NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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December 27, 2022

Mr. Kristof G. Koletar, Esquire
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602

Ms. Elizabeth Chichester Morrogh, Esquire
4020 University Drive, Suite 300
Fairfax, VA 22030

Re: *John B. Forbes v. Susan S. Forbes*, Case No. CL-2022-6734

Dear Counsel:

FACTS

Decedent Shelley Forbes ("Decedent") is the mother of Defendant Susan Forbes ("Defendant"), Plaintiff John B. Forbes ("Plaintiff" and referred to as Be) and Chip Forbes ("Chip"). Defendant, Plaintiff, and Chip are Decedent's heirs. Prior to her death, Decedent opened two accounts in her name: a checking account with Union Bank ("Union Bank Checking Account") and an investment account with LPL Financial ("LPL Account"). Decedent also had interests in two family businesses: SWM Properties, Inc. and Service Welding and Machine Company ("SWM Properties"). From the winding up of these interests, Decedent received a payout of over $2.5 million. The payout was deposited into the LPL Account.

On August 23, 2012, Decedent executed a Power of Attorney ("First Power of Attorney") naming Defendant as her agent and attorney-in-fact to act on her behalf. On May 25, 2017, Defendant filed a petition with North Carolina's Craven County Circuit Court, seeking a judicial determination that Decedent, due to her mental difficulties caused by Alzheimer's dementia, was incompetent to handle her own affairs. Defendant alleged that Decedent had been scammed out of her money and was not filing taxes. Defendant also stated that Decedent was no longer able to communicate her wishes regarding legal documents and service nor identify or resist financial exploitation. Once the power of attorney was executed, Defendant made a series of payments to herself and Kathleen Shelley, whose relation to Decedent is unclear. After these transactions

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were made, Decedent executed a second Power of Attorney ("Second Power of Attorney") under Virginia law on September 5, 2018.

Payments and other financial transfers to Defendant occurred after the Second Power of Attorney's execution. On October 4, 2018, approximately a month before Decedent's passing, Decedent added Defendant as the transfer-on-death beneficiary of 100% of the LPL Account. On October 16, 2018, Defendant paid herself $15,000 from the LPL Account as an annual exclusion gift. No gifts were received by, or distributed to, Plaintiff, Chip, or any other unidentified heirs.

On November 16, 2018, Decedent died intestate. Decedent was survived by Defendant, Plaintiff, and Chip. Defendant did not notify Plaintiff or Chip of Decedent's death until five days after Decedent's passing. Upon Decedent's death, Defendant became the sole beneficiary of over $2.5 million. No assets were distributed to Plaintiff, Chip, or any other heirs.

In September 2019, Chip became aware of both the sale of SWM Properties and Decedent's distributions from that sale. Chip discussed this information with Plaintiff and asked Defendant to provide information on the sale. However, Chip and Plaintiff did not receive a response from Defendant. On October 29, 2019, Chip requested an attorney's services to send a written request to Defendant for all actions taken under the Second Power of Attorney, as allowed by Virginia Code § 64.2-1612(I). Decedent's attorney provided an accounting of Defendant's actions only from the time Decedent moved to Virginia in 2017 until December 2019.

On January 31, 2020, Chip qualified for and was named as the administrator of Decedent's estate before the Fairfax County Circuit Court. In March 2020, Plaintiff, in his individual capacity, along with Chip in his individual capacity and as the administrator of Decedent's estate, brought suit against Defendant ("First Complaint"), alleging that Defendant committed acts of undue influence, unjust enrichment, breach of fiduciary duty, and fraud. On November 29, 2021, Plaintiff and Chip took a voluntary nonsuit of the First Complaint. On May 22, 2022, keeping within the limitations date to recommence the suit under Virginia Code § 8.01-229(E)(3), Plaintiff alone recommenced his action by filing the current Complaint ("Second Complaint"), alleging undue influence, unjust enrichment, and breach of fiduciary duty. Chip was not included as a party in the Second Complaint. On May 28, 2022, Chip died. In response to the Second Complaint, Defendant filed a Plea in Bar. Plaintiff filed an opposition. I then took this matter under advisement.

ANALYSIS

The primary argument asserted by the defendant in her Plea in Bar is that Plaintiff lacks standing to bring this action. I find that this argument is correct insofar as the complaint alleges that the defendant acted with Undue Influence (Count I), Unjust Enrichment (Count II), and Breach of Fiduciary Duty (Count III). I will grant the Plea in Bar as to these three counts; I deny the Plea in Bar as to the claim for Fraud (Count IV) and request for an accounting. My reasoning follows.

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In Virginia the proper party to litigate on behalf of a decedent's estate is the personal representative of the estate. *See Burns v. Equitable Associates,* 220 Va. 1020, 1028 (1980).[1] Plaintiff is not, and never has been, the personal representative of Decedent's estate.

On January 31, 2020, Chip, and only Chip, qualified as the administrator of Decedent's estate. In March 2020, Plaintiff and Chip sued their sister, Defendant. Plaintiff brought the action in his individual capacity and Chip brought the action in his individual capacity *and* in his capacity as Decedent's personal representative.

Under the well-settled principle in *Burns, supra,* Plaintiff did not have capacity to bring that action and Chip did not have standing to bring that action *in his individual capacity*. Only Chip in his capacity as Decedent's personal representative had standing to bring the action.

Notwithstanding whom had standing to bring that action, Plaintiff and Chip suffered a nonsuit on November 29, 2021. Plaintiff, solely in his private capacity, and within the time limits prescribed in Va. Code §8.01-229(E)(3) refiled this action on May 22, 2022. Chip was not included as a plaintiff in the Second Complaint. Chip passed away on May 28, 2022.[2]

Although I find that Plaintiff lacks standing to bring this action as to the counts of Undue Influence, Unjust Enrichment, and Breach of Fiduciary Duty, I believe I should address one erroneous argument put forth by Defendant in support of her Plea in Bar. Her argument is that after a nonsuit, any refiled action must include *all* plaintiffs from the first action.

In support of this assertion, Defendant cites *Dalloul v. Agbey,* 255 Va. 511 (1998). In *Dalloul,* the plaintiff filed a seven-count complaint against two individual defendants (Dalloul being one of them) and five corporate defendants. After pretrial hearings, the trial court eventually dismissed Counts III through VII, leaving only Counts I and II against the individual defendants. Eventually the plaintiff asked for a nonsuit. The trial court, over the corporate defendants objection, entered an order that simply stated, "...the nonsuit of Plaintiff be, and hereby is, entered." *At 513.* All plaintiffs appealed.

On appeal, Dalloul argued that when the trial court entered the nonsuit the claims enumerated in Counts III through VII were no longer before the court. Thus, the argument, went, if the nonsuit were to be allowed, then the legal effect would be to allow a plaintiff to renew a claim that had been conclusively decided against that plaintiff.

The Supreme Court agreed with Dalloul. In so doing, the Supreme Court stated, "'the action' subject to a plaintiff's nonsuit request is comprised of the claims and parties remaining in the case after any other claims and parties have been dismissed with prejudice or otherwise

[1] There is an exception to this general rule that will be discussed later. In my opinion, the exception applies to Plaintiff's Fraud count.

[2] Neither the pleadings nor the argument of counsel reveals why Chip was not included as a plaintiff in the second action. Perhaps because of Chip's terminal illness the parties elected not to include him as a plaintiff. Any conclusion I would reach about this matter would be purely speculative and, moreover, not necessary to my determination.

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eliminated from the case." *See Dalloul v. Agbey,* 255 Va. 511, 514 (1998). This language, cited by Defendant, does not stand for the proposition that after a nonsuit all plaintiffs from the original complaint must be included as plaintiffs in a refiled complaint.

I offer this analysis of *Dalloul* only for the proposition that a subsequent filing of a nonsuited action does not require that all original plaintiffs must be included in the refiling. The analysis does not change my finding that Plaintiff lacks standing to bring the second action. That finding is based, as noted earlier, on the black letter law of the Commonwealth that only a personal representative can bring an action against the estate. In other words, if Plaintiff had had standing in the First Complaint, he would have had standing to pursue the Second Complaint even in with Chip's absence.

I find support for my conclusions in *Platt v. Griffith,* 299 Va. 690 (2021). In that case two sisters filed a complaint against their brother and stepmother alleging that the defendants had unduly influenced their father to make inter vivos transfers of his property and assets prior to his death. The complaint alleged that the defendants committed a breach of fiduciary duty (just like Count III in this case), waste of the estate, constructive fraud (just like Count IV in this case), conversion, business conspiracy, and undue influence (just like Count I in the instant case). The Circuit Court granted a motion to dismiss the complaint based on a lack of standing.

The Supreme Court discussion of standing begins with the proposition that "Virginia Law establishes that "'[t]he personal representative, not a beneficiary of the estate, is the proper party to litigate on behalf of the estate and that is true even when the personal representative is also a proper beneficiary of the estate.'" *Platt v. Griffith,* 299 Va. 690, 692 (2021) (quoting *Burns, supra*). The appellants "consistently denied" that they were challenging the estate or suing on behalf of the estate. To this assertion the Supreme Court pointed out that the appellants' claim relating to the recission of the *inter vivos* transfers[3] are inherently on behalf of the estate because the [decedent] could have brought the claims during his lifetime. *See Platt*, 299 Va. at 693.

That analysis holds true here. Everything Plaintiff requests would have belonged to Decedent during her lifetime. However, I find that the analysis does not control my finding as to the accounting and Count IV, Fraud.

THE ACCOUNTING

It appears to me that Defendant's argument conflates standing with the statute of limitations. Defendant asserts that Plaintiff did not make his request for an accounting within one year as required by Virginia Code §64.2-1614(A). Defendant premises her argument on the fact that because Plaintiff did not request an accounting under Virginia §64.2-1612(I) that he cannot now seek relief under Virginia Code §64.2-1614.

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[3] Although Plaintiff in this case does not include a count for Recission, he does include in his prayer for relief the recission of the transfer on death designation of the investment account.

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Defendant's argument fails because Virginia Code §64.2-1614 does not enumerate any condition precedent which Defendant would have this Court insert. §64.2-1614 simply states, "In addition to the remedies referenced in §64.2-1621, the following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief." Thereafter, subsection (A)(4) lists "The principal's spouse, parent, or descendant." Plaintiff is a descendant and falls into that section.

In *Phillips v. Rohrbaugh,* 300 Va. 289 (2021) the Supreme Court of Virginia stated that Virginia Code §46.2-1614(A)(4) does not give the expanded list of relatives of the principal carte blanche to bring actions for accountings. According to the Court, Code §46.2-1612(I) places three limitations on the plaintiff who seeks an accounting under Code §46.2-1614(A)(4).

First, the plaintiff must allege "'a good faith belief that the principal suffers an incapacity or, if deceased, suffered incapacity at the time the agent acted.'" *Id.,* at 31. The Second Complaint alleges, *inter alia,* that on May 25, 2017, that the defendant filed a petition with the Circuit Court of Craven County, North Carolina, seeking a judicial determination that Decedent was incompetent to handle her own affairs. See Compl., ¶7. Defendant, in that action, alleged that Decedent suffered from Alzheimer's dementia and that Decedent was unable to communicate her wishes regarding legal documents or identify and resist financial exploitation. *See id.* However, approximately sixteen months later, Decedent herself executed an updated General Power of Attorney (what I refer to as the Second Power of Attorney), again naming Defendant as her agent notwithstanding the fact that, according to the defendant in her North Carolina proceeding, she had alleged that Decedent suffered from dementia. *See id.*, at ¶10. Defendant inexplicably did not inform her siblings of their mother's death for five days and still has not informed them what happened to Decedent's remains. *See id.*, at ¶14. Throughout this period, Defendant made numerous payments of substantial sums of money to herself and one Kathleen Shelley.[4] We see then, that not only has Plaintiff alleged incapacity, but Defendant has as well. However, Defendant alleged Decedent was incapacitated while she simultaneously had Decedent execute more legal documents which gave Defendant both increased control over Decedent's affairs and increased benefits from Decedent's Estate.

Second, subsection I, like subsection H, includes "'a proviso [e]xcept as otherwise provided in the power of attorney'" which gives the principal the power to forbid account-rendering disclosures to anyone but himself.'" *See Phillips*, 300 Va. at 310-11. Fatal to Phillips's claim was the fact that the power of attorney included such a provision. The Second Power of Attorney here does not include such a provision.

Third, the request must be made within one year of the principal's death. Decedent died on November 16, 2018. Plaintiff retained counsel to submit the request to Defendant. Counsel's letter is dated October 29, 2019. Defendant was served with the request, by private process server on November 12, 2019, four days before the one year had elapsed. *See* Compl., ex. I.

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[4] The pleadings do not make it clear who Kathleen Shelley is or what her relationship is to Decedent, Defendant, Plaintiff, or Chip.

Therefore, this Court shall refer the case, insofar as it requests an accounting, to the Commissioner of Accounts to conduct such an accounting.

THE FRAUD COUNT

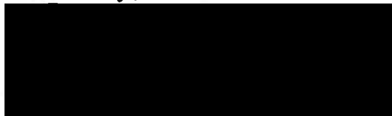
In footnote 1, *supra,* I mentioned that there is an exception to the general rule that only the personal representative of an estate may bring an action on behalf of the estate. The Supreme Court of Virginia discussed that exception in *Phillips, supra.* In *Phillips,* the plaintiff sued her brother in his capacity as an agent managing their father's financial affairs pursuant to a power of attorney and in his capacity as an executor of their father's estate. The trial court granted demurrers to the complaint and dismissed the complaint.

The Court noted, as all the cases of this nature do, that only the personal representative of an estate has exclusive standing to sue on behalf of the estate. *See Phillips*, 300 Va. at 303. The Court then noted that Phillips argued that she fit into a narrow exception to the general rule, and the exception enables certain beneficiaries to serve as ad hoc representatives of the estate under special circumstances. Noting that there is "'no fixed and rigid rule to determine what constitutes special circumstances,'" *See id.,* at 303 (citing *Jeffries v. Antonsanti*, 142 Va. 218 (1925)) the Court found that Phillips had not sufficiently pled her special circumstances.

The Court identified two possible scenarios that might allow a plaintiff such as Phillips, or Plaintiff in this case, to proceed with the action—"'fraud'" or the "'refusal to sue.'" *See id.,* at 303. Phillips had not alleged fraud, the Court stated. *See id.* In this case, however, I find that Plaintiff has sufficiently alleged fraud to deny the Plea in Bar as noted in the discussion for the accounting, *supra.* Plaintiff has not alleged a refusal to sue, so that exception enjoys no relevance to this case.

By way of order attached hereto, this Court sustains the Plea in Bar insofar as the Second Complaint alleges that Defendant acted with Undue Influence (Count I), Unjust Enrichment (Count II), and Breach of Fiduciary Duty (Count III). I will grant the Plea in Bar as to these three counts; I deny the Plea in Bar as to the claim for Fraud (Count IV) and the request for an accounting.

Sincerely,



Robert J. Smith
Judge, Fairfax County Circuit Court

cc: Ms. Anne Heishman (Commissioner of Accounts)

OPINION LETTER

VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

JOHN B. FORBES,	)	
	)	
Plaintiff,	)	
v.	)	**Case No: CL-2022-6734**
	)	
SUSAN S. FORBES,	)	
	)	
Defendant.	)	
	)	

ORDER

WHEREAS this matter came before the Court on the Defendant's Plea in Bar, and

WHEREAS the Court has considered counsels' pleadings and briefs and the applicable law,

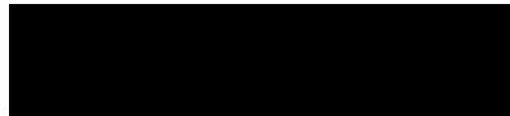
The COURT ORDERS:

1. The Plea in Bar as to Counts I (Undue Influence), II (Unjust Enrichment), and Count III (Breach of Fiduciary Duty) is SUSTAINED.

2. The Plea in Bar as to Count IV (Fraud) and as to the request for an accounting, is OVERRULED.

3. As to the accounting, the Court hereby refers this case to the Commissioner of Accounts to conduct the accounting.

ENTERED this 27th day of December 2022.



JUDGE ROBERT J. SMITH

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.