

No. 24-

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IN THE  
**Supreme Court of the United States**

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KISHNA S. MINOR,

*Petitioner,*

*v.*

ANNE M. HEISHMAN, IN HER CAPACITY AS  
THE COMMISSIONER OF ACCOUNTS FOR THE  
19TH JUDICIAL CIRCUIT OF VIRGINIA,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE SUPREME COURT OF VIRGINIA

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

It is a well-established maxim “*aliquis non debet esse iudex in*”—no one should be a judge in their own cause. The Commonwealth of Virginia, however, has violated this maxim, allowing quasi-judicial officers to act as accuser and adjudicator, resulting in structural violation of the Due Process Clause. While this particular office is present only in Virginia and West Virginia, this is not an isolated issue. Commissioners of Accounts in Virginia oversee all conservators, guardians, executors, and other fiduciaries. In Fairfax County, Virginia alone, this generally accounts for 1,800 new matters each year. Indeed, *amicus curiae* below, the Virginia Conference of Commissioners of Accounts, supported the outcome of these cases, showing that similar due process violations by commissioners are likely to recur.

The Question presented in this case is: Whether a Commissioner of Accounts—a quasi-judicial officer appointed by the state court to supervise fiduciaries—violates the Due Process Clause, by acting as both an accuser and adjudicator, when she (1) convenes an evidentiary hearing, despite the complaining parties’ lack of standing, and declares herself to be an interested, “not neutral” party, (2) assumes the role of investigator, based on the improperly received evidence, and files a petition to disqualify the fiduciary and forfeit its bond, and (3) simultaneously seeks and is granted authority by the state court to preside over a hearing to make findings on that very issue—whether to disqualify the fiduciary and forfeit the bond.

**PARTIES TO THE PROCEEDING  
AND RELATED PROCEEDINGS**

The parties to the proceeding below are as follows:

Petitioner is Kishna S. Minor.

Respondent is Anne M. Heishman, in her capacity as the Commissioner of Accounts for the 19th Judicial Circuit of Virginia.

The related proceedings below are:

1. *In re Estate of Wilder*, 109 Va. Cir. 420, 2022 WL 18360614 (Fairfax Cir. Ct. Apr. 11, 2022)
2. *Minor v. Heishman*, 78 Va. App. 690, 892 S.E. 2d 667 (Va. Ct. of Appeals 2023)
3. *Minor v. Heishman*, Record No. 230811 (Va. Sup. Ct. May 20, 2024)

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Kishna S. Minor respectfully petitions for a writ of certiorari to review the judgment of the Virginia Supreme Court upholding the ruling of the Virginia Court of Appeals and Fairfax County Circuit Court.

### **OPINIONS BELOW**

The Fairfax County Circuit Court’s opinion is reported at *In re Estate of Wilder*, 109 Va. Cir. 420, 2022 WL 18360614 (Fairfax Cir. Ct. Apr. 11, 2022), and it is reproduced at Appendix (“App.”) C, at 43–55. The Virginia Court of Appeals opinion affirming the Fairfax County Circuit Court is reported at *Minor v. Heishman*, 78 Va. App. 690, 892 S.E. 2d 667 (Va. Ct. of Appeals 2023), and it is reproduced at App. B, at 3–42. The Virginia Supreme Court order, finding no reversible error and refusing the petition for appeal is not reported, and it is reproduced at App. A, at 1–2. The Virginia Supreme Court order denying petition to set aside judgment and for rehearing is not reported, and is reproduced at App. D, at 56–57.

### **JURISDICTION**

The Virginia Supreme Court issued its order denying Ms. Minor’s petition to set aside the judgment rendered on April 12, 2024, and grant a rehearing thereof, on May 20, 2024. Petitioner brings this petition for certiorari within the timeline specified by Rule 13 of the Supreme Court and the Order granting an extension of time on August 16, 2024.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are: U.S. Const. art 14, § 1 and Virginia Code §§ 64.2-1200; 1203; 1204; 1206; 1209; 1210; 1213; 1215; 1216; 1312; 2021, which are appended at App. E, at 58–76.

## INTRODUCTION

It is a well-established maxim “*aliquis non debet esse iudex in*”—no one should be a judge in their own cause. This maxim originated before the founding of this Nation and has been affirmed by this Court repeatedly. Yet, the Commonwealth of Virginia has created a statutory structure to supervise fiduciaries, whereby its Commissioners of Accounts can, and in this case did, act as both an accuser and an adjudicator. This is a structural error which is a *per se* deprivation of due process guaranteed under the Constitution. It is an error that it likely to continue, if not reversed by this Court.

The courts below disregarded this maxim when they reviewed the record in this case and opined Commissioner Heishman did not act both as an accuser and an adjudicator. On February 3, 2021, Commissioner Heishman convened a hearing under Virginia Code § 64.2-1209 at the request of two individuals who lacked standing. In response to Ms. Minor’s argument that these individuals lacked standing to assert their objections and that it was improper for Commissioner Heishman to proceed with the hearing and receive evidence—given her role as a neutral arbiter—Commissioner Heishman stated that *she* had standing to continue the hearing. Commissioner Heishman continued,

stating that she is “not a neutral arbiter,” she is “an interested person,” and she does not see the point of § 64.2-1209 if she cannot hear these objections.

Commissioner Heishman then took an extraordinary step, further and irreparably mixing her powers as an adjudicator with that of an advocate. On August 13, 2021, she proffered an order to the Fairfax County Circuit Court, delegating to herself the authority to preside over a hearing regarding Ms. Minor’s qualification and bond, which was entered by the court over Ms. Minor’s objections. *That same day*—prior to the hearing over which she was to preside—Commissioner Heishman moved the Fairfax County Circuit Court to remove Ms. Minor as fiduciary and to forfeit her bond. On September 29, 2021, Commissioner Heishman presided over the hearing to decide that issue, after having already advocated for a specific outcome. Unsurprisingly, Commissioner Heishman’s findings were consistent with her prior advocacy. She filed her report with the Fairfax County Circuit Court, which generally defers to the factual findings of commissioners. Importantly, Ms. Minor was never given the opportunity to be heard by a neutral adjudicator.

By the actions of Commissioner Heishman, she became both an accuser and an adjudicator. While the Commonwealth of Virginia has argued below, and is likely to argue here, that the reports by a commissioner are not the acts of a judge, the role of the commissioner is quasi-judicial, including the power to hold hearings where the commissioner acts as a judicial officer. Moreover, reports of commissioners are entitled to deference relating to their factual findings, which are based on the credibility determinations of the commissioner. Such a quasi-judicial

role requires the same impartiality as any other judicial function—impartiality which Commissioner Heishman expressly lacked. This lack of impartiality is a structural error that can only be corrected by vacating the orders in this case and remanding for proper process to remedy this error. Therefore, this Court should grant certiorari to review the decisions of the courts below and remedy the deprivation of due process as required under the United States Constitution to Ms. Minor.

## STATEMENT

### I. Background

This case revolves around the estate of Eric Witt Wilder (“Mr. Wilder”). “On October 12, 2018, acting on the petition of Kishna Minor, the trial court adjudicated Mr. Wilder an incapacitated adult.” *Minor v. Heishman*, 78 Va. App. 690, 697 (2023). The trial court then appointed Kishna S. Minor (“Ms. Minor”), his granddaughter, as temporary conservator and temporary guardian of his estate. *Id.* Thereafter, on November 16, 2018, the circuit court appointed Ms. Minor as permanent guardian and conservator for his estate. *Id.*

Ms. Minor qualified on the same day and ultimately posted bond in the amount of \$1,200,000 with surety provided by Liberty Mutual Insurance Company (“Liberty Mutual”). *Id.* While in these roles, Ms. Minor “filed an initial inventory, an amended inventory, a first accounting, and a second and final accounting of Mr. Wilder’s estate with the Office of the Commissioner of Accounts.” *Id.* at 698. There were no exceptions filed to the first three of these documents, and they were

approved by the Commissioner of Accounts prior to Anne M. Heishman's ("Commissioner Heishman") appointment as Commissioner of Accounts for the 19th Judicial Circuit. *See id.* at 698 n.3.

Before Commissioner Heishman acted on the second and final accounting, on December 18, 2019, Eric Wilder, the son of Mr. Wilder, wrote to Commissioner Heishman's office "alleging that [Ms.] Minor understated the assets of Mr. Wilder's estate in the inventory that she had filed." *Id.* at 700. Subsequently, Cynthia Bowers,<sup>1</sup> Mr. Wilder's daughter, joined her brother as an "objector." *Id.*

On June 15, 2020, Eric Wilder filed a hearing request with Commissioner Heishman's office that also requested production of certain documents relating to bank accounts at Burke & Herbert Bank. *Id.* Pursuant to Virginia Code § 64.2-1209, Commissioner Heishman held a hearing on Mr. Wilder and Ms. Bowers' objections on February 3, 2021. *Id.* at 700–01.

At the February 3 hearing, Ms. Bowers and Mr. Wilder were permitted to present evidence, over the objection of Ms. Minor who *correctly* argued that they lacked standing. *Id.*; *see also Estate of Wilder*, 109 Va. Cir. 420, 2022 WL 18360614 at \*4 (Fairfax Cir. Ct. Apr. 11, 2022). In response to Ms. Minor's argument that the hearing was a nullity that it could not continue due to the lack of standing, the following colloquy occurred:

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1. Ms. Bowers is also known as Ms. Walker in the record below. References in this petition will match the Virginia Court of Appeals opinion, where it referred to her as Cynthia Bowers.

THE COMMISSIONER: You know, I appreciate the arguments, Mr. Stuart. And I agree with you there's really nothing on point, because the cases that you cited don't talk about 64.2-1209, and whether standing means the same as –

MR. STUART: Well –

THE COMMISSIONER: No, Mr. Stuart, I heard you. I have standing. So I have supervisory authority over Ms. Minor as Conservator. That's what my job is, that I report to the Court as to whether or not I think something should be approved or not approved. . . . And so I certainly appreciate the issue. I think it's very interesting. I think that, given my duties under 64.2-1200, and what this office is charged with, now that these objections have been brought to my attention, I believe I do have the authority to move forward and hear [the] case as to these funds that were allegedly used by Ms. Minor.

MR. STUART: And Ms. Heishman, if I can respond just briefly. If there is no party with standing, certainly you don't have standing, anymore than the Court has standing. So—but you step in the role of an adversary, an adversarial party here. You're adding the role of the neutral arbiter.

THE COMMISSIONER: But I'm not a neutral arbiter, Mr. Stuart, I supervise

fiduciaries. I'm not neutral. And so what I'm saying to you is that I'm an interested person here. And if I can't hear these objections, I don't see the point to 64.2-1209.

Pet. for Appeal, 15–16 (citing Va. Record at 254–56) (emphasis added). During this hearing, Commissioner Heishman admitted that it was convened pursuant to Virginia Code § 64.2-1209 rather than any other power. Va. Record at 70; *see also* Va. Supp. Record at 5–32 (Report of Commissioner Heishman, repeatedly referring to it as a “1209 hearing”).

Based on the evidence presented by counsel for Ms. Bowers and Mr. Wilder at the hearing, Commissioner Heishman issued a summons to Ms. Minor pursuant to Virginia Code § 64.2-1216(A), requiring her to file a “proper” account. *Minor*, 78 Va. App. at 701–02. Following the lack of what Commissioner Heishman deemed a “proper” account, her office filed a report of noncompliance with the Fairfax County Circuit Court pursuant to Virginia Code § 64.2-1215. *Id.* at 702. The Fairfax County Circuit Court therefore set a show cause hearing on August 13, 2021. *Id.* In the direct words of the Virginia Court of Appeals, the Fairfax County Circuit Court placed Commissioner Heishman in the position of both accuser and adjudicator:

On August 13, 2021, the trial court heard the arguments of Minor and the Commissioner with regard to the show cause order. The trial court then entered an order proffered by the Commissioner, which read, in part: “[T]he Commissioner of Accounts is directed to hold

a hearing to determine whether the Court should remove the fiduciary and whether, and in what amount, the fiduciary's bond should be forfeit." On the same date, August 13, 2021, the Commissioner filed a petition to remove Minor as the fiduciary of Mr. Wilder's estate, and to forfeit bond. That petition stated: "Your [C]ommissioner is of the opinion that the fiduciary's failure to file a proper account requires that she be removed as conservator and that her fiduciary bond be forfeit."

*Id.* at 690, 702–03. Pursuant to the August 13 order, Commissioner Heishman "presided" over a hearing on September 29, 2021, to "determine 'whether and, what amount, if any, of Ms. Minor's bond should be forfeited.'" *Id.* at 703. Following this hearing, Commissioner Heishman, in alignment with her August 13, 2021, prehearing motion, filed a report with the Fairfax County Circuit Court recommending the forfeiture of Ms. Minor's bond. *Id.*

Ms. Minor and Liberty Mutual both filed exceptions to Commissioner Heishman's report, but the Fairfax County Circuit Court confirmed Commissioner Heishman's report. *Id.* at 703. Following this ruling, the circuit court issued a letter opinion where it agreed with Ms. Minor that neither Eric Wilder nor Cynthia Bowers had standing under Virginia Code § 62.4-1209 to seek a hearing, but it went on to hold that there are other ways that a Commissioner of Accounts can hold a hearing other than § 64.2-1209. App. C at 52–53; *see also Minor*, 78 Va. App. at 704 (2023). This is entirely beside the point, since the hearing was convened specifically pursuant to § 64.2-1209. App. C at 43.

On May 20, 2022, Ms. Minor filed a motion for clarification and reconsideration of the trial court’s April 11, 2022, letter opinion. *Minor*, 78 Va. App. at 704. On June 3, 2022, the trial court heard arguments and issued the underlying ruling. A timely appeal followed, where the Virginia Court of Appeals affirmed the district court for substantially the same reasons on October 10, 2023. *Id.* A timely appeal to the Virginia Supreme Court followed, where the Virginia Supreme Court summarily affirmed the Virginia Court of Appeals on April 12, 2024, and it denied Ms. Minor’s petition to set aside the April 12, 2024 order, and grant a rehearing thereof on May 20, 2024. App. A, D.

This petition timely follows, seeking review of this important question regarding the deprivation of due process endured by Ms. Minor due to the statutory structure and procedural process of the Virginia Statutes and the actions of the Fairfax County Circuit Court and Commissioner of Accounts for the 19th Judicial Circuit.

### **REASONS FOR GRANTING THE PETITION**

This case presents an issue where “a state court . . . has decided an important question in a way that conflicts with relevant decisions of this Court.” Sup. Ct. Rule 10(c). At stake is whether the statutory structure established by the Commonwealth of Virginia ensures due process for individuals or allows some positions to act as both accuser and adjudicator.

**I. Ms. Minor was deprived of due process of law.**

This Court has previously determined the maxim *aliquis non debet esse iudex in*—no one should be a judge in their own cause—applies in federal court. *See Williams v. Pennsylvania*, 579 U.S. 1, 8 (“an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.”) (citing *In re Murchinson*, 349 U.S. 133, 136–37 (1955)). Despite this clear proclamation, the Commonwealth of Virginia’s statutory scheme for supervising fiduciaries creates the opportunity for Commissioners of Account to preside over hearings where they will decide controversies, as an adjudicator, which they are also advocating before the Virginia Circuit Courts, creating a situation where the accuser is also an adjudicator. Such a situation is a structural error and not amenable to harmless error review. *Id.* at 14. Therefore, the only remedy left is vacatur of the decision and remand for consideration with proper due process.

A brief review of Commissioner Heishman’s actions during this matter’s pendency before the trial court firmly establish that she was, at least during key portions of the proceedings, both the accuser and an adjudicator wielding judicial authority. As noted above, on February 3, 2021, Commissioner Heishman convened a hearing under Virginia Code § 64.2-1209, which specifically limits the individuals that may object. Despite no objection from an individual with standing, Commissioner Heishman stated that she is “not a neutral arbiter,” she is “an interested person,” and she does not see the point of § 64.2-1209 if she cannot hear the objections despite not finding any other interested party. Pet. for Appeal, 15–16 (citing Va.

Record at 256–56). Accordingly, she proceeded with the hearing regardless, including allowing the attorney for the individuals with no standing to present evidence and arguments. *See id.*

Subsequently, on August 13, 2019, the trial court ordered, at Commissioner Heishman’s request, that Commissioner Heishman preside over a hearing to determine if Ms. Minor should be removed from her position as conservator and if her bond should be revoked. *Minor*, 78 Va. App. at 702 (“The trial court then entered an order proffered by the Commissioner, which read, in part: ‘[T]he Commissioner of Accounts is directed to hold a hearing to determine whether the Court should remove the fiduciary and whether, and in what amount, the fiduciary’s bond should be forfeit.’”) *On the same day, Commissioner Heishman filed a motion stating her opinion that Ms. Minor should be removed and her bond forfeit. Id.* Over a month later, Commissioner Heishman then presided over a hearing to determine if Ms. Minor should be removed, and her bond should be forfeit. *Id.* at 703.

At the September 29, 2021, hearing, no adverse or interested person appeared other than the Commissioner herself, who proceeded to introduce evidence on her own behalf, overruling objections of Ms. Minor’s counsel. Pet. for Appeal, 22 (citing Va. Record at 458–62). And, on October 15, 2021, the Commissioner filed her report, which was later adopted by the Fairfax County Circuit Court. Va. Supp. Record at 5–28; *See also* Va. Record at 161 (Order of the Fairfax County Circuit Court, dated November 8, 2021, confirming Commissioner Heishman’s Report). In addition, on January 21, 2022, the Commissioner

appeared before the Court as sole adversary of Mr. Minor concerning the Rule to Show Cause. Va. Record at 516–18.

In this case, the Commissioner acted in both an enforcement role and an adjudicatory role with regard to identical issues before her. The Court of Appeals believes that Appellants’ argument in this regard “misunderstands the role of a Commissioner of Accounts and the statutory scheme established for the protection of fiduciary accounts.” *Minor*, 78 Va. App. at 716. By the Court of Appeals’ reading of the statute, a commissioner enjoys a supervening authority to move freely into either role, overriding duties of impartiality and even clearly established legal principals such as standing.

Under Virginia Code § 64.2-1200 *et seq.*, however, a commissioner may act *either* as enforcer *or* adjudicator depending on the circumstances. But nothing in these statutes confer an authority on a commissioner that allows her to pursue both roles at once. Even if the statute could somehow be read to allow this, it is a fixture of constitutional and common law that none may serve as “both accuser and adjudicator in a case.” *See, e.g., Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016); *Dr. Bonham’s Case*, 8 Coke Reports 107a, 118a, 77 Eng. Rep. 638, 652 (1610) (a College of Physicians, chartered by Parliament to license physicians, cannot both prosecute a physician and adjudicate the same cause); Virginia Code § 2.2-4024.1 (an agency investigator or prosecutor at any stage in a contested case may not serve as the hearing officer in the same case). In *Williams*, this Court enunciated clear rules and standards for reviewing the conduct of individuals and whether it creates an impermissible bias due to the joint roles of accuser and accused.

The *Williams* Court began with the immutable and logical truth that “an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.” *Williams*, 579 U.S. at 8–9 (citing *Murchison*, 349 U.S. at 136–137). Indeed, the “due process guarantee that ‘no man can be a judge in his own case’ would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she made a critical decision.” *Id.* at 9. It should be noted Supreme Court “precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge “is too high to be constitutionally tolerable.” *Id.* at 4 (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Precedent utilizes an objective standard because bias can be difficult to see in oneself, and actual bias created subjectively can be difficult to prove. Therefore, by utilizing objective standards, it is easier to create firm rules that protect against bias.

Moreover, the *Williams* Court specifically determined a critical issue in this case: whether one adjudicator’s recommendation or thoughts can infect the entire proceeding. In *Williams*, the issue involved a panel decision, but the Court recognized that a biased adjudicator’s involvement infects the entire decision because “[t]he fact that the interested judge’s vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. *Id.* at 15. The courts below ignored this reality and allowed the recommendation by Commissioner Heishman, with her impermissible bias, to infect the trial court’s reasoning. This is the definition of prejudice: the Commissioner simultaneously asserted that Ms. Minor be removed and

her bond forfeit and sought an adjudicatory role on the same issues, then submitted her report suggesting the removal to the Fairfax County Circuit Court. This is akin to one judge on a panel sharing their opinion with the other judges.

As if this is not enough, Commissioner Heishman made multiples statements on the record that were more than “inartful.” First, Commissioner Heishman plainly stated that she “is not a neutral arbiter.” Pet. for Appeal, 15–16 (citing Va. Record at 254–56). She went further, clarifying that she does not even see her role as requiring that she be a neutral arbiter. *Id.* As if to compound her error, Commissioner Heishman stated that she is an interested person, and “if I cannot hear these objections, I do not see the point of 64.2-1209.” *Id.*

Despite the lack of interested parties who could invoke § 64.2-1209 hearings, the Court of Appeals, nonetheless, describes the hearings convened by Commissioner Heishman under § 64.2-1209 as “investigatory hearings” that “were within the Commissioner’s ‘supervisory’ authority” under § 64.2-1200. *Minor*, 78 Va. App. at 713. This is not so. The hearings were *specifically* convened pursuant to § 64.2-1209, and Commissioner Heishman invoked only § 64.2-1209 as the grounds for proceeding with the hearing. Her error is plain and no amount of retroactive blue penciling can correct it.

If Eric Wilder and Cynthia Bowers were interested persons with standing to object under § 64.2-1209, and if the Commissioner filed a report following the hearing of these objections pursuant to § 64.2-1210 after hearing evidence from both sides, then the report may well

have served as a basis for bond forfeiture and fiduciary removal—after confirmation of the report—with the Commissioner retaining her impartiality. This would have been a proper exercise of a commissioner’s adjudicatory authority. In the alternative, had Commissioner Heishman independently investigated the matter under her own authority, she might have brought a petition under Virginia Code §§ 64.2-1404 and 64.2-1410 for the removal of the fiduciary and appointment of a substitute fiduciary to investigate and make a bond forfeiture recommendation. In that case, the Commissioner would have properly acted as *only* an investigator and prosecutor, leaving the circuit court as adjudicator and affording both the fiduciary and surety the ability to defend against the petition and present evidence to a neutral finder of fact.

But neither of these proper processes occurred. Instead, Commissioner Heishman took up the mantle of both *investigator and prosecutor, as well as adjudicator* and presided over hearings where she was also advocating the same issue before the trial court. Allowing such an action to stand would be a violation of due process and contravene the findings of the *Williams* and *Murchinson* Courts.

Turning to the issue of whether a commissioner can be referred matters from a circuit court, yet still remain in a non-judicial role, nothing in the statutes governing commissioners of accounts gives a circuit court authority to refer matters to a commissioner as such. But circuit courts do make referrals to commissioners of accounts as commissioners in chancery. *See Phillips*, 300 Va. at 307, 863. In cases where a commissioner is impartial and not already prosecuting a fiduciary for non-compliance,

the practice is authorized. In the case at bar, however, Commissioner Heishman was not impartial. Moreover, this would place in the hands of a commissioner the power both of prosecution and adjudication with regard to the same issues and, thereby, violates the due process rights of the fiduciary. *See, e.g., Brown v. Brown*, 11 Va. App. 231 (1990) (where commissioner in chancery could be seen as partial, the fact that the court could decline to confirm a commissioner's report is insufficient to cure the breach of process.). In reality, a commissioner of accounts is, in some ways, operating similar to a magistrate judge on some issues. The trial court obtains a recommendation on the outcome of certain matters from the commissioner that oversaw the hearing on that matter. This, of course, would render the commissioner a judicial actor sitting in an adjudicatory capacity, even if the report is not binding.

The Virginia Court of Appeals even acknowledged that a commissioner of accounts is a quasi-judicial officer, *Phillips v. Rohrbaugh*, 300 Va. 289, 306–07 (2021), but states that a commissioner “makes findings of fact and conclusions of law in her report, which, upon submission to the trial court, are *merely recommendations* which the trial court may accept or reject.” *Minor*, 78 Va. App. at 716 (emphasis added). For this statement, the Virginia Court of Appeals cites *Henderson*, 297 Va. at 712. But the *Henderson* opinion does not state this. Rather, it observed that, by statute, a commissioner's report is subject to review by the court. *Id.* The Virginia Supreme Court's jurisprudence on the issue shows the commissioner's findings are more than mere recommendations.

A commissioner has the authority to resolve conflicts in the evidence and to make factual findings. *Trotman v.*

*Trotman*, 148 Va. 860, 867 (1927). Moreover, “while the report of a commissioner . . . does not carry the weight of a jury’s verdict, it should be sustained unless the trial court concludes that the commissioner’s findings are not supported by the evidence.” *Morris v. United Va. Bank*, 237 Va. 331, 337 (1989) (citations omitted). A commissioner of accounts hearing a matter is definitively a finder of fact, and his or her findings are presumptively correct. *Morris*, 237 Va. at 337–38. This demonstrates that a commissioner is not simply an investigator but surely steps into a quasi-judicial role, which must be as free from bias as any other judicial role including bias from acting as a prosecutor or investigator.

Moreover, Virginia’s Commissioners of Accounts perform functions similar to those exercised by probate judges in other states, including . . . presiding over hearings related to . . . objections to a fiduciary’s account, which hearings the court would conduct in the absence of the Commissioner of Accounts. MANUAL FOR COMMISSIONERS, § 19.4 at 333. Each of these duties and authorities is closely related to the judicial process. *Id.* As a consequence 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. 697, 701 (1878). Due process, even in a quasi-judicial context, requires an impartial decision-maker. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *see also Williams*, 579 U.S. at 16 (“Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”).

Commissioner Heishman took up both the mantle of accuser and adjudicator in this matter. This action

infected the entire proceeding and irreversibly damages the integrity of the proceedings. Such a harm cannot be remedied except by vacatur and remand for new proceedings with proper process.

## **II. This was structural error and could not be harmless.**

In *Williams*, this Court went so far as to determine that an error stemming from an individual's involvement in the roles of both accuser and adjudicator was structural error. *Williams*, 579 U.S. at 14 (“the Court holds that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.”). As presciently determined, even if the individual does not cast a deciding vote, their involvement alone is bound to cause structural error. *Id.*

Because this error is structural “the Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect ‘not amenable’ to harmless-error review, regardless of whether the judge’s vote was dispositive.” *Id.* (citing *Puckett v. United States*, 556 U.S. 129, 141, (2009)). Therefore, this Court does not need to engage in an analysis to determine whether there was any harm from the actions of Commissioner Heishman or the Farifax County Circuit Court’s consideration of her report. Instead, it is presumed that the lack of due process has infected the entire proceedings, which must be vacated and started again.

**III. This case presents an appropriate vehicle to resolve this important issue.**

This case presents an appropriate vehicle to address an important statutory issue in the Commonwealth of Virginia. There is nothing standing in the way of the Court issuing a decision overruling the issues below as violative of the Due Process Clause and requiring that the process begin anew with proper procedures to ensure due process. The facts here provide the Court with an opportunity to make a clean and objective ruling.

First, there were no alternative grounds that are sufficient to prevent such an action from being effective. The Fairfax County Circuit Court expressly held “the Commissioner behaved appropriately in conducting the hearing under Va. Code § 64.2-1209,” upholding the rule to show cause. *In re Est. of Wilder*, 109 Va. Cir. 420 (2022). Therefore, there are no additional issues that must be resolved from the trial court.

The Virginia Court of Appeals upheld this ruling by finding that Commissioner Heishman did not take on a dual role of accuser and adjudicator *because of the statutory structure in Virginia*. Yet, this is plain error as Commissioner Heishman specifically acted in both a quasi-judicial and prosecutorial role as outlined above. The Virginia Court of Appeals did not stop there. It decided that Commissioner Heishman exercised independent statutory authorities for her actions. This, however, does not matter for this analysis and it is also incorrect based on the record below. Moreover, this finding cannot remove the infection of Commissioner Heishman’s actions as both accuser and adjudicator.

As an initial matter, such an argument would only go to harmless error review, which is not applicable here. *See Williams*, 579 U.S. at 14 (finding such an error is not subject to harmless error review because it is structural error). Moreover, the Fairfax County Circuit Court correctly ruled that Eric Wilder and Cynthia Bowers lacked standing under Virginia Code § 64.2-1209, because they were not “interested persons” under that statute who could object. App. C at 51–52. Since the entire proceeding below was based on that hearing, it is a legal nullity, and it should have been dismissed upon that ground without any further action by Commissioner Heishman.

Any argument that Commissioner Heishman had the authority to convene hearings by other means lacks any statutory basis and is not founded in the history of this case. Rather, both the Fairfax County Circuit Court and the Virginia Court of Appeals found that Commissioner Heishman convened the hearings pursuant to Virginia Code § 64.2-1209. App. B at 8, App. C at 44. Indeed, Commissioner Heishman herself stated that the hearings were convened specifically pursuant to § 64.2-1209. Va. Supp. Record at 9.

At the Section 1209 hearing, Commissioner Heishman received evidence from parties without standing to object—upon which she later based her October 15, 2021 Report. *See* App. H at 111–13 (referencing exhibits received into evidence); Va. Record at 458 (September 29th hearing, records for Account 4200 “in evidence”). The Rule to Show Cause and the Petition for Forfeiture of Bond before the lower court on January 21, 2022, were based entirely on the objections originally filed with the Commissioner and the evidence offered during

the § 64.2-1209 hearing. *See* Va. Record at 375 (August 13, 2021 hearing at 3:2–7). Prior to the objections of the parties that lacked standing, the Commissioner’s office was involved in routine review, audit, and approval of Ms. Minor’s accounts. Va. Record at 183–84 (Statement of Facts, ¶¶ 1–8).

In its Opinion, the Virginia Court of Appeals notes that the circuit court found Eric Wilder and Cynthia Bowers to lack standing; but rather than address the effect of the lack of standing, it adopted the circuit court’s ruling that “while [§ 64.2-1209] 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.” *Minor*, 78 Va. App. at 704, 713. This is an incorrect and untenable decision that leads directly to the deprivation of due process to Ms. Minor.

Virginia “jurisprudence is clear that when a party without standing brings a legal action, the action so instituted is, in effect, a legal nullity.” *Johnston Mem’l Hosp. v. Bazemore*, 277 Va. 308, 312 (2009) (quoting *Harmon v. Sadjadi*, 273 Va. 184, 193 (2007)). “[A]n action filed by a party who lacks standing is a legal nullity.” *McClary v. Jenkins*, 299 Va. 216, 221 (2020) (citing *Kocher v. Campbell*, 282 Va. 113, 119, 712 S.E.2d 477 (2011)). Therefore, the hearing, which Commissioner Heishman convened specifically pursuant to § 64.2-1209 is a legal nullity of no legal effect, as if it did not occur. This is, of course, correct as § 64.2-1209 provides 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.

Applying the language of this statute, if a party filed suit involving a fiduciary's accounts, but lacked standing to bring the suit, the proceeding would be a nullity, notwithstanding any referral by the circuit court to the commissioner of accounts. Hence, the result would be no different under § 64.2-1209: that is, the entire proceeding, beginning with the initial claim through the commencing of a § 64.2-1209 proceeding by a commissioner, would be a nullity.

Neither the Commissioner nor the Circuit Court acquired jurisdiction over the subject matter of the objections. The Commissioner could no more act on the evidence received as a result of the objections than the Circuit Court could in a suit where a plaintiff lacked standing. Both are nullities and should have been treated as if they did not occur.

As to the Virginia Court of Appeals argument that there were additional authorities that allowed these actions, no citation was provided to any authority to convene such a hearing. Instead, the citations provided are to subpoena power, power to revoke a fiduciary's bond, and other authorities. No authority has been cited providing the manner in which Commissioner Heishman could convene this hearing.

Regardless, this is all beside the point, since it is Commissioner Heishman's actions, taking up the mantle of adjudicator in addition to her investigative and prosecutorial role, which causes the structural error. Her assumption of the adversarial role at the Section 1209 hearing, and subsequent request to refer the matter back to herself for adjudication on the merits infects the entire proceeding since it was not remedied before a decision was issued by the circuit court.

Finally, if the rulings below stand, there is nothing to stop continued decisions in this regard which would allow Commissioners of Accounts in Virginia and West Virginia to continue acting as both accuser and adjudicator, with the blessing of the courts in those states, in violation of individuals' due process rights. There is clearly a danger of this issue arising again based on the nature and tenor of the decisions below, the brief submitted by *amicus curiae*, which was the Virginia Conference of Commissioners of Accounts, and the structure of the Commonwealth's provisions. These clearly evince that this issue will be continuing in nature and affect persons beyond Ms. Minor.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## **APPENDIX**

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**APPENDIX A — REFUSAL OF PETITION FROM  
THE COURT OF APPEALS OF VIRGINIA,  
DATED APRIL 12, 2024**

**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of April, 2024.

Record No. 230811  
Court of Appeals No. 0980-22-4

KISHNA MINOR, *et al.*,

*Appellants,*

v.

ANNE M. HEISHMAN,  
COMMISSIONER OF ACCOUNTS,

*Appellee.*

**FROM THE COURT OF APPEALS OF VIRGINIA**

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

2a

*Appendix A*

A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: /s/  
Deputy Clerk

3a

**APPENDIX B — OPINION OF THE COURT OF  
APPEALS OF VIRGINIA, DATED  
OCTOBER 10, 2023**

COURT OF APPEALS OF VIRGINIA

Record No. 0980-22-4

KISHNA SHIRESE MINOR, *et al.*

v.

ANNE M. HEISHMAN, COMMISSIONER OF  
ACCOUNTS

OPINION BY  
JUNIUS P. FULTON, III  
October 10, 2023, Decided

FROM THE CIRCUIT COURT  
OF FAIRFAX COUNTY.  
Robert J. Smith, Judge.

This appeal arises out of proceedings initiated by Anne M. Heishman, the Commissioner of Accounts for Fairfax County (“Commissioner”), to forfeit the bond of Kishna S. Minor, the conservator for the estate of Eric Witt Wilder (“Mr. Wilder”), an incapacitated adult. After receiving information indicating that Minor had underreported the assets of Mr. Wilder’s estate, the Commissioner commenced hearings to determine the veracity of the allegations. The hearings led the Commissioner to discover that Minor had indeed underreported certain

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assets, and in fact was abusing her power as conservator by misappropriating funds from Mr. Wilder's estate in violation of her fiduciary duties. The Commissioner prepared a report recommending bond forfeiture and filed that report with the trial court. The trial court held a hearing and subsequently confirmed the Commissioner's report. In a final order dated June 3, 2022, the trial court entered judgment against Minor and Liberty Mutual Insurance Company ("Liberty Mutual"), the bond surety, and ordered that the bond be forfeited in the amount of \$575,126.27.<sup>1</sup> Both Minor and Liberty Mutual appeal. For the following reasons, we affirm the trial court's decision.

**BACKGROUND**

Eric Witt Wilder was born on July 31, 1926, and died on August 5, 2019. He was married to Thelma Wilder ("Mrs. Wilder") and had three adult children: Eric R. Wilder ("Eric"), Brian Wilder ("Brian"), and Cynthia Bowers ("Cynthia"). On October 12, 2018, acting on the petition of Kishna Minor, the trial court adjudicated Mr. Wilder an incapacitated adult<sup>2</sup> and appointed Minor, his

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1. This amount included the amount of funds that Minor misappropriated while acting as conservator of Mr. Wilder's estate (\$574,462.27), as well as the fee and costs owed to the Commissioner for the commission of her duties (\$664).

2. In its order, the trial court noted that the then 92-year-old Mr. Wilder had dementia and other ongoing health conditions that made Mr. Wilder "incapable of receiving and evaluating information effectively." The trial court further noted that Mr. Wilder "lack[ed] the capacity necessary to mak[e] responsible decisions regarding the management of his property or personal affairs."

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granddaughter, as his temporary guardian and temporary conservator of his estate. On November 16, 2018, the trial court appointed Minor as the permanent legal guardian for Mr. Wilder, and the permanent conservator for his estate. In its order, the trial court noted the need for a permanent guardian and conservator for Mr. Wilder based on “the financial dissipation conducted by Brian Wilder and allowed by Mrs. Thelma Wilder.” Minor qualified on the same day, and posted bond in the amount of \$1,200,000, with surety provided by Liberty Mutual.

Relevant to this appeal, the trial court’s orders gave Minor “the power to access, spend, transfer, sell, liquidate, encumber, and otherwise manage [Mr. Wilder’s] income and assets, including any accounts jointly titled with Thelma Wilder.” In addition, both orders stated that the “Conservator shall make those reports required by Virginia Code §§ 64.2-1305 and 64.2-2021.” Neither the October 2018 order nor the November 2018 order identified the assets and income of Mr. Wilder. Pursuant to the duties outlined in Code §§ 64.2-1305 and - 2021, Minor filed an initial inventory, an amended inventory, a first accounting, and a second and final accounting of Mr. Wilder’s estate with the Office of the Commissioner of Accounts.<sup>3</sup> These filings identified various assets and bank accounts belonging to Mr. Wilder’s estate. However, Minor failed to identify five joint bank accounts held by Mr. Wilder and his wife, as well as an additional bank account

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3. The first three filings were initially reviewed and approved by a different commissioner. Mrs. Heishman took over the administration and supervision of Minor and Mr. Wilder’s estate after the second and final accounting was filed.

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Mr. Wilder held with Burke & Herbert Bank identified as “-4200” (“Account - 4200”). It was this undisclosed bank account that gave rise to this appeal.

**I. Minor misappropriates estate funds.**

On October 15, 2018—just three days after her appointment as Mr. Wilder’s temporary guardian and conservator—Minor opened Account - 4200 with funds Mr. Wilder already maintained in another account—identified as “-4197”—with Burke & Herbert Bank (“Account - 4197”). During the latter part of 2018 and 2019, Minor made a number of questionable purchases with funds from Account - 4200. For instance, within two weeks of Minor’s initial qualification as conservator, she put a \$6,000 deposit on hold with Safford of Tysons, a luxury car dealer. In November of 2018, she used the account to purchase \$3,000 in goods from Balsam Hill, \$25,437.92 in furniture at Restoration Hardware, and over \$6,000 at Next Day Blinds. She used the account to make a purchase with Carnival Cruise in January 2019 in the amount of \$2,018.20. She used \$2,489 from the account to purchase a Peloton exercise bike, and paid the attendant \$39 monthly membership fee with funds from the account as well. The bank statements from Account - 4200 further reflect 15 “Transf to Kishna” transactions totaling \$166,813.57.

In addition to these questionable transactions, Minor withdrew \$200,000 from Account - 4200 on October 30, 2018, and used those funds to pay \$100,000 each to Cynthia and Eric. In total, the questionable transactions from the undisclosed Account - 4200 totaled \$574,539.45.

*Appendix B***II. The filings with the Office of the Commissioner of Accounts and subsequent proceedings**

In January of 2019, Minor filed her initial inventory of Mr. Wilder's estate with the Office of the Commissioner of Accounts. In April of 2019, Minor filed an amended inventory. Neither of these filings contained information regarding the five joint accounts or Account - 4200. The prior commissioner approved the amended inventory in May of 2019. No exceptions were filed to the prior commissioner's report approving the inventory. Minor filed the first accounting of Mr. Wilder's estate with the Office of the Commissioner of Accounts on May 14, 2019. Mr. Wilder passed away on August 5, 2019. Minor filed the second and final accounting of Mr. Wilder's estate on October 1, 2019. Again, the aforementioned bank accounts were not contained in either of Minor's accountings for the estate. On December 17, 2019, the prior commissioner approved the first accounting filed by Minor. No exceptions were filed to the prior commissioner's report approving this account. However, on December 18, 2019, prior to the review and approval of Minor's second account, Eric wrote to the predecessor commissioner alleging that Minor understated the assets of Mr. Wilder's estate in the inventory she had filed. Later, Cynthia joined Eric as an objector, though no report was ultimately filed by the Commissioner concerning Eric and Cynthia's objections.

On June 15, 2020, Eric filed a hearing request with the Commissioner, Mrs. Heishman, also requesting production of certain bank records, including records from Burke & Herbert Bank. The Commissioner initially

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set a hearing on the objections for December 1, 2020, pursuant to Code § 64.2-1209. However, although the hearing was convened on that date, it was continued until January 5, 2021, because the Commissioner had received documents and allegations which indicated the potential for forfeiture of the surety bond, and she wanted the surety on Minor's bond to appear as well. Prior to adjourning the December 1 hearing, Minor confirmed the existence of the undisclosed Account - 4200. In anticipation of the January 5 hearing, counsel for Minor filed a hearing brief, asserting, among other arguments, that Eric and Cynthia were not "interested parties" within the meaning of Code § 64.2-1209, and therefore the proceeding was improper. On January 5, 2021, the Commissioner re-convened the hearing and again continued it to allow Eric's counsel to file a response to the brief filed by Minor's counsel. On the same date, the Commissioner issued a subpoena duces tecum to Burke & Herbert Bank, based on the allegations made by Eric as well as the admission made by Minor during the December 1 hearing. The bank's response reflected both statements from Account - 4197, which accurately reflected and accounted for transactions spent on Mr. Wilder's guardianship and his estate, and from Account - 4200, transactions for which Minor never accounted. Finally, on February 3, 2021, the Commissioner convened the hearing concerning the objections of Eric and Cynthia for the third time.

It was during the first of these three hearings (the "investigatory hearings") that the Commissioner confirmed the existence of Account - 4200. Minor acknowledged opening and controlling two separate

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accounts, explaining that Account - 4200 was a “guardian account” that was only to be reported to “the State” and not to the Commissioner. During the final hearing on February 3, which Minor did not attend, evidence was presented which detailed the existence of Account - 4200 and the myriad transactions Minor had made with the funds therein. Minor’s counsel offered no evidence to explain or justify the transactions from Account - 4200. However, no report or further action was taken by the Commissioner as a direct result of these investigatory hearings.

After the February hearing, an auditor with the Office of the Commissioner of Accounts wrote to Minor requesting documentation explaining the propriety of the expenditures from Account - 4200. Minor’s counsel responded via letter on March 3, 2021, stating that “much of the non-conservator funds went to address perceived inequities or improprieties within the family” and that “[i]n terms of the expenses paid from Account 4200, most of the funds went to prepare an ‘in-law’ suite for her grandfather in her own house.” Minor never provided any documentation or evidence to support the propriety of these transactions.

The Commissioner determined that Minor’s response was insufficient, and, due to inconsistencies with the documentary evidence the Commissioner had subpoenaed from Burke & Herbert Bank, concluded that she had yet to properly account for the transactions reflected in the bank statements concerning Account - 4200. The Commissioner therefore issued a summons to Minor

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pursuant to Code § 64.2-1216(A)<sup>4</sup> on April 13, 2021, and following the procedure set forth in Code § 64.2-1215(A),<sup>5</sup>

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4.

If any fiduciary required to account fails to make a complete and proper account within the time allowed, the commissioner of accounts shall either (i) proceed against the fiduciary in accordance with the procedures set forth in § 64.2-1215 or (ii) file with the circuit court and the clerk at such times as the court shall order, but not less than twice a year, a list of all fiduciaries who have failed to make a complete and proper account within the time allowed, excepting those fiduciaries to whom the commissioner of accounts has granted additional time. Upon the filing of this list, the clerk shall issue a summons against each fiduciary [\*\*\*10] on the list, returnable to the first day of the next term of court, and the court shall take action against the fiduciary in accordance with the procedures set forth in § 64.2-1215.

Code § 64.2-1216(A).

5.

If any fiduciary fails to make the return required by § 64.2-1300, the commissioner of accounts shall issue, through the sheriff or other proper officer, a summons to the fiduciary requiring him to make such return. If the fiduciary fails to make the required return within 30 days after the date of service of the summons, the commissioner of accounts shall report the fact to the circuit court. The court shall immediately issue a summons to the fiduciary requiring him to appear . . . . If, after his appearance before the court, the fiduciary continues to fail to make the required return within such time as the court may prescribe, the fiduciary shall be punished for contempt of court.

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instructed Minor to file a proper final account within 30 days. Minor did not file a proper account, and on May 21, 2021, the Commissioner filed a report of noncompliance with the Fairfax County Circuit Court, pursuant to Code § 64.2-1215(A).

On May 26, 2021, pursuant to the Commissioner's report, the trial court entered a show cause summons to be heard on August 13, 2021. On August 6, 2021, Minor filed a response to the show cause order, again arguing that the proceeding was a "nullity," and also arguing that the Commissioner had made certain statements during the investigatory hearings that illustrated that she was not an impartial adjudicator. On August 13, 2021, the trial court heard the arguments of Minor and the Commissioner with regard to the show cause order. The trial court then entered an order proffered by the Commissioner, which read, in part: "[T]he Commissioner of Accounts is directed to hold a hearing to determine whether the Court should remove the fiduciary and whether, and in what amount, the fiduciary's bond should be forfeit." On the same date, August 13, 2021, the Commissioner filed a petition to remove Minor as the fiduciary of Mr. Wilder's estate, and to forfeit bond. That petition stated: "Your [C]ommissioner is of the opinion that the fiduciary's failure to file a proper account requires that she be removed as conservator and that her fiduciary bond be forfeit."

On September 29, 2021, the Commissioner presided over a hearing conducted pursuant to the trial court's order

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Code § 64.2-1215(A).

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to determine “whether and, what amount, if any, of Ms. Minor’s bond should be forfeited.” Counsel for Minor and counsel for her surety, Liberty Mutual, appeared at the hearing, though Minor herself was not present. Although Minor was not present, her counsel provided evidence concerning joint accounts held by the Wilders. However, no evidence was offered to explain how the funds from Account - 4200 were used to benefit Mr. Wilder. Minor’s counsel objected that she was denied due process because the Commissioner was acting both as a prosecutor and as an adjudicator, and she again argued that the proceedings were a “nullity” because they were instituted by Eric and Cynthia, both of whom lacked standing as “interested person[s]” under Code § 64.2-1209. Counsel for Minor and for Liberty Mutual also argued in the alternative that the amount that they ought to be liable for was far less than the \$574,462.27 that the Commissioner asserted. Cynthia attended the hearing remotely but offered no evidence or argument. Eric did not attend this hearing.

**III. The trial court’s rulings**

On October 15, 2021, the Commissioner filed her report of the hearing as ordered by the trial court, recommending forfeiture of the bond. On November 1, 2021, Minor and Liberty Mutual each separately filed exceptions to the report. On November 8 and November 10, 2021, the trial court confirmed the Commissioner’s report. No appeal was noted from the November orders.

On January 21, 2022, the parties appeared before the circuit court for an order memorializing the now confirmed

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Commissioner’s report, as well as her petition to forfeit bond. The trial court took the matters under advisement, and on April 11, 2022, the trial court issued a letter opinion addressing “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.” The trial court noted Minor’s argument that she had been deprived of due process because the Commissioner was acting both as an adverse party and as an arbiter, but it did not expressly address that argument in its opinion. Instead, it addressed the role of the Commissioner of Accounts under Code § 64.2-1200, and held that the Commissioner had “general supervision authority over . . . fiduciaries” and the authority “to make *ex parte* settlements of the fiduciaries’ accounts.” The trial court agreed that Eric and Cynthia lacked standing under Code § 64.2-1209 to seek a hearing, but it held that, “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.” Noting that “the Commissioner has the authority to review and report an accounting under § 64.2-1200,” it decided that “it would be . . . absurd . . . 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.” It therefore concluded that “the Commissioner was correct in conducting a hearing after being contacted by the decedent’s son.”

On May 20, 2022, Minor filed a motion for clarification and reconsideration of the trial court’s April 11, 2022 letter opinion. On May 27, 2022, at the trial court’s request, the

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Commissioner filed a response to that motion. On June 3, 2022, the trial court heard argument from Minor and the Commissioner regarding the motion and entered a final order denying the motion and entering judgment against Minor. Minor and Liberty Mutual appealed.

**ANALYSIS****I. Appellants’ assignments of error on appeal**

On appeal, Minor and Liberty Mutual (“appellants”) present ten assignments of error. However, these assignments of error can be broken up into four distinct categories: (1) assignments of error related to the hearing process carried out by the Commissioner, (2) assignments of error related to the Commissioner herself, (3) assignments of error related to the supposed remedies available to Eric and Cynthia, and (4) assignments of error related to the evidence considered by the Commissioner.

**II. Standard of Review**

To resolve the issues presented by appellants, “we must look to the statutory provisions governing the procedures for the approval of final accountings submitted by a . . . conservator for an estate to a Commissioner of Accounts and a circuit court.” *Henderson v. Cook, Trustee for Noojin*, 297 Va. 699, 711, 831 S.E.2d 717 (2019). “[A]n issue of statutory interpretation is a pure question of law which we review de novo.” *Id.* (alteration in original) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174 (2007)).

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When the language of a statute is unambiguous, we are bound by the plain meaning of that language. Furthermore, we must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity. If a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute.

*Id.* (quoting *Conyers*, 273 Va. at 104). “Additionally, ‘[t]he plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction.’” *Id.* (alteration in original) (quoting *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637 (2007) (citation and internal quotation marks omitted)). “Further, although the report of a commissioner [of accounts] does not carry the weight of a jury’s verdict, ‘an appellate court must give due regard to the commissioner’s ability, not shared by the [trial court], to see, hear, and evaluate the witnesses at first hand.’” *Heath v. Heath*, 38 Va. App. 727, 731, 568 S.E.2d 408 (2002) (citations omitted). “A commissioner’s findings of fact which have been accepted by the trial court ‘are presumed to be correct when reviewed on appeal and are to be given ‘great weight’ by this Court. The findings will not be reversed on appeal unless plainly wrong.’” *Id.* at 731-32 (citation omitted).

*Appendix B***III. The nature and history of Commissioners of Accounts in Virginia**

We next turn to the nature and history of the commissioner of accounts in Virginia. “The office of the Commissioner of Accounts is unique to Virginia and West Virginia.” *Gray v. Binder*, 294 Va. 268, 276, 805 S.E.2d 768 (2017) (citing Frank O. Brown, Jr., *Virginia Practice: Probate Handbook*, § 2:11 (2014)). “Since their creation, Virginia circuit courts have been vested with jurisdiction over fiduciary matters, including the administration of estates.” *Id.* “It would be ‘impracticable’ for circuit courts to perform every aspect of estate administration.” *Id.* (quoting *Shipman v. Fletcher*, 91 Va. 473, 477, 22 S.E. 458 (1895)). “The Commonwealth established the office of the Commissioner of Accounts ‘to afford a prompt, certain, efficient, and inexpensive method’ for the settlement of fiduciaries’ accounts and the distribution of estates.” *Id.* (quoting *Carter Adm’r v. Skillman*, 108 Va. 204, 207, 60 S.E. 775 (1908)).

As a quasi-judicial official, the commissioner of accounts is “one of the most important [offices] known in the administration of justice.” *Henderson*, 297 Va. at 711-12 (quoting *Gray*, 294 Va. at 276). Its origins can be traced back to the office of the commissioner in chancery, and it is considered to have “the same general authority as a commissioner in chancery, in addition to the statutory duties and responsibilities of the commissioner of accounts.” *Phillips v. Rohrbaugh*, 300 Va. 289, 307, 863 S.E.2d 847 (2021) (quoting The Standing Comm. on the Comm’rs of Accts. of the Jud. Council of Va., Manual

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for Commissioners of Accounts at 293-94 (6th ed. 2019) (footnotes omitted)). The Supreme Court of Virginia has agreed with the Judicial Council that “[b]ased upon these background principles, . . . ‘the circuit court may refer any matter it deems appropriate to the commissioner of accounts pursuant to its general referral powers to commissioners in chancery.’” *Id.* (quoting Manual for Commissioners of Accounts at 293-94). “A commissioner in chancery is an officer appointed by the [circuit court] to aid [it] in the proper and expeditious performance of [its] official duties.” *Gray*, 294 Va. at 276 (quoting *Raiford v. Raiford*, 193 Va. 221, 226, 68 S.E.2d 888 (1952)). “A good commissioner is the right arm of the court, and his services are indispensable to the due administration of justice.” *Id.* (quoting *Raiford*, 193 Va. at 226). “[T]he office of commissioner in chancery is one of the most important known in the administration of justice.” *Id.* (quoting *Bowers Adm’r v. Bowers*, 70 Va. (29 Gratt.) 697, 700 (1878)). “Nonetheless, commissioners serve to assist the court, not to supplant it.” *Id.* (citing *Shipman*, 91 Va. at 477). “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.” *Id.* at 278.

“[F]rom the very necessity of their appointment and the nature of their office, [a commissioner of accounts’] work is subject to the review of the court.” *Henderson*, 297 Va. at 712 (quoting *Gray*, 294 Va. at 276-77). “[The court] may accept or reject it, in whole or in part, as its judgment, upon such review, may dictate, whether it be of law or fact.” *Id.* (quoting *Gray*, 294 Va. at 276-77). Finally,

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the General Assembly has enacted Code §§ 64.2-1200 et seq. and 64.2-1300 et seq. to govern Commissioners of Accounts and fiduciaries in Virginia. These statutes will be laid out, as relevant, in detail below.

**IV. Appellants timely noted their appeal.**

Before we reach appellants' assignments of error, we must first address the Commissioner's argument that appellants have procedurally defaulted their appeal. The Commissioner argues that "Appellants failed to note any appeal to the circuit court's order[s] confirming the Commissioner's Report over their exceptions within thirty (30) days, which was a final, appealable order. In failing to do so, they have waived their right to appeal the same in this proceeding" pursuant to Code § 8.01-675.3. That statute provides that "a notice of appeal to the Court of Appeals in any case within the jurisdiction of the court shall be filed within 30 days from the date of any final judgment order, decree, or conviction."

The Commissioner argues that the trial court's orders entered November 8 and 10, 2021, confirming the Commissioner's report "were final as to Minor and Liberty Mutual" based on language contained in Code § 64.2-1213. That statute provides that "[t]he report, to the extent to which it is confirmed by an order of the circuit court upon exceptions filed pursuant to subsection B of § 64.2-1212 . . . shall be taken to be correct, except so far as it may . . . be surcharged or falsified." However, if a party files exceptions to the report, that party may not bring a suit to surcharge or falsify the report; rather,

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“the action of the court on the report *shall be final as to such party*, except that it may be appealed from as in other suits.” Code § 64.2-1213 (emphasis added). Based on this language, the Commissioner argues that the trial court’s confirmation of the Commissioner’s report was a final order for purposes of appeal. We disagree.

We do not read the language contained in Code § 64.2-1213 (specifically the use of the word “final”) as altering the traditional analysis of whether an order is a final, appealable order under Rule 1:1<sup>6</sup> by per se transforming a circuit court’s confirmation of a commissioner’s report into a final order for purposes of appeal. Instead, we read the cited language simply as a restriction that the General Assembly has placed upon certain litigants—those who have already had their opportunity to challenge a commissioner’s factual findings and legal conclusions contained in her report—in potential future legal actions. See *Lister v. Virginia Nat’l Bank.*, 209 Va. 739, 741-42, 167 S.E.2d 346 (1969) (holding that former Code § 26-34 “does not prohibit a beneficiary, who did not file exceptions to the commissioner’s report within the statutory period (now 15 days), from seeking equitable relief by instituting a suit in proper time to surcharge and falsify an [e]x parte

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6. Rule 1:1(b) provides:

Unless otherwise provided by rule or statute, a judgment, order, or decree is final if it disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except the ministerial execution of the court’s judgment, order, or decree.

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settlement of the fiduciary's account. A beneficiary may elect whether to file exceptions to the report or to institute a suit to surcharge and falsify. If he files exceptions to the report then he is barred from prosecuting such a suit.”).

In addressing the question of timeliness of appellants' notice of appeal in this matter, we therefore turn to the traditional legal analysis concerning Rule 1:1 and whether a trial court's order “dispose[d] of the whole subject, [gave] all the relief contemplated, . . . and [left] nothing to be done in the cause save to superintend ministerially the execution of the order.” *Jefferson v. Commonwealth*, 298 Va. 473, 475, 840 S.E.2d 329 (2020) (quoting *Daniels v. Truck & Equip. Corp.*, 205 Va. 579, 585, 139 S.E.2d 31 (1964)).

Here, as appellants correctly point out, though the trial court confirmed the Commissioner's report in November of 2021, those orders did not “dispose[] of the entire matter,” pursuant to Rule 1:1(b), because the issues pertaining to the propriety of the process carried out by the Commissioner, as well as bond forfeiture, were still to be decided. Even though the trial court had confirmed the Commissioner's report, the concurrent petition filed by the Commissioner to remove Minor as fiduciary and forfeit bond was still pending before the trial court. In fact, after the trial court confirmed the Commissioner's report in November of 2021, the trial court held an additional show cause hearing on the issue of bond forfeiture. The trial court explicitly took the matter of bond forfeiture under advisement, not ruling on the legal arguments raised by appellants until it issued its April 11, 2022 letter opinion.

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Further, the trial court only formally memorialized its rulings regarding bond forfeiture and the process carried out by the Commissioner in its final order, entered on June 3, 2022. “A ‘trial court speaks only through its written orders’ and written ‘orders speak as of the day they were entered.’” *Jefferson*, 298 Va. at 477 (quoting *Davis v. Mullins*, 251 Va. 141, 148, 466 S.E.2d 90 (1996)). The final order entered by the trial court on June 3, 2022, was the final, appealable order in this case. Therefore, appellants’ notice of appeal filed on June 28, 2022, was timely.<sup>7</sup>

**V. The hearing process carried out by the Commissioner complied with her statutory duties and authorities.**

Appellants’ first assign error to the trial court’s ruling by arguing that the entire proceeding was a “nullity” because it was instituted by Eric and Cynthia. Before the Commissioner approved the final accounting filed by Minor, Eric contacted the Commissioner, notifying her that Minor had underreported the assets in her initial and amended inventories and sought a hearing in front of the Commissioner pursuant to Code § 64.2-1209. That statute provides that:

Any interested person, or the next friend of an interested person, may, before the commissioner of accounts, insist upon or object

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7. In coming to this conclusion, we expressly decline to opine on whether, in a different case where no petition was pending, a trial court’s confirmation of a commissioner’s report would constitute a final order for purposes of appeal.

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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.

Appellants argue that Eric and Cynthia were not “interested persons” pursuant to that statute. Appellants acknowledge that the Commissioner did not file a report with the trial court concerning the hearings she held on December 1, 2020, January 5, 2021, and February 3, 2021. Nevertheless, appellants argue that the Commissioner “receive[d] evidence upon which she later based her October 15, 2021, Report.”

Appellants believe this to be a standing issue, citing to *Johnston Mem'l Hosp. v. Bazemore*, 277 Va. 308, 312, 672 S.E.2d 858 (2009), for the proposition that Virginia “jurisprudence is clear that when a party without standing brings a legal action, the action so instituted is, in effect, a legal nullity.” Appellants argue that, because Eric and Cynthia were not “interested persons” under the statute, “the only thing the Commissioner could do with the objections before her would be to dismiss the objections for lack of standing.” Appellants also make a similar argument with respect to the Commissioner herself, arguing that she also was not an “interested” party pursuant to Code § 64.2-1209. These arguments fail for the same reason: they misunderstand the proceedings carried out below, as well as the nature of the position of the Commissioner of Accounts.

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“The law with respect to the settlement of fiduciary accounts prior to the adoption of the Code of 1849 was in a very unsatisfactory condition.” *Carter’s Adm’r*, 108 Va. at 206. In an effort to remedy these issues, the General Assembly created the office of the commissioner of accounts. The language from the revisors’ report illustrates their recognition of the pitfalls that existed at the time concerning the proper settlement and distribution of estates:

Far better would it be for him that his accounts should be settled correctly *in the first instance*, . . . [and that] . . . it must be a great improvement to have such accounts settled by commissioners holding their offices under appointment of the circuit courts; commissioners appointed such because of their acquaintance with the principles on which the accounts should be stated, and from whom, therefore, *a settlement on proper principles* may generally be expected.

*Report of Revisors of Virginia Code*, 1849, ch. 132, p. 676 n.\* (January 1849) (emphasis added).

Further, the Supreme Court of Virginia has recognized “how minute, how careful, and how sufficient [are the provisions laid out in the Virginia Code] for the settlement of the accounts of fiduciaries. [The law] is full, ample, and complete. It guards and protects every interest as amply as could be done by a formal suit in chancery.” *Carter’s Adm’r*, 108 Va. at 213. “[A]t every step

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of [her] administration the law provides proper machinery by which the fiduciary can be compelled to collect and distribute the funds committed to [her] care, and to settle [her] accounts showing the manner in which [the] trust has been executed.” *Id.*

Code § 64.2-1200 provides that “[t]he commissioner of accounts shall have general supervision of all fiduciaries admitted to qualify in the court or before the clerk of the circuit court and shall make all *ex parte* settlements of the fiduciaries’ accounts.” That statute further provides that “[e]ach commissioner of accounts shall retain the power of supervision over every account, matter, or thing referred to him until a final account is approved for such account, matter, or thing . . . .” Trustees, conservators, and other types of fiduciaries have an obligation to “account before the Commissioner of Accounts.” Code § 64.2-1206. Code § 64.2-1312 provides that “[t]he commissioner of accounts shall state, settle, and report to the circuit court an account of the transactions of a fiduciary, as provided by law.” Code § 64.2-1203 provides that “Commissioners of accounts . . . shall have the power to issue subpoenas to require any person to appear before them and to issue subpoenas duces tecum to require the production of any documents or papers before them.” And Code § 64.2-1204 provides that:

When any fiduciary of an estate has given a bond to the court and then absconds with or improperly disburses any or all of the assets of the estate, the commissioner of accounts may petition the court in which the order was

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made conferring his authority on the fiduciary and ask the court to order that such bond be forfeited.

The statutory scheme places affirmative duties upon both the fiduciary and the Commissioner. As laid out above, circuit courts in Virginia have jurisdiction over fiduciary matters, including the proper administration of estates. The Commissioner of Accounts serves at the pleasure of the trial court, and the purpose of the Commissioner is to aid the trial court in carrying out the prompt settlement of fiduciaries' accounts and the proper distribution of estates. The Commissioner's duty in this regard is to assess the fiduciaries' inventory and accountings, as well as any evidence before it, and file a report with the trial court, recommending a disposition for the trial court to adopt. This duty includes an assessment of whether a fiduciary has "improperly disburse[d] any or all of the assets of the estate." Code § 64.2-1204. The Commissioner thereby serves as the first step in the process of administering estates. In doing so, the Commissioner's duty is not simply to ensure the job is done, but to make certain that the job is done right.

Here, we agree with the trial court that "while [Code § 64.2-1209] 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." The General Assembly has charged the Commissioner with the duty and authority to ensure the correct administration of estates. Pursuant to this duty, Code § 64.2-1203 grants the Commissioner the power

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to subpoena “any person to appear before them.” The record demonstrates that that is what occurred here, and we see no issue with that process. The investigatory hearings that appellants complain of were well within the Commissioner’s “supervisory” authority outlined in Code § 64.2-1200, and her authority to require “any person” to appear before her pursuant to Code § 64.2-1203. Further, the Commissioner was carrying out her statutory obligation to ensure Minor made a “complete and proper account.” Code § 64.2-1216(A). When Minor failed to do so, the Commissioner was required to take steps against Minor, and ultimately bring the issue to the trial court’s attention pursuant to Code §§ 64.2-1215 and - 1216. Finally, upon learning of Minor’s “improper disburs[ement]” of certain estate funds, the Commissioner was entitled to “petition the court . . . and ask the court to order that [the] bond be forfeited.” Code § 64.2-1204.

The trial court considered the petition and accompanying report from the Commissioner, as well as the exceptions filed by Minor and Liberty Mutual to that report, and ultimately confirmed the Commissioner’s report, subsequently entering an order forfeiting a portion of the bond. Given that the proceedings below were properly conducted pursuant to the Commissioner’s statutory authority—and not as the result of Code § 64.2-1209—nothing about this process was improper as to constitute error.

*Appendix B***VI. The Commissioner remained a neutral arbiter, notwithstanding the statements she made.**

Finding no success in their attempt to challenge the hearing process carried out by the Commissioner, appellants next call into question the propriety of the Commissioner herself. Appellants seize upon several statements made by the Commissioner during the investigatory hearings wherein she intimated that, notwithstanding the fact that Eric and Cynthia may not be “interested persons” under Code § 64.2-1209,<sup>8</sup> she, herself, was an “interested person” for purposes of the hearing, that she “had standing in the case,” and that she was not “neutral.” Appellants argue that these statements evince bias on the part of the Commissioner and that the hearing process, in turn, violated their due process rights. In making this argument, appellants cite to *Palmer v. Atl. Coast Pipeline, LLC*, 293 Va. 573, 801 S.E.2d 414 (2017), for the proposition that due process “includes, among other things . . . the opportunity to be heard before an impartial

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8. In agreeing with appellants that Eric and Cynthia were not “interested person” under Code § 64.2-1209, the trial court ruled that an “interested person” was a person who had standing. In the context of the statute, the trial court explained that that meant a person who had a “pecuniary interest” in the outcome of the case, a definition which neither Eric nor Cynthia meet. We express no opinion on the correctness of the trial court’s adopted definition of “interested person,” determining that we can resolve the case on other grounds. See *Commonwealth v. White*, 293 Va. 411, 419, 799 S.E.2d 494 (2017) (“The doctrine of judicial restraint dictates that we decide cases on the best and narrowest grounds available.” (cleaned up) (quoting *Commonwealth v. Swann*, 290 Va. 194, 196, 776 S.E.2d 265 (2015))).

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tribunal.” *Id.* at 585 (McCollough, J., concurring). Further, and notwithstanding their arguments concerning the Commissioner’s alleged bias, appellants also argue that the process generally was unfair because the Commissioner engaged in both an adjudicatory role *as well as* a prosecutorial role. This, appellants argue, also violates their due process rights.

Here, the record makes clear that the Commissioner, in making the assertions that she was “interested,” “had standing” in the case, and was not “neutral,” merely intended to express the fact that she, as Commissioner of Accounts, had a duty to assess the evidence presented to her and ensure the proper administration and distribution of Mr. Wilder’s estate. For instance, during the January 5 hearing, in response to the contention that no interested party had come forward with objections, the Commissioner replied: “I appreciate that. But you know, I also, as the Commissioner of Accounts, have an interest in this, as well. And this statute provides me with general authority over fiduciaries.” And further, during the hearing on February 3, the Commissioner stated:

I think that, given my duties under 64.2-1200, and what this office is charged with, now that these objections have been brought to my attention, I believe I do have the authority to move forward and hear [the] case as to these funds that were allegedly used by Ms. Minor.

Such an “interest” is not improper, and the Commissioner’s statements do not render her an

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impartial adjudicator. In fact, the trial court came to this very conclusion, stating: “[M]y understanding [of these statements is that] she was referring to . . . the duties of the Commissioner of Account[s].” The trial court further acknowledged that “although the words that she used might not have been the most artful words to use in that context, [she was saying] that the Commissioner of Accounts had duties and obligations.” On appeal, “we will not fix upon isolated statements . . . taken out of the full context in which they were made[] and use them as a predicate for holding the law has been misapplied.” *Yarborough v. Commonwealth*, 217 Va. 971, 978, 234 S.E.2d 286 (1977). The trial court’s finding in this regard is entitled to deference, and we cannot say that such a finding was plain error. *Heath*, 38 Va. App. at 732.

Similarly, appellants argue that the Commissioner violated their due process rights by exercising both “enforcement” and “adjudicatory” authority. Appellants rely on *Williams v. Pennsylvania*, 579 U.S. 1, 136 S. Ct. 1899, 195 L. Ed. 2d 132 (2016), for the proposition that “an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.” *Id.* at 8. Further, citing to a Pennsylvania case, *Lyness v. Commonwealth, State Bd. of Medicine*, 529 Pa. 535, 605 A.2d 1204 (Pa. 1992), they argue that any appearance of bias and partiality, including “commingling prosecutorial and adjudicatory functions . . . must be viewed with deep skepticism.” *Id.* at 1207.

This assignment of error again misunderstands the role of a Commissioner of Accounts and the statutory

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scheme established for the protection of fiduciary accounts. Though the Commissioner is a “quasi-judicial” officer, *Phillips*, 300 Va. at 306, and is tasked with generally supervising fiduciaries in Virginia, Code § 64.2-1200, the Commissioner does not act as a “prosecutor” or “enforcer” in carrying out her duties. The Commissioner makes findings of fact and conclusions of law in her report, which, upon submission to the trial court, are merely *recommendations* which the trial court may accept or reject. *See Henderson*, 297 Va. at 712. “[F]rom the very necessity of their appointment and the nature of their office, their work is subject to the review of the court. It may accept or reject it, in whole or in part, as its judgment, upon such review, may dictate, whether it be of law or fact.” *Gray*, 294 Va. at 276-77 (alteration in original) (quoting *Shipman*, 91 Va. at 477). The statutes governing Commissioners of Accounts and requiring them to make reports to the trial court do not place upon Commissioners the duty to act as a prosecutor. The Commissioner is simply required to “report every account stated under [Code § 64.2-1200 et seq.] . . . along with any matters specially stated deemed pertinent by the commissioner of accounts.” Code § 64.2-1210. If the fiduciary takes issue with the report filed by the Commissioner, the fiduciary may file her own exceptions to the Commissioner’s report. Code § 64.2-1212. However, the Commissioner bears no duty to *prove* the facts, opinions, and legal conclusions contained in her report. Rather, the duty to properly account for all funds under her control as fiduciary *always remains with the fiduciary*, and she is personally liable for a breach of her fiduciary duty. *See* Code § 64.2-2021(D), (E) (setting out the “[g]eneral duties and liabilities of [a]

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conservator,” expressly clarifying that “[a] conservator stands in a fiduciary relationship to the incapacitated person for whom [s]he was appointed conservator,” and requiring that “[a] conservator shall comply with and be subject to the requirements imposed upon fiduciaries generally under . . . [Code] § 64.2-1200 et seq., . . . specifically including the duty to account set forth in § 64.2-1305”). Therefore, the Commissioner here did not take on the role of prosecutor or enforcer.<sup>9</sup> Instead, as has been explained above, the Commissioner merely aided the trial court in the proper administration and distribution of Mr. Wilder’s estate. No error arises from this.

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9. Though appellants do not come right out and say it, implicit in their argument concerning these “dual roles” is the contention that, in *any* case where a commissioner determines that the evidence she has received indicates the misuse or misappropriation of funds, the Commissioner must delegate the task of filing the petition—and possibly the report—to a separate individual, such as an assistant commissioner appointed pursuant to Code § 64.2-1201, so as to avoid any appearance of bias or impropriety. It seems to us that such a sweeping rule, if provident, would have been expressly stated by the General Assembly in the relevant statutory scheme. In fact, Code § 64.2-1201 provides both the trial court and the Commissioner with discretion in making the determination whether she should be recused from the administration and supervision of a certain case. *See* Code § 64.2-1201 (“The judges of each circuit court may appoint, in addition to commissioners of accounts, assistant commissioners of accounts who shall perform all the duties and exercise all of the powers required of the commissioner of accounts in all cases in which the commissioner of accounts is so situated that he cannot perform the duties of his office or in which the commissioner of accounts is of the opinion that it is improper for him to act. . . . Assistant commissioners of accounts shall act only in such cases that the commissioner of accounts delegates to him.”). We have found no evidence in the relevant statutes of the broad-sweeping rule that appellants advance, and we decline to adopt such a rule here.

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In the same vein, appellants argue that the trial court erred by not dismissing the action “where the Commissioner sought referral of a matter for the Commissioner’s adjudication to determine whether a fiduciary should be removed and her bond be forfeit and simultaneously asked the Court to remove the fiduciary and order her bond forfeit.” Appellants’ brief makes clear that this assignment of error is predicated upon the same alleged “lack of impartiality” of the Commissioner, as well as the same arguments concerning the “dual roles” she supposedly engaged in. As we have already refuted those notions—and given the statutory obligations incumbent upon the Commissioner to report fiduciary malfeasance to the trial court, and, where appropriate, initiate proceedings against such a fiduciary—this assignment of error fails.

**VII. The assignment of error related to Eric and Cynthia’s statutory remedy misunderstands the nature of the proceedings below.**

Appellants next argue that even if Eric and Cynthia were “interested persons” under Code § 64.2-1209, their remedy was limited to a suit to surcharge and falsify under Code § 64.2-1213.<sup>10</sup> Appellants’ argument again

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10. Code § 64.2-1213 provides that an approved inventory of the assets contained in an estate “shall be taken to be correct, except so far as it may, in a suit, in proper time, be surcharged or falsified.” A suit to surcharge and falsify an accounting entails the “surcharge” of the account (compensation for misspent funds) and “falsification” (rejection of the prior proposed accounting as improper). The Court in *Listor*, explained in detail the mechanics of a suit to surcharge and falsify:

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misunderstands the nature of the proceedings below. The trial court's order and rulings were not made *on behalf of* Eric and Cynthia, as "interested persons" proceeding pursuant to Code § 64.2-1209. In fact, neither Eric nor Cynthia were parties to the instant case; they received no judgment or remedy, and their legal rights were not affected in any way by the trial court's ruling. Therefore, any arguments related to what remedies may or may not have been available to Eric and Cynthia are not relevant to the instant case.<sup>11</sup> Instead, the trial

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When errors or mistakes only are shown to exist in an account the settlement will not be opened, as will be done where fraud or accident affecting the entire action of the probate court is shown, but the person alleging the error or mistake in the account will be permitted to surcharge and falsify it. The distinction between opening an account and surcharging and falsifying it is that when an account is opened the whole [\*\*\*36] of it becomes subject to review, while when it is merely surcharged and falsified the inquiry is limited to particular items alleged to have been improperly included or omitted, and in all other respects the account is left to stand as it is.

209 Va. at 742 (citation omitted).

11. To the extent that appellants argue on brief that *any party* (including the Commissioner) would be required to first file suit to surcharge and falsify the approved inventory, that argument is waived as it was not contained in appellants' seventh assignment of error, which states, in whole: "The [trial] [c]ourt erred by not dismissing the proceeding where, even if the original objectors were 'interested persons' and had standing to object, their remedy was limited to a suit to surcharge and falsify under Virginia Code § 64.2-1213." This language is clearly tailored only towards Eric and Cynthia, as the

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court, in evaluating the report and recommendations filed by the Commissioner, was tasked with determining whether Minor had properly accounted for Mr. Wilder's estate, as his conservator. Determining that she had not properly accounted for Mr. Wilder's estate, but instead had abused her powers as conservator, the trial court correctly entered an order finding that Minor had violated her fiduciary duties, thereafter revoking her bond. Such order was not error and had no connection with the initial objections brought to the attention of the Commissioner by Eric and Cynthia.

**VIII. The assignments of error related to the evidence considered by the Commissioner fail because appellants failed both to offer certain evidence before the Commissioner and to proffer what evidence they would have actually offered.**

Appellants next challenge the ruling below on the ground that the Commissioner failed to consider certain evidence. Specifically, appellants argue that the Commissioner: (1) “failed to apply the presumptions under Virginia Code § 6.2-606 concerning multiple-party accounts held by spouses and failed to consider evidence that an account in question contained non-conservatorship

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“original objectors.” Rule 5A:20(c)(1) (“Only assignments of error listed in the brief will be noticed by this Court.”); *see also Banks v. Commonwealth*, 67 Va. App. 273, 289, 795 S.E.2d 908 (2017) (“This Court is limited to reviewing the assignments of error presented by the litigant. [W]e do not consider issues touched upon by the appellant’s argument but not encompassed by his assignment of error. (internal citations omitted)).

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assets,” and (2) “failed to consider evidence that the Administrator of the Estate of Eric W. Wilder assented to and ratified certain distributions.”

Regarding the former assignment of error, appellants argue that any alleged joint accounts held by Mr. and Mrs. Wilder are governed by Code § 6.2-606. That statute states that any account owned by a married couple “shall belong to them equally.” In *Lewis v. House*, 232 Va. 28, 348 S.E.2d 217, 3 Va. Law Rep. 470 (1986), the Supreme Court of Virginia wrote, regarding this statutory provision: “[w]e construe the word ‘equally’ to mean ‘in equal proportions.’ . . . [We find no merit in the] contention that, because a joint account belongs to spouses ‘equally,’ the entire account is owned by each.” *Id.* at 31. Appellants argue that “[t]he Commissioner received no evidence of the intent of the parties regarding these accounts . . . [and] found that any failure by Ms. Minor to account for funds, whether they belonged to [Mr.] Wilder or [Mrs.] Wilder constituted grounds for a bond forfeiture.” Appellants also argue that Minor did not have a duty to account for joint accounts held by both Mr. and Mrs. Wilder.

In other words, the general thrust of appellants’ argument is: (1) the funds contained in Account - 4200 were joint funds owned by both Mr. and Mrs. Wilder, (2) Code § 6.2-606 requires that these funds be viewed separately, not jointly, as between the two of them, (3) Minor was only a fiduciary of Mr. Wilder’s assets, not Mrs. Wilder’s, and (4) the court should view any funds used by Minor as Mrs. Wilder’s funds, not Mr. Wilder’s funds, thereby exculpating Minor of any violation of her fiduciary duties.

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Similarly, appellants also argue that the Commissioner did not receive any evidence with regard to *how Mr. and Mrs. Wilder may have viewed the funds in Account - 4200*—i.e., that it is possible that the couple would have viewed *most or all* of the funds contained in Account - 4200 as belonging to *Mrs. Wilder*, thereby placing those funds outside of the fiduciary control and responsibility of Minor, as conservator for Mr. Wilder’s estate.

To the extent that appellants argue that Minor had no duty to account for bank accounts held jointly by Mr. and Mrs. Wilder, that contention is belied by the trial court’s initial orders appointing Minor as temporary and then permanent conservator of Mr. Wilder’s estate. Those orders specifically provided:

It is therefore ORDERED, ADJUDGED AND DECREED: . . . That Kishna Minor is hereby appointed permanent Conservator for Eric Witt Wilder, with all the rights powers, and duties, set forth in Virginia Code §§ 64.2-2021, 64.2-2022, and 64.2-2023, including but not limited to: the power to access, spend, transfer, sell, liquidate, encumber, and otherwise manage Respondent’s income and assets, *including any accounts jointly titled with Thelma Wilder*.

(Emphasis added). The trial court granted Minor the power to manage accounts jointly held by Mr. and Mrs. Wilder. Minor therefore had a duty to properly account for any such joint accounts, and further had the duty not to misappropriate any funds contained in those joint

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accounts. *See Asberry's Adm'r v. Asberry's Adm'r*, 74 Va. (33 Gratt.) 463, 469 (1880) (“The use of the assets by the personal representative [conservator or guardian] for his own private purposes, or for the payment of his own debts, is necessarily a misapplication of trust funds, and a breach of trust. . . . These are elementary principles.”).

Further, to the extent that appellants argue that the Commissioner erred by not receiving pertinent evidence on the intent of Mr. and Mrs. Wilder as to how the funds contained in the joint accounts should be disbursed or to whom they belonged, appellants had the opportunity to introduce any such evidence in front of the Commissioner during the September 29, 2021 hearing, but chose not to. Because appellants did not offer any such evidence at that hearing, they waived any argument regarding this issue in front of the trial court, and subsequently here on appeal. *See Heath*, 38 Va. App. at 733-34 (finding no abuse of discretion where trial court refused “to consider the . . . issue on the merits, for the first time [in front of the trial court, where]” “wife had the opportunity to request and present evidence on the issue [in front of the commissioner] but failed to do so”).

Appellants have also failed to proffer on appeal what that evidence may have been, how any such evidence would affect our analysis, and whether and how that evidence would affect the trial court’s final order forfeiting the bond. Rule 5A:20(d), (e) (Appellants’ opening brief must contain “[a] clear and concise statement of the facts that relate to the assignments of error” as well as “the argument (including principles of law and authorities) relating to each assignment of error.”).

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Regarding the latter assignment of error—that the Commissioner failed to consider any evidence that Mrs. Wilder may have assented to and ratified the improper transactions and distributions made by Minor—appellants note that the Commissioner gave notice of the September 29, 2021 hearing to Mrs. Wilder, the “only interested person who could have asked the Commissioner for a hearing under Va. Code § 64.2-1209.” Because Mrs. Wilder did not intervene or object to Minor’s conduct in managing Mr. Wilder’s estate, appellants argue that Mrs. Wilder constructively assented to and ratified Minor’s conduct.

This assignment of error fails for reasons similar to the one above. If a fiduciary acts regarding estate property to her own advantage, that action is only excused if she affirmatively shows that:

[T]he beneficiary, being *sui juris*, had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom [s]he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that [s]he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by [her]self, or which he might, with reasonable diligence, have possessed, and that [s]he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information

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and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity.

*Owens v. Owens*, 196 Va. 966, 972-73, 86 S.E.2d 181 (1955) (quoting 3 Pomeroy on Equity Jurisprudence, § 958(d), p. 814 (5th ed. 1941)). The burden was therefore upon Minor to show that the transactions and disbursements she made were freely consented to by Mrs. Wilder. However, while appellants had ample opportunity to present evidence regarding Minor's knowledge of the ownership of Account - 4200 and the myriad disbursements she made, they chose not to. Our holding in *Heath* therefore bars any consideration of those arguments on appeal. *See Heath*, 38 Va. App. at 733-34. Further, appellants again failed to proffer on appeal what evidence, if any, they would have introduced to prove Mrs. Wilder's consent or the propriety of the expenditures. *See* Rule 5A:20(d), (e). Instead, appellants argue that the trial court should have intuited that Mrs. Wilder's failure to intervene and object illustrated that she "constructively assented" to the inappropriate transactions and disbursements. This we decline to do, given the "presumption of invalidity" set out in *Owens*.

Finally, appellants assign error to the Commissioner's reliance "upon . . . *ex parte* communications and documents submitted after the hearing" and her rejection of "Appellant Liberty Mutual's suretyship defenses, specifically by impairing the opportunity for full discovery based on the *ex parte* evidence." Specifically, appellants

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point to an email from Brian sent after the September 29, 2021 hearing wherein Brian purportedly claimed that he was Mrs. Wilder’s power of attorney, and represented that he objected to Minor’s mismanagement of Mr. Wilder’s estate on behalf of Mrs. Wilder. Appellants argue that they were not allowed an opportunity to respond to the email before the Commissioner filed her report. Appellants argue that they would have had certain “suretyship defenses” available to them, “including laches,” and that they were “precluded . . . from engaging in discovery, including issuing third-party subpoenas and/or conducting third-party depositions to gather the facts necessary to develop [their] defenses.” Because the trial court did not conduct its own evidentiary hearing, appellants contend that they were denied “the legal tools to put on a defense.”

This argument yet again misunderstands the proper roles and duties of the actors in this case. Mrs. Wilder was not required to object to Minor’s conduct; Minor was required *by the Code of Virginia* to fulfil her fiduciary duties. *See* Code §§ 64.2-1305 and - 2021. The Commissioner was required to ensure the prompt and proper administration and distribution of Mr. Wilder’s estate, and report to the trial court her factual findings, legal conclusions, and her recommendations. In that regard, Minor had ample opportunity to present evidence of her suretyship defenses—assent, ratification, laches, etc.—at the multiple hearings that the Commissioner held throughout 2020 and 2021. Minor failed to offer any evidence of such defenses before the Commissioner. And further, Minor failed to explain her actions by providing a proper second and final accounting to the

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Commissioner. Based on the evidence actually presented to the Commissioner during the several hearings she conducted, there was sufficient evidence to support the trial court's ruling below that Minor failed to fulfil her fiduciary duties and to properly account for the assets of Mr. Wilder's estate. Further, to the extent that the appellants argue that they were not given an opportunity to conduct discovery regarding Brian's email specifically, the report filed by the Commissioner makes clear that the Commissioner did not rely on Brian's email in coming to the conclusions she did in her report. Concerning the email, the Commissioner noted in her report that "it is not necessary for [Mrs.] Wilder to object" to Minor's misuse of the funds under her control. We think it is clear that the email was not a pivotal piece of evidence relied upon by the Commissioner or the trial court. Therefore, no evidentiary hearing or discovery process was required in order to develop a factual record concerning this email.

**CONCLUSION**

The only connection to Code § 64.2-1209 in the proceedings below was that the Commissioner initially held three investigatory hearings based on complaints by Eric and Cynthia about the amount of money detailed in the initial and amended inventories as transferred to Mrs. Wilder upon Mr. Wilder's death. It was those complaints which led to the discovery of the hidden account and other questionable disbursements by Minor. Nevertheless, the Commissioner did not file a report based on these hearings. Every action she took after those hearings was independent of Eric and Cynthia's

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complaints. Instead, she acted pursuant to her statutory duties to determine the propriety of the second and final accounting filed by Minor, relying on her own statutory authority to subpoena “any person” and bank records pursuant to Code § 64.2-1203, demand a proper accounting pursuant to Code § 64.2-1216, and seek Minor’s removal and forfeiture of her bond when such accounting was not provided pursuant to Code § 64.2-1204. Further, the Commissioner’s neutrality cannot fairly be called into question here, based on the statements taken out of context during the investigatory hearings. The record demonstrates that she acted appropriately, pursuant to her statutory duties, in filing her report and offering her recommendations to the trial court. Additionally, the contention that the Commissioner took on “dual roles” in performing her duties is belied by the statutory scheme contained in Code §§ 64.2-1200 et seq. and 64.2-1300 et seq. Finally, none of the evidentiary issues that appellants raise are meritorious. The trial court therefore did not err in confirming the Commissioner’s report and entering a final order forfeiting Minor’s bond.

*Affirmed.*

**APPENDIX C — OPINION OF THE CIRCUIT  
COURT OF FAIRFAX COUNTY, VIRGINIA,  
DATED APRIL 11, 2022**

CIRCUIT COURT OF FAIRFAX COUNTY,  
VIRGINIA

Case Nos. CL-2021-11578 & FI-2018-1980

IN RE ESTATE OF ERIC WITT WILDER

April 11, 2022, Decided

**Opinion**

Robert J. Smith, Judge

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.

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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 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 -4200"). Through subpoenas, the Commissioner discovered \$574,539.45 in unexplained transactions from Account -4200. 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

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1. "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.

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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

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-4200, 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.

**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, 59 S.E. 476 (1907).

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2. "*Inter Partes*" means between the parties. *Inter Partes*, Merriam-Webster Dictionary.

*Appendix C***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.

*Appendix C***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, 805 S.E.2d 768 (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, 60 S.E. 775 (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, 22 S.E. 458 (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, 103 S.E. 599 (1920); *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 159, 63 S.E. 751 (1909); *Fayette Land Co. v. Louisville & N.R. Co.*, 93 Va. 274, 284, 24 S.E. 1016 (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

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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, 805 S.E.2d 768 (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, 106 S.E.2d 133 (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, 318 S.E.2d 292 (1984) (citations omitted).

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**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>

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3. 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

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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, 552 S.E.2d 67 (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

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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.*

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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*, 264 Va. 27, 34, 563 S.E.2d 727 (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, 509 S.E.2d 302 (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 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.

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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

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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.

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.

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Sincerely,

/s/ Robert J. Smith  
Robert J. Smith, Judge  
Fairfax County Circuit Court

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**APPENDIX D — DENIAL OF REHEARING  
OF THE SUPREME COURT OF VIRGINIA,  
DATED MAY 20, 2024**

**VIRGINIA:**

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 20th day of May, 2024.

Record No. 230811  
Court of Appeals No. 0980-22-4

KISHNA MINOR, *et al.*,

*Appellants,*

v.

ANNE M. HEISHMAN,  
COMMISSIONER OF ACCOUNTS,

*Appellee.*

**UPON A PETITION FOR REHEARING**

On consideration of the petition of the appellants to set aside the judgment rendered herein on April 12, 2024, and grant a rehearing thereof, the prayer of the said petition is denied.

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A Copy,

Teste:

Muriel-Theresa Pitney, Clerk

By: /s/  
Deputy Clerk

## APPENDIX E — RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

### U.S.C.A. Const. Amend. XIV

#### AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be

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reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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**VA Code Ann. § 64.2-1200**  
Formerly cited as VA ST § 26-8

§ 64.2-1200. Commissioners of accounts

Effective: October 1, 2012

A. The judges of each circuit court shall appoint as many commissioners of accounts as may be necessary to carry out the duties of that office. The commissioner of accounts shall have general supervision of all fiduciaries admitted to qualify in the court or before the clerk of the circuit court and shall make all ex parte settlements of the fiduciaries' accounts. The person appointed as a commissioner of accounts shall be a discreet and competent attorney-at-law and shall be removable at the pleasure of the court.

B. In the event more than one commissioner of accounts is appointed, each commissioner of accounts shall maintain his own office and keep his own books, records, and accounts. Each commissioner of accounts shall retain the power of supervision over every account, matter, or thing referred to him until a final account is approved for such account, matter, or thing, unless he resigns, retires, or is removed from office, in which case his successor shall continue such duties.

C. For any given service performed, each commissioner of accounts shall have the authority to establish a lesser fee than that prescribed by the court or to waive one or more fees.

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**VA Code Ann. § 64.2-1203**  
Formerly cited as VA ST § 26-8.1

§ 64.2-1203. Subpoena powers of commissioners of accounts, assistants, and deputies; penalty

Effective: October 1, 2012

Commissioners of accounts, assistant commissioners of accounts, and deputy commissioners of accounts shall have the power to issue subpoenas to require any person to appear before them and to issue subpoenas duces tecum to require the production of any documents or papers before them. Commissioners of accounts, assistants, and deputies shall not have the power to punish any person for contempt for failure to appear or to produce documents or papers, but may certify the fact of such nonappearance or failure to produce to the circuit court, which may impose penalties for civil contempt as if the court had issued the subpoena. Commissioners of accounts, assistants, and deputies may certify to the circuit court the fact of a fiduciary's failure to inform the clerk or commissioners of his nonresident status and new address pursuant to § 64.2-1409. The court, upon a finding of a violation of § 64.2-1409, may impose a \$50 civil penalty. Such penalties shall be paid to the state treasurer for deposit into the general fund.

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**VA Code Ann. § 64.2-1204**  
Formerly cited as VA ST § 26-2

§ 64.2-1204. Commissioners of accounts to examine  
and report on bonds and whether fiduciaries should be  
removed

Effective: October 1, 2012

A. When any fiduciary, other than a sheriff or other officer, who is required to file an inventory or an account with the commissioner of accounts has made such a filing, the commissioner of accounts shall examine whether the fiduciary has given bond as the law requires and whether the penalty and surety stated in the bond are sufficient. At any time before a required filing is made by a fiduciary with the commissioner of accounts, upon the application of any interested person or the next friend of an interested infant, and after reasonable notice to the fiduciary, the commissioner of accounts for the circuit court wherein the fiduciary qualified shall investigate (i) the bond given and inquire whether security ought to be required of a fiduciary who may have been allowed to qualify without giving it and (ii) whether it is improper to permit the estate of the decedent, ward, or other person to remain under the fiduciary's control due to the incapacity or misconduct of the fiduciary, the removal of the fiduciary from the Commonwealth, or for any other cause. The commissioner of accounts shall report the result of every examination and inquiry to the court and to the clerk of court.

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B. When any fiduciary of an estate has given a bond to the court and then absconds with or improperly disburses any or all of the assets of the estate, the commissioner of accounts may petition the court in which the order was made conferring his authority on the fiduciary and ask the court to order that such bond be forfeited.

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**VA Code Ann. § 64.2-1206**  
Formerly cited as VA ST § 26-17.3

§ 64.2-1206. Settlement of fiduciaries' accounts

Effective: October 1, 2012

Every fiduciary referred to in this part shall account before the commissioner of accounts of the jurisdiction wherein he qualified as provided in this part. Every account shall be signed by all fiduciaries. A statement in a separate document, signed by the fiduciary and attached to an account, that a fiduciary has received, read, and agrees with the account shall be treated as a signature to the account.

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**VA Code Ann. § 64.2-1209**  
Formerly cited as VA ST § 26-29

§ 64.2-1209. Who may insist or object before  
commissioner of accounts

Effective: October 1, 2012

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.

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**VA Code Ann. § 64.2-1210**  
Formerly cited as VA ST § 26-31

§ 64.2-1210. Accounts and debts and demands to be  
reported

Effective: October 1, 2012

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.

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**VA Code Ann. § 64.2-1213**  
Formerly cited as VA ST § 26-34

§ 64.2-1213. Effect of confirmation of report

Effective: October 1, 2012

The report, to the extent to which it is confirmed by an order of the circuit court upon exceptions filed pursuant to subsection B of § 64.2-1212 or in whole when confirmed by lapse of time without exceptions pursuant to subsection A of § 64.2-1212, shall be taken to be correct, except so far as it may, in a suit, in proper time, be surcharged or falsified. However, no person who was a party to exceptions filed to the report shall bring a suit to surcharge or falsify the report, and in such case the action of the court on the report shall be final as to such party, except that it may be appealed from as in other suits.

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**VA Code Ann. § 64.2-1215**  
Formerly cited as VA ST § 26-13

§ 64.2-1215. Power of commissioner of accounts to  
enforce the filing of inventories

Effective: October 1, 2012

A. If any fiduciary fails to make the return required by § 64.2-1300, the commissioner of accounts shall issue, through the sheriff or other proper officer, a summons to the fiduciary requiring him to make such return. If the fiduciary fails to make the required return within 30 days after the date of service of the summons, the commissioner of accounts shall report the fact to the circuit court. The court shall immediately issue a summons to the fiduciary requiring him to appear and shall, upon his appearance, assess a fine against the fiduciary in an amount not to exceed \$500 unless excused for sufficient reason. If, after his appearance before the court, the fiduciary continues to fail to make the required return within such time as the court may prescribe, the fiduciary shall be punished for contempt of court.

B. Whenever the commissioner of accounts reports to the court that a fiduciary who is an attorney-at-law licensed to practice in the Commonwealth has failed to make the required return within 30 days after the date of service of a summons, the commissioner of accounts shall also mail a copy of his report to the Virginia State Bar.

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**VA Code Ann. § 64.2-1216**  
Formerly cited as VA ST § 26-18

§ 64.2-1216. Failure to account; enforcement

Effective: October 1, 2012

A. If any fiduciary required to account fails to make a complete and proper account within the time allowed, the commissioner of accounts shall either (i) proceed against the fiduciary in accordance with the procedures set forth in § 64.2-1215 or (ii) file with the circuit court and the clerk at such times as the court shall order, but not less than twice a year, a list of all fiduciaries who have failed to make a complete and proper account within the time allowed, excepting those fiduciaries to whom the commissioner of accounts has granted additional time. Upon the filing of this list, the clerk shall issue a summons against each fiduciary on the list, returnable to the first day of the next term of court, and the court shall take action against the fiduciary in accordance with the procedures set forth in § 64.2-1215.

B. Every commissioner of accounts shall file with the court and the clerk at such times as the court shall order, but not less than quarterly, a list of all fiduciaries whose accounts for any reason have been before the commissioner of accounts for more than five months. The commissioner of accounts shall note on the list the fiduciaries who are deemed delinquent.

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C. Whenever the commissioner of accounts reports to the court that a fiduciary who is an attorney-at-law licensed to practice in the Commonwealth has failed to make the required settlement within 30 days after the date of service of a summons, the commissioner of accounts shall also mail a copy of his report to the Virginia State Bar.

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**VA Code Ann. § 64.2-1312**

Formerly cited as VA ST § 26-17.10

§ 64.2-1312. Report to circuit court; death of fiduciary;  
fiduciary for recipient of federal benefits

Effective: October 1, 2012

A. The commissioner of accounts shall state, settle, and report to the circuit court an account of the transactions of a fiduciary, as provided by law. Every fiduciary shall also, at the request of the commissioner of accounts, exhibit (i) the securities held by the fiduciary together with a statement from every bank in which cash is held at the terminal date of the account and (ii) proof that all premiums due upon any required surety bond have been paid.

B. If a personal representative of a decedent's estate, a testamentary trustee, a guardian, a conservator, or a committee dies prior to the filing and settlement of the fiduciary's account, the personal representative of the fiduciary's estate shall have the obligation to make the requisite filing and settlement through the date of death unless any successor fiduciary makes the requisite filing.

C. For fiduciaries acting on behalf of a recipient of social security, supplemental security income, or veteran's or other federal benefits, no accounting to the commissioner of accounts shall be required of benefits paid to a designated representative on behalf of the recipient if the representative is otherwise required to account for

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such benefits. However, any fiduciary otherwise required to make an accounting to the commissioner of accounts shall disclose in the account the total amount of such benefits received during the accounting period for which no incremental fee for such benefits shall be charged by the commissioner of accounts.

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**VA Code Ann. § 64.2-2021**

Formerly cited as VA ST § 37.1-137.3; VA ST § 37.2-1022

§ 64.2-2021. General duties and liabilities of conservator

Effective: October 1, 2012

A. At all times the conservator shall exercise reasonable care, diligence, and prudence and shall act in the best interest of the incapacitated person. To the extent known to him, a conservator shall consider the expressed desires and personal values of the incapacitated person.

B. Subject to any conditions or limitations set forth in the conservatorship order, the conservator shall take care of and preserve the estate of the incapacitated person and manage it to the best advantage. The conservator shall apply the income from the estate, or so much as may be necessary, to the payment of the debts of the incapacitated person, including payment of reasonable compensation to himself and to any guardian appointed, and to the maintenance of the person and of his legal dependents, if any, and, to the extent that the income is not sufficient, he shall so apply the corpus of the estate.

C. A conservator shall, to the extent feasible, encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage the estate and his financial affairs. A conservator also shall consider the size of the estate, the probable duration of the conservatorship, the incapacitated person's accustomed manner of living, other resources known to

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the conservator to be available, and the recommendations of the guardian.

D. A conservator stands in a fiduciary relationship to the incapacitated person for whom he was appointed conservator and may be held personally liable for a breach of any fiduciary duty. Unless otherwise provided in the contract, a conservator is personally liable on a contract entered into in a fiduciary capacity in the course of administration of the estate, unless he reveals the representative capacity and identifies the estate in the contract. Claims based upon contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, or torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor. A successor conservator is not personally liable for the contracts or actions of a predecessor.

E. A conservator shall comply with and be subject to the requirements imposed upon fiduciaries generally under Part A (§ 64.2-1200 et seq.) of this subtitle, specifically including the duty to account set forth in § 64.2-1305.

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**VA Code Ann. § 2.2-4024.1**

**§ 2.2-4024.1. Disqualification**

Effective: July 1, 2015

A. An individual who has served as investigator, prosecutor, or advocate at any stage in a contested case or who is subject to the authority, direction, or discretion of an individual who has served as investigator, prosecutor, or advocate at any stage in a contested case may not serve as the presiding officer or hearing officer in the same case. An agency head who has participated in a determination of probable cause or other preliminary determination in an adjudication may serve as the presiding officer in the adjudication unless a party demonstrates grounds for disqualification under subsection B.

B. A presiding officer or hearing officer is subject to disqualification for any factor that would cause a reasonable person to question the impartiality of the presiding officer or hearing officer, which may include bias, prejudice, financial interest, or ex parte communications; however, the fact that a hearing officer is employed by an agency as a hearing officer, without more, is not grounds for disqualification. The presiding officer or hearing officer, after making a reasonable inquiry, shall disclose to the parties all known facts related to grounds for disqualification that are material to the impartiality of the presiding officer or hearing officer in the proceeding. The presiding officer or hearing officer may self-disqualify and withdraw from any case for reasons listed in this subsection.

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C. A party may petition for the disqualification of the presiding officer or hearing officer promptly after notice that the person will preside or, if later, promptly on discovering facts establishing a ground for disqualification. The petition must state with particularity the ground on which it is claimed that a fair and impartial hearing cannot be accorded or the applicable rules of ethics that require disqualification. The petition may be denied if the party fails to promptly request disqualification after discovering a ground for disqualification.

D. A presiding officer not appointed pursuant to the provisions of § 2.2-4024, whose disqualification is requested shall decide whether to grant the petition and state in a record the facts and reasons for the decision. The decision to deny disqualification by a hearing officer appointed pursuant to § 2.2-4024 shall be reviewable according to the procedure set forth in subsection C of § 2.2-4024. In all other circumstances, the presiding officer's or hearing officer's decision to deny disqualification is subject to judicial review in accordance with this chapter, but is not otherwise subject to interlocutory review.

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**APPENDIX F — OPINION OF THE NINETEENTH  
JUDICIAL CIRCUIT OF VIRGINIA,  
DATED APRIL 11, 2022**

NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4009  
703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

COUNTY OF FAIRFAX

CITY OF FAIRFAX

April 11, 2022

Anne Heishman  
OFFICE OF THE COMMISSIONER OF ACCOUNTS  
4084 University Drive, Suite 102  
Fairfax, Virginia 22030

Joseph W. Stuart  
JOSEPH W. STUART, PLC  
Old Town Village  
10427 North Street, Suite 200  
Fairfax, Virginia 22030-2568

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-

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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 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,

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1. “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.

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(“Account-4200”). Through subpoenas, the Commissioner discovered \$574,539.45 in unexplained transactions from Account-4200. 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

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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 -4200, 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.

**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.

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2. "*Inter Partes*" means between the parties. *Inter Partes*, Merriam-Webster Dictionary.

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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

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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 (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

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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

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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

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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

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3. 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.*

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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 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.

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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

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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.

The Commissioner is directed to draft an order and submit it to the Court after circulating it with opposing counsel.

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

Sincerely,

/s/ \_\_\_\_\_  
Robert J. Smith, Judge  
Fairfax County Circuit Court

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**APPENDIX G — TRANSCRIPT TO THE  
PROCEEDING IN THE CIRCUIT COURT OF  
FAIRFAX COUNTY, DATED DECEMBER 1, 2020**

[1]VIRGINIA

Fiduciary Number:  
FI-2018-0001980

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

IN RE:

ESTATE OF ERIC WILDER,

Incapacitated Adult.

Tuesday, December 1, 2020  
Videoconference

The above-entitled matter came on to be heard before THE HONORABLE ANNE M. HEISHMAN, COMMISSIONER IN CHANCERY, COMMISSIONER OF ACCOUNTS, for the Circuit Court of Fairfax County, Office of the Commissioner of Accounts, 4084 University Drive, Suite 102, Fairfax, Virginia, via Zoom Videoconference, commencing at approximately 1:00 o'clock p.m., when there were present on behalf of the respective parties:

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[3]PROCEEDINGS

THE COMMISSIONER: Good afternoon. Ms. Cucinelli, can you hear me?

THE COMMISSIONER: Yes.

Ms. Minor, can you hear me?

MS. MINOR: Yes.

THE COMMISSIONER: Hi. Also, the black conference indicates Mackenzie Payne, one of our staff attorneys, is in the conference room.

MS. CUCINELLI: Okay.

THE COMMISSIONER: Ms. Cucinelli, are we expecting your client?

MS. CUCINELLI: Yes. I'm sorry, she stepped out for just a moment. She'll be back in just one minute.

THE COMMISSIONER: Okay, no problem.

MS. CUCINELLI: She's in the ladies room. So Cynthia Bowers is our client, and she'll be joining us very shortly.

I'm also, I'm sorry, we have one laptop.

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[4]THE COMMISSIONER: No, no problem, not a problem.

MS. CUCINELLI: Okay. Also present is Rodney Wilder, who is one of the three adult children of the late Eric Wilder.

THE COMMISSIONER: Okay, great. We'll wait for Cynthia – is it Bowers or Bowser?

MS. CUCINELLI: Bowers.

THE COMMISSIONER: We'll wait for her to come back. And then I have kind of a preliminary matter that I wanted to take up before we get into the case.

MS. CUCINELLI: Absolutely. Apologies for the late delivery of –

THE COMMISSIONER: No, no, that's okay. And I'm sorry we didn't get the Zoom invite to you. I don't think we realized that you were involved to this extent.

But we got your exhibit binder, and have been able to, I think, get up to speed on some of the issues.

MS. CUCINELLI: Great.

[5]THE COMMISSIONER: I'm just going to look something up while we're waiting for Cynthia.

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MS. CUCINELLI: And if you don't mind, I don't know how this is going to affect my speech with a mask.

THE COMMISSIONER: Oh, no, no, go ahead and put it on.

MS. CUCINELLI: Okay.

THE COMMISSIONER: Absolutely. Whatever you are comfortable with, I am. Mackenzie and I are able to keep a pretty good distance, but –

MS. CUCINELLI: Okay.

THE COMMISSIONER: – better to be safe than sorry.

MS. CUCINELLI: Okay, so Ms. Bowers just walked back in. Ms. Bowers is right here.

THE COMMISSIONER: Good afternoon, Ms. Bowers. I'm Anne Heishman, I'm the Commissioner of Accounts for the Fairfax County Circuit Court.

MS. BOWERS: How are you?

THE COMMISSIONER: I'm good. How are [6]you doing?

MS. BOWERS: Just fine, thank you.

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THE COMMISSIONER: Good. And we are here on the Estate of Eric Witt Wilder. This is actually pertaining to the Conservatorship. And I know that there is a separate matter with his Estate. But this is pertaining to the Conservatorship.

This is what we call a 1209 Hearing, which is when somebody asks us to have a hearing because they have objections to the administration of either an estate or a conservatorship.

And it was Eric Rodney Wilder who brought this to our attention, and has asked for a hearing under Virginia Code 64.2-1209, with some complaints and objections about Ms. Minor's fulfillment of her conservatorship duties.

MS. BRAMBLE: Right.

THE COMMISSIONER: And Ms. Minor, do you understand what we're doing here?

MS. MINOR: Yes.

[7]THE COMMISSIONER: Okay. So I just wanted to raise this as a preliminary issue, Ms. Cucinelli, and get both of your thoughts.

I can see that Ms. Minor, as Conservator, was under a bond with Liberty Mutual, a surety bond.

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And so Ms. Minor, I got a packet of bank statements from Ms. Cucinelli today. And there is a stack of bank statements from Burke & Herbert, identifying you as Conservator, but those were never provided to our office.

And so I am concerned about that, and I'm concerned about what we saw in the bank statements. And we don't have the bonding company here.

And Ms. Cucinelli, we give them written notice, and then typically what we do is we email the Zoom invite to one of the representatives. She is actually out of the office.

I am a little concerned about going forward without having the bonding company present, and I'll tell you why.

[8]We had a hearing – well, it was before my time, but in December, where there was a hearing. The bonding company – the Notice basically kind of got crossed in the mail.

We wrote a report recommending a bond forfeiture, and then they had exceptions, saying that they didn't get Notice. So then we had to have a second hearing.

And so based on what I see in the bank accounts that were provided, I am concerned that that's the direction that we're headed. And I don't want to have a hearing without the bonding company here.

Do you follow?

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MS. CUCINELLI: I understand.

THE COMMISSIONER: And Ms. Minor, I don't know if you understand this. But I'm seeing a whole separate bank account that this office was not aware of at Burke & Herbert.

Are you familiar with that bank account?

MS. MINOR: So there was –there was a bank account for the Conservatorship, and there [9]was a bank account for the Guardianship.

And so they're two separate bank accounts. The bank account for the Guardianship is reported to the state, and the bank account for the Conservatorship is reported to the Commissioner's Office.

THE COMMISSIONER: No. Anything related to the finances of the ward is reported to my office; the state doesn't have anything to do with the finances.

And so I'm just going to tell you that Ms. Cucinelli has provided us with a whole stack of bank statements from Burke & Herbert, showing a lot of transfers out to you, personally –

MS. MINOR: Uh–huh.

THE COMMISSIONER – and expenses that I don't– maybe there is some justification for it, but that's what the purpose of this hearing is.

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MS. MINOR: Right.

THE COMMISSIONER: But the reason that I'm reluctant to go forward without the bonding company here, is based on the documents I've [10]seen, it's possible that this office would recommend a bond forfeiture against you, and they need to have Notice, so that they can participate in the hearing.

MS. MINOR: Right. And what is bond forfeiture?

THE COMMISSIONER: It means that if we find that you spent money on yourself, as opposed to Mr. Wilder, or you misused the funds in any way, you're going to have to pay that money back to the Estate –

MS. MINOR: Uh–huh.

THE COMMISSIONER: – his Estate. And the way that we do that is we recommend a bond forfeiture, so that the bonding company actually pays that amount. And then they would turn around and pursue action against –

MS. MINOR: I'd have to pay them.

THE COMMISSIONER: Right. And so I don't want to have a hearing and write a report recommending a bond forfeiture and I'm not saying that I'm doing that. I mean, this is just [11]based on the bank statements that I've just seen today for the first time.

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And Ms. Minor, obviously, you'll have a full opportunity to explain what went on with the finances.

But what I'd like to do is continue this to a date where everybody can be available, including the bonding company. Ms. Cucinelli, I hate to continue it, and I know that –

MS. CUCINELLI: No, my clients don't have a problem with it.

THE COMMISSIONER: I'm afraid if we go forward, and then it's really going to be a setback if we have to then come back again, is my thought.

MS. CUCINELLI: Understood.

THE COMMISSIONER: Okay. So Ms. Minor, do you have any objection to continuing this to a later date?

MS. MINOR: I'd like to get it over with. If it's just going to make it double work, [12]then I guess we'll need to just wait.

THE COMMISSIONER: Okay. Well, what I am going to do is, I need to reach out to our representative at the bonding company, and find out what date she has available.

And then we will reach out to all of you, with several different dates. And we will certainly try to fit it in as soon as we can.

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And Ms. Cucinelli, how much time do you think that you will need for your presentation, just ballpark?

MS. CUCINELLI: Well, and I will tell you that we were going to walk, basically – I mean, I don't know that we need more than an hour –

THE COMMISSIONER: Okay.

MS. CUCINELLI – to walk through everything.

That being said, and perhaps with additional time, we'll have a better number for you. But we are going to walk through this.

We don't have a full accounting–

[13] THE COMMISSIONER: Right.

MS. CUCINELLI: – so much. I mean, frankly, the spreadsheet that was presented to you was prepared by Ms. Bowers, who is an accountant, so it's a long way to where we need to go.

I don't know that we're going to come out and say, and this is how much, you know, we believe is owed back to the Estate.

THE COMMISSIONER: Right.

MS. CUCINELLI: But we're close.

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THE COMMISSIONER: Okay, that's helpful, because I do want to try to slot it in, so that we can get it heard sooner, rather than later.

What I also would ask is that you provide a copy of your exhibits to Ms. Minor.

MS. CUCINELLI: Sure. And we did provide a link this morning, but we are certainly can –

THE COMMISSIONER: Okay, you did, okay.

MS. CUCINELLI – mail it to her.

THE COMMISSIONER: Ms. Minor, did you [14]get the email, the link that Ms. Cucinelli emailed you with the exhibits?

MS. MINOR: I got it maybe a couple of minutes before the meeting started, so I haven't had a chance to –

THE COMMISSIONER: But you did get it.

MS. MINOR:– actually look at it. I got it from Mackenzie, actually, Mackenzie Payne sent it. She forwarded it to me.

THE COMMISSIONER: Did you forward it to her?

MS. CUCINELLI: Ms. Minor, I sent an email this morning. Can you confirm what your email address is?

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MS. MINOR: Sure, just a minute. Yeah, my email is Kminor256@outlook.Com. And I received a email at 12:18 p.m. from Mackenzie Payne, Esquire.

THE COMMISSIONER: Yes. Her's was just a reply all, that we got the email link. So my question is, do you have the link from Ms. Cucinelli with the exhibits?

[15]MS. MINOR: Okay, yeah. Now that I open, yeah, open up the entire thread, yes, it is. And it came in at 9:05 this morning.

THE COMMISSIONER: Okay. So those are exhibits that she was planning to present at the hearing.

If you have any trouble opening them, you need to let her office know. You don't have to do it right now, I'm just telling you.

MS. MINOR: Okay.

THE COMMISSIONER: And Ms. Cucinelli, are there any dates that you know you're not available, since we are coming up on the winter break?

MS. CUCINELLI: Regrettably, Your Honor, I've got [unintelligible] December. The only dates that – next Monday and Tuesday I'm in trial.

Other than that, I have a hearing on the 16th, and I'm happy to send this to you in advance. But no, otherwise, I'm available. And I believe my clients can make themselves [16]available, as well.

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MS. BOWERS: Oh, yes.

THE COMMISSIONER: Okay.

And Ms. Minor, are there any dates that you know are not going to be good for you?

MS. MINOR: No, I'm available.

THE COMMISSIONER: Okay. Then I would say we will plan for between an hour and two. Okay, great.

Well, we will work on this this afternoon. It's really just a matter of hearing back from the bonding company. And let me look at my calendar here.

We are pretty booked, actually, through January, but we can slot it in somewhere.

MS. CUCINELLI: Great.

THE COMMISSIONER: So we'll do that. Okay? So we will be in touch with a new date, and then we'll get the Zoom link out probably about a week ahead of time.

And if there are additional exhibits, you know, please send those to us.

[17]And Ms. Minor, if you have any exhibits, then you can certainly send those to us, as well. Okay?

MS. MINOR: Okay.

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THE COMMISSIONER: Great. Thank you so much. I'm sorry about the continuance, but I think this is the best solution.

MS. CUCINELLI: That's fair. No, not at all, thank you.

THE COMMISSIONER: Okay, thanks.

(Whereupon, the Hearing in the above-entitled matter was concluded.)

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**APPENDIX H — TRANSCRIPT TO THE  
PROCEEDING IN THE CIRCUIT COURT OF  
FAIRFAX COUNTY, DATED FEBRUARY 3, 2021**

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Fiduciary Number:  
FI-2018-0001980

IN RE:

ESTATE OF ERIC WILDER, Incapacitated Adult.

Wednesday, February 3, 2021  
Videoconference

The above-entitled matter came on to be heard before THE HONORABLE ANNE M. HEISHMAN, COMMISSIONER OF ACCOUNTS, for the Circuit Court of Fairfax County, Office of the Commissioner of Accounts, 4084 University Drive, Suite 102, Fairfax, Virginia, via Zoom Videoconference, commencing at approximately 10:00 o'clock a.m., when there were present on behalf of the respective parties:

\* \* \*

[65]Ms. Walker, can you raise your right hand, please?

Whereupon,

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CYNTHIA WALKER

a witness, was called for examination by Counsel on behalf of Kishna Minor, and, after having been duly sworn by Commissioner Heishman, was examined and testified as follows:

THE COMMISSIONER: Mr. Stuart, go ahead.

EXAMINATION ON BEHALF  
OF KISHNA MINOR

BY MR. STUART:

Q Ms. Walker, looking at the check with your name on it, that's on the screen right now, that represents a hundred thousand dollars that you received from Kishna Minor; correct?

A Yes.

Q Okay. You have never disclosed this to the Commissioner, have you, through your accounts or otherwise?

A I told my –

Q Now –

MS. CUCINELLI: Objection, Ms. Heishman. [66]I don't understand what the – I mean, Ms. Walker is not before your office. This is about the accounts of Kishna Minor.

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THE COMMISSIONER: Well, Mr. –

MS. CUCINELLI: This goes to his argument about unclean hands, right, which takes us back to the issue of standing, which you've already decided, which is that your office is looking into the accounts of Kishna Minor.

THE COMMISSIONER: I'm going to let Mr. Stuart go ahead and ask questions of Ms. Walker.

MR. STUART: Thank you.

THE COMMISSIONER: So Mr. Stuart, you are cutting out a little bit, so I heard her say that, yes, she got this hundred thousand dollars from Kishna Minor. So what was the next question?

BY MR. STUART:

Q Ms. Walker, my next question is, you did not disclose this yourself, or through your Counsel, to the Commissioner's Office, this payment; did you?

[67]A I – when we first went to talk to Ms. Cucinelli, we told her about these checks. But I did not provide copies of them, no.

Q Okay. So neither you nor Ms. Cucinelli informed the Commissioner that you received this payment?

A I cannot speak for Ms. Cucinelli. I can only tell you that I did – I did inform my Counsel about these checks.

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Q All right. Now your brother is Eric Rodney Wilder; correct?

A Yes.

Q And on the same date, October 30th, 2018, he received a hundred thousand dollars from Kishna Minor –

A Yes.

Q – correct?

MS. CUCINELLI: Objection. This is about Eric Wilder, it's not about Cynthia Bowers. Why is he asking her questions, when Mr. Wilder is available?

MR. STUART: If she knows

[68][unintelligible.]

THE COMMISSIONER: If she knows, she can answer. If she doesn't know, then she doesn't know.

MR. STUART: She's answered that he did.

BY MR. STUART:

Q Your attorney, Ms. Cucinelli, submitted to the Commissioner a number of statements for accounts that we were just discussing, within the last ten minutes, from a variety of other banks.

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And they were United Bank, Navy Federal Credit Union, BB&T; is that correct?

A Yes.

Q Okay. Now your father, Eric Witt Wilder, and your mother, Thelma Wilder, had joint accounts; is that correct?

A Yes.

Q And they had joint accounts at these institutions?

A Correct, yes.

Q And you were involved with Kishna when she was appointed as Conservator and Guardian for [69]your father. You went with her to one or more of these banks to set up various accounts; correct?

A Clarify set up.

Q Well, you were there when she established accounts, after becoming appointed Guardian and Conservator.

A I was there when she established the account at – after the conservatorship was awarded, I went with her to BB&T.

At BB&T Kishna produced the documents from the Court. And they said that they could not establish the account at that time, because they needed to work with their legal department.

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From there, we went to Burke & Herbert. And Burke & Herbert looked at the documents, and opened up the conservator accounts for her.

That happened, I believe it was the day of the – when she was awarded, on October 12th.

Q All right. So Kishna opened up accounts using funds from the joint accounts that your father and mother had together at BB&T Bank; right?

[70]A Hold on just a moment. There were no funds that were – there were no funds to – I was not with her when the funds were removed from the accounts.

Q Okay.

A I was with her when the account was established at Burke & Herbert, Mr. Stuart.

Q Uh- huh.

A But I was not with her when she went to the banks to withdraw money. So I don't know how much money was taken from the accounts.

Q Well, okay. I'm not asking you about how much money was taken or removed from these existing accounts. I'm saying Kishna withdrew money from joint accounts that your father and mother had; correct?

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A According to the statements, but I wasn't there with her.

Q Right.

A I don't know what you're trying to get me to say to you, Mr. Stuart.

Q I'm not trying to get you to say [71]anything, I'm just trying to get you to acknowledge that, what you've attempted to get in through your Counsel, that there were joint accounts that mother and father had at several banks and a credit union; [unintelligible] United Bank and Navy Federal Credit Union.

And from those accounts were transferred funds by Kishna Minor to other accounts, right, after she became Guardian and Conservator?

A Yes, from those bank accounts. Yes.

Q All right. Would you bear with me a second?

A Sure.

Q And Kishna transferred fifty percent of those funds into the Conservator Account; right?

A No, that's not correct.

Q Okay, what's wrong with that?

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A Because when you look at – when you look at the source – when you look –

MS. CUCINELLI: I' m sorry to interrupt.

THE COMMISSIONER: Wait a minute. Ms. Walker has said that she doesn't have any idea [72]how much money was taken from the joint accounts.

I don't know how she's going to have the knowledge to say what was put into this Conservator Account that was reported to the Commissioner's Office, versus what was put into Account 4200, that was not reported to the Office.

MR. STUART: Okay.

BY MR. STUART:

Q So let me – take a look at the exhibits that were admitted into evidence, Ms. Walker, to Exhibit Number 1, account number one, that is an account ending in 4197.

A Okay.

Q Okay. And the first pages shows two deposits, for example, that were March deposits made into that account; do you see it?

THE COMMISSIONER: What exhibit are you on, Mr. Stuart? If you can't share screen –

MR. STUART: [Unintelligible.]

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THE COMMISSIONER: Go ahead.

MR. STUART: Their Exhibit Number 1, [73]which are bank statements from Burke & Herbert for the account ending in 4197.

THE COMMISSIONER: Right. Let me open those up, so that we can look at those. Okay, here we are.

MS. CUCINELLI: I'm sorry, is this the Commissioner's Exhibit 1?

THE COMMISSIONER: Yes.

MS. CUCINELLI: Okay.

MR. STUART: No, it's your Exhibit Number 1, Ms. Cucinelli; you offered it.

MS. CUCINELLI: No, my Exhibit Number 1 is the account ending in 4200, Mr. Stuart.

THE COMMISSIONER: Exhibit 1 is the 419 – I'm sorry, wait. Sorry, this is Exhibit 2. 4197 is Exhibit 2.

MR. STUART: Okay. And those are the documents that were produced, by virtue of the subpoena, which Ms. Cucinelli offered into evidence.

THE COMMISSIONER: Correct.

BY MR. STUART:

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[74]Q Look at Exhibit Number 2, Account Number 4197 bank statements. Do you see that, Ms. Walker?

A Yes, I see that; I'm sorry. Yes, I do.

Q And these were deposits that were made from joint – this [unintelligible] deposits from joint accounts that your father and mother had; right?

MS. CUCINELLI: I'm sorry, I'm objecting again. Ms. Kishna Minor had control of this, my client did not. Why are you –

THE COMMISSIONER: Well, just a second, just a second. If Ms. Walker knows – Mr. Stuart, I'm looking at the October 15th deposit of 65,915.52.

MR. STUART: Right.

THE COMMISSIONER: Then we have an October 23rd deposit of 231,409.50. So if Ms. Walker knows where those came from, and then there's another deposit of 70,704.04. That's all in October of 2018.

I don't know if she knows the – I don't [75]know how she would know, but –

MR. STUART: Well, I'm asking her. I'm saying those are deposits that were made by Kishna from joint accounts of your mother and father.

BY MR. STUART:

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Q Those are deposits, and you were with her when she went there.

A No, I was not. I was not with her when she made these deposits.

Q Okay. Those are deposits –

A I'm telling you I was not with her when she went and withdrew this money from Navy Federal, from United Bank or from BB&T.

I was with her when she went and established the account at BB&T, opening up the account. That's all I was with her, that's all I was with Kishna for.

This mess that she has done, with moving the money from one bank account to the other, that was all on her, and I was not with her.

And I had no information, or was not [76]privity to the fact that she was sitting up here taking all of their money, and opening up two separate accounts.

I take that back, I take that back. Kishna did tell me that she opened up two accounts. She said she opened up one for my father, and the other one was for my mother.

And that money in that second account for my mother, was supposed to be given to my mother when my father passed away.

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That's what – that's what Kishna told me. But as far as –

Q So –

A No, I was not with her.

Q Okay, okay. So you weren't with her, that's your testimony. But she did fund those accounts from other joint accounts that your mother and father had; right?

A Yes.

Q That's what you knew?

MS. CUCINELLI: She said she can't know.

THE WITNESS: No, I mean, I –

[77]BY MR. STUART:

Q The next question, ma'am.

THE COMMISSIONER: Go ahead, Mr. Stuart, what's the next question?

BY MR. STUART:

Q The next question, ma'am.

A Okay.

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Q The next question is this. In your – there was a response that was filed by your Counsel just about a week ago.

And in that, she says – did you see that, Ms. Walker?

A Yes.

Q Okay. Now in the response here's what – I'm reading it. It says, "The individuals who have raised concerns and presented extensive documentation of Ms. Minor's theft, may not be interested persons under the statute; however, it cannot be that the Commissioner can turn a blind eye to blatant misappropriation."

"Mr. Wilder and Ms. Bowers," – that is you, that's referring to you, right, Ms. Bowers?

[78]A Yes. Yes, sir, that's me.

Q Okay. – "participated in the guardianship matter before the Court in 2018, and supported their niece's Petition and appointment." Okay?

Then it goes on to say, "Only after, to discover that Ms. Minor had misused her grandparents' money, [unintelligible] alert the last Commissioner's to his concerns" [unintelligible] "and considerably more time for Mr. Wilder and Ms. Bowers" – that is you, Ms. Walker – "to unwind Ms. Minor's scheme, and that of the information provided to the Commissioner's Office."

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Okay. You were fully aware of what was going on in October of 2018; right?

You got the hundred thousand dollars; correct?

A No, I wasn't aware.

Q You weren't aware that you got a hundred thousand dollars?

A No, I was aware that I got a hundred [79]thousand dollars, Mr. Stuart. What I'm –

Q Right. And you –

A – saying is that I was not aware of the source of the money.

Ms. Minor, my niece, told us – my niece told me and my brother that the money that she gave us was from CDs that she cashed, and was not from these two bank accounts.

That's what she told me and my brother.

It wasn't until I got – it wasn't until I got, in December, when Kishna produced copies of the checks that she gave us, that she was now tying it to the 4200 account, and that was the source of the funding.

But up until that time – up until that time, Kishna told me, and told my brother, that she funded those with CDs that were not included in the initial filing of the Conservatorship.

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Q So –

A So I –

Q – who owned the money?

A Pardon?

[80]Q Who owned that money?

A For the CDs?

Q Whatever. Who was –

A Well, if it was CDs and everything, I'm assuming it came from my father's accounts.

Q Okay. And you claim that you received a hundred thousand dollars from your father's accounts [unintelligible] and that there is a bunch of money missing.

[Unintelligible] Complaint that was filed, and the objections filed by your brother, which you joined; right?

Is that there was a bunch of money missing, but there is no accounting for the two hundred thousand that you and he got; right?

A No, because she said it wasn't included in the initial – Kishna said that the –

THE COMMISSIONER: [Unintelligible.]

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THE WITNESS: – two hundred thousand dollars was not included – I’m sorry?

MS. CUCINELLI: No, Ms. Bowers, hold on one second. I have a question. I’m sorry. Mr. [81]Stuart asked the question. I’m sorry, I don’t understand. But it wasn’t including the two hundred thousand?

I don’t understand the question. If you could repeat it.

MR. STUART: Well, your client understood, Ms. Cucinelli, she answered. I mean, I just would object to the kind of talking objections through all of this.

If there’s an objection, then I’ll stop talking and listen.

THE COMMISSIONER: All she said was that she needed you to repeat the question.

MR. STUART: Okay.

BY MR. STUART:

Q The hundred thousand dollars you got, and the hundred thousand your brother got came, you thought, came from your father’s funds. That’s what you said; right?

A Kishna said that she had cashed CDs. That’s all I know. That’s what she said.

Q Okay. So it could have been that Kishna [82]was giving you the money; is that what you thought, from her own –

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A Kishna – no. Kishna was giving us the money, but it wasn't the money that was included from the – it wasn't from the filing.

THE COMMISSIONER: All right. Ms. Walker, this is what I think – this is the question.

THE WITNESS: Okay.

THE COMMISSIONER: Did Kishna have two hundred thousand dollars that she was giving you money from, or was the two hundred thousand dollars from your parents?

THE WITNESS: I don't know. Only thing Kishna said –

THE COMMISSIONER: Well, okay.

THE WITNESS: Only thing Kishna said was that she had – she had cashed some CDs.

THE COMMISSIONER: Of your parents'; is that right?

THE WITNESS: I guess, yes.

THE COMMISSIONER: Well, I mean, did you [83] think that Kishna was giving you a hundred thousand dollars of her own money?

THE WITNESS: No.

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THE COMMISSIONER: Okay. I think we're all agreed that this two hundred thousand dollars – Mr. Stuart, stop me if I'm wrong – but we're all agreed that the two hundred thousand dollars came from Mr. and Mrs. Wilder.

Don't you agree, Mr. Stuart?

MR. STUART: Correct, correct.

THE COMMISSIONER : Okay, yes.

MR. STUART: That's all I was trying to say.

THE COMMISSIONER: I think we all – I think it's pretty obvious what's happening. So let's move on to something else.

BY MR. STUART:

Q Okay. So the hundred thousand dollars, Ms. Walker, came up because – and the Guardianship itself with your grandfather came up because you had a problem with your brother, Brian, getting paid about a hundred thousand [84] dollars from your grandfather's funds; right?

A Because my brother had taken those, yes.

Q Okay. You say he had taken it. But in any case, you say he got the money. And then it was actually that that prompted you to begin the Guardianship Petition; right?

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You hired –

A No, no. That –

Q [Unintelligible]

A – wasn't why I began – that wasn't why I said I was going to do the guardianship.

I was going to do the guardianship because when my father was hospitalized at Holy Cross in September, my mother was not coming up there to, you know, to talk to the doctors, and wasn't an active participant like in my dad's care, while – while she was – while my dad was hospitalized.

Nor, when she – when she did come up there, did she understand really what the doctors were trying to tell her about my father's care.

So I – I said that I was going to go [85]ahead and do – I had told Kishna that I had planned on getting an attorney to file the Conservatorship for my dad.

Q So then you moved forward with that, with the Conservatorship and the Guardianship Petition.

A Uh-huh.

Q And that Kishna would be the best person to serve, right, in those two roles?

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A Well, that's kind of a gray area. I mean –

Q Did you object to it?

A I did not –

THE COMMISSIONER : Mr. Stuart, I don't know what the relevance of all this background is.

MR. STUART: Okay, I'm getting to it, Your Honor. I'm getting to it, if I could just lay my foundation for it.

THE COMMISSIONER: Okay, all right.

BY MR. STUART:

Q The two hundred thousand dollars that [86]were paid to you and your brother were an attempt to – from these funds, were an attempt to resolve the dispute and controversy about your other brother, Brian, getting money from your father; right?

That's what it was about?

A Is that what Kishna told you?

Q I'm asking you if it's true or not.

A Kishna told me it was CDs, it was from CDs.

Q The purpose of making the payments was to even up things between your brother, Brian, and you and your brother, Rodney; right?

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A Is that what Kishna told you?

Q Ma'am, I'm just asking you the question. Yes or no.

A I'm just – look, I'm just – I can't say – I can't say anything on that one. I mean, she told me it was from CDs.

Q Why else would she just give you a hundred thousand dollars?

A I don't know. Why did she take damn [87]near seven hundred thousand?

Q Okay.

MS. CUCINELLI : Can we – look, I'm curious to know why. I don't know think Ms. Bowers has confirmed –

MR. STUART: Just state your objection.

Ms. Cucinelli, please, state your objection.

THE COMMISSIONER: I think her objection –

MS. CUCINELLI: Relevance, my objection is relevance –

THE COMMISSIONER: – is to relevance.

MS. CUCINELLI: – Mr. Stuart.

MR. STUART: It's relevant to this case, and I'll address it, once I get the answers out of your client.

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I'm just trying to get a straight answer, that's all. It's either yes or no.

BY MR. STUART:

Q A hundred thousand dollars to you and Rodney was to even things up with what you say Brian got; right?

[88]A No. That's not the story I was told.

Q Just because she felt like giving you the money?

A That's – I'm telling you what she told me, Mr. Stuart.

Q No, you –

A You know, I mean, like this is a wangled – a tangled web that has been woven.

Q Uh-huh, I agree.

A But you know, but I'm telling you what she told me. And it was she got the money from CDs.

Q Okay. Now Ms. Walker, just one last question. There were a bunch of documents that were submitted to the Commissioner, and which your attorney, Ms. Cucinelli, attempted to get into evidence.

A Okay.

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Q Including statements from BB&T, United Bank, Navy Federal, and a spreadsheet that she assigned you to do.

A Yes, I did that.

[89]Q Okay. Were you on any of these accounts?

Was your name on any of these accounts –

A Okay.

Q – from – were they?

Your name was not on those accounts; were they?

A My mother's – my father's name was on it and my mother's.

Q Okay. Not your name; correct?

A My mother's name was on them.

Q Okay. But ma'am, I'm just asking a simple question.

A No, you're trying – I know what you're asking. So let me tell you how we came about these statements.

Q No, I'm not asking you a question about that. I'm asking you, saying that your name was not on any of these accounts; right?

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A No, my name is not.

Q Okay. Now you don't hold a Power of Attorney for your mother or your father; do you?

[90]A No, I do not.

Q So you obtained the documents, having no authority to get them; right?

A My mother had the authority.

Q Okay.

A So we got the statements – no, let me – you asked me a question, let me answer it.

So when – hold on. Hold on. When Kishna closed out the account with my father, and my mother became the sole heir of my father's Estate, that was when, July – that was on July 10th of last year.

In August and September of that year, because we kept – my brother – my brother, Eric, kept saying, you know, that money from the Accounting, that there should be more money than that.

So we took our mother four times – as a matter of fact eight times. We took her to Navy Federal, we took her to BB&T, we took her to United Bank, and we took her to Burke & Herbert.

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And we got the bank manager. And the [91]bank manager came out and asked my mother for her ID. We told her what we wanted.

We showed them the documents that we got from Fairfax showing her that she was the sole heir of daddy's Estate, and that we needed to probate his Estate.

So we were asking for the bank statements. The manager or the bank representative from each of these banks came out, asked for my mother's ID, and asked if it was okay to get the bank statements. And my mother said, yes.

Q I'm not asking for hearsay evidence.

A I'm not giving – I'm not giving you hearsay evidence.

Q But you are.

A I'm telling you what happened.

Q I'm just asking – the question was, that you obtained –

A And I already answered that question. I already told you that my name is not on there.

Q Okay.

[92]A I'm telling you how we got the statements. And no, I did not get the statements illegally.

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Q I didn't say that you did.

A You implied –

THE COMMISSIONER: Okay, let's move on. Are there other questions?

BY MR. STUART:

Q Last question on that. Now you claim your mother is incapacitated, right, she doesn't know what's going on; right?

A My mother has not been declared incapacitated, but yes, her memory is slipping.

Q Okay. But you said, in a response filed by your Counsel, she said that she is preparing to file a Guardianship Petition.

A We are, we are.

Q And that you're alleging –

A I said my mother – I said my mother is slipping; she is.

Q Okay.

A Yes.

[93]Q But you took her to banks to get all this information; right?

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A Yes.

THE COMMISSIONER: Mr. Stuart, this is not a hearing about Ms. Walker, and the capacity of Mrs. Wilder, so let's move on. I'm objecting to this question. Let's move on to something that's relevant.

MR. STUART: Well, again, Your Honor, I mean, Ms. Heishman, I'm not trying to make that an issue. I'm talking about how the information was obtained.

THE COMMISSIONER: She already answered.

BY MR. STUART:

Q The last question, I think very last question. I quoted you what your attorney wrote for you. And it says, it took considerably more time for you to unwind this minor scheme about "mismanaging" your grandfather's or your grandmother's, or some combination of their assets.

But you knew about the scheme, because [94]you got a hundred thousand dollars in October; right?

A No, absolutely not.

Q No? Okay.

A No. I did not know of any –

MR. STUART: I have no further questions.

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THE COMMISSIONER: Okay, thank you.

Ms. Cucinelli, did you have any questions for your client?

MS. CUCINELLI: No, I don't.

THE COMMISSIONER: Okay.

Mr. Stuart, anything else?

MR. STUART: Yes, I call Eric Wilder as an adverse witness.

THE COMMISSIONER: Mr. Wilder, can you unmute? Mr. Wilder, can you hear?

MR. WILDER: Yes.

THE COMMISSIONER: Okay. Let me ask you to raise your right hand.

Whereupon,

ERIC RODNEY WILDER

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