 30, 2015 and February 5, 2016 in Record No. 150899 (*Gray v. Binder et al.),*

e) to award him his costs in making this appeal; and,

for such other or further relief this Court deems just and proper.

Respectfully submitted,
STEVEN C. GRAY
Appellant



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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 intestate heirs of Albert Bahnfleth:

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ii) the following intestate heirs are represented by Dick L. Williams, Esq., Williams, Williams, & Loeffel, P.C., 139 East Washington Street, East Peoria, Illinois 61611-2548; 309.353.5898 (telephone); dick@WWTLawOffice.com :

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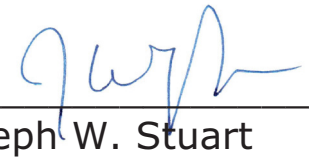
(c) A copy of the foregoing Appellant's Opening Brief was sent, postage prepaid, by first class mail, to all counsel, to the unrepresented intestate heirs, and to the Administrator.

(d) The word count of the foregoing Appellant's Opening Brief is 3,959 words, excluding the cover page, table of contents, table of authorities, and certificate.

Given under my hand this 10TH day of April, 2017.



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