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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge and Master-In-Equity

Appellate Case No. 2014-002249

IN RE: Estate of Valerie D'Agostino

Nicholls & Crampton, P.A.,

Appellant,

Estate of Valerie D'Agostino,

Respondent.

RECORD ON APPEAL

VOLUME 2 OF 2

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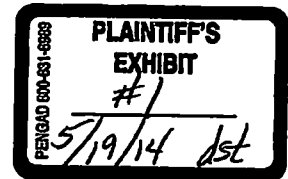
5/19/14 at 1:50 pm

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
IN THE MATTER OF ESTATE OF)
VALERIE D'AGOSTINO:)
NICHOLLS & CRAMPTON, P.A.,)
Plaintiff,)
v.)
ESTATE OF VALERIE D' AGOSTINO,)
Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2013-CP-07-01491

MOTION FOR SUMMARY JUDGMENT



TO: J. ASHLEY TWOMBLEY, ATTORNEY FOR THE DEFENDANT:

Plaintiff, Nicholls & Crampton, P.A. hereby moves that this Court grant this motion pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on the grounds that there are no genuine issues as to any material fact in this case and that the moving party is entitled to a judgment as a matter of law.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. Therefore, Plaintiff asserts it is entitled to judgment in this action as a matter of law.

This motion is based on the following grounds:

1. The Plaintiff claims in its original Petition for Allowance of Claim and

Memorandum in Support filed on May 8, 2013, (attached as Exhibit "A"), that it is owed \$6,013.00 (includes interest through May 1, 2013, representing 31 months of interest) for services rendered to Mr. Richard D' Agostino for actions taken as Personal Representative of the Estate of Valerie D' Agostino. As of April 23, 2014 the accumulating interest of one and one-half (1 ½) percent per month has brought the balance approximately to \$7,188.68.

2. On June 10, 2010, Richard D'Agostino, consented to, approved, and signed an Engagement Letter (contract) with the Plaintiff, Nicholls & Crampton, P.A., regarding professional legal service fees, costs, disbursements, and payment policy relating to the Engagement Letter's subject: "Estate of Valerie D'Agostino" (attached as Exhibit "B"). During depositions, Mr. Nicholls testified that the Engagement Letter presented in depositions was in fact the Engagement Letter between Richard D'Agostino and Nicholls & Crampton, P.A. The validity of the contract is not in dispute.

3. The Plaintiff's Engagement Letter (Exhibit "B"), approved and signed by Richard D'Agostino on June 10, 2010, states: "We will send you detailed, itemized monthly bills reflecting our charges. All statements sent to you are payable within thirty (30) days. Any charges not paid within said thirty days will accrue interest from the due date at the rate of one and one-half (1 ½) percent per month until paid". The validity of the terms of the contract are not in dispute.

4. The Plaintiff outlined its legal services in an invoice dated September 23, 2010 (attached as Exhibit "C"), rendered to Mr. D'Agostino and related to the Estate of Valerie D'Agostino. The legal services included drafting and reviewing Court documents for the probate process and personal representative issues; participating in various telephone conferences and

communications with various parties, as well as with Mr. D'Agostino; and engaging in interoffice conferences to determine strategy. During depositions, the Plaintiff, Mr. Nicholls testified that the services listed in the invoice were provided to Mr. Richard D' Agostino in connection with the administration of his wife's estate [Estate of Valerie D'Agostino]..." Nicholls Dep. 21:9-12. The Defendant has provided no evidence challenging the validity of the Plaintiff's charges in the invoice.

5. The Defendant presented one witness, Ronald W. Huther (Personal Representative of the Estate of Valerie D'Agostino), in support of its denial of the Plaintiff's claim. During his deposition, Mr. Huther was asked if he had any personal knowledge of the activities listed in the Plaintiff's invoice dated September 23, 2010 (Exhibit "C"). Mr. Huther testified "I don't have any. I just recognize a couple of names on here..." Huther Dep. 42:11-43:7. When questioned about the activities listed on the invoice, Mr. Huther stated that "these look like the day-to-day activities of his lawyer. I don't know whether they occurred or they didn't occur. I assume they occurred. I have no knowledge of any of this stuff" Huther Dep. 44:17-45:2. The Plaintiff's invoice serves as the primary basis for its claim. The Defendant's sole witness testified that he has no knowledge of the Plaintiff's activities listed on the invoice. Thus, there is no issue as to the validity of the Plaintiff's activities on the invoice.

6. Although Mr. Huther testified that he had no personal knowledge of the services listed on the invoice which is the basis of the Plaintiff's claim, Ronald W. Huther's attorney filed a Notice of Disallowance of Claim. In that Notice of Disallowance of Claim, filed by J. Ashley Twombly of Twenge & Twombly Law Firm and signed by Ronald W. Huther as (Personal Representative of the Estate of Valerie D'Agostino), (attached as Exhibit "D"), they include the following statement:

"... the amount of the claim is unreasonable in light of the services that was provided."

During direct examination, Mr. Huther (Personal Representative of the Estate of Valerie D'Agostino), was asked to review the Plaintiff's invoice (Exhibit "C") which serves as the basis of the Plaintiff's claim. Specifically, Mr. Huther was asked: "would it surprise you if I told you that that an attorney might charge as much as \$275 an hour for the services that are represented on this page?" Mr. Huther's replied: "No, it would not surprise me." Huther Dep. 45:18-22. Mr. Huther was then asked: "Would it surprise you if I told you that paralegals might be charged at a rate of somewhere between \$135 or more for these types of services?" Mr. Huther replied: "Nothing on this regard surprises me." Huther Dep. 46:3-7. Mr. Twombly then interrupted Mr. Huther's testimony to state on the record: "We will stipulate that all those fees are reasonable." Huther Dep. 46:8-9. Although the premise for the Defendant's denial of claim was that the "claim is unreasonable in light of the services that was provided", the Defendant, through his counsel, has since stipulated that "all those fees are reasonable." Huther Dep. 46:8-9. Thus, there is no issue as to the reasonableness of the fees charged by the Plaintiff.

7. The Defendant alleged in its Notice of Disallowance of Claim filed by J. Ashley Twombly of Twenge & Twombly Law Firm, (Exhibit "D"), that the Defendant did not owe the claim because the charges were owed by Richard D'Agostino. The Defendant alleges in its Notice of Disallowance of Claim the following statement:

Richard D' Agostino was contracted with Nicholls & Crampton, P.A. personally and not in his representative capacity as the Personal Representative of the Estate of Valerie D' Agostino. Because the services you provided were provided to Richard D' Agostino personally, the Estate of Valerie D' Agostino is not responsible for paying the fees associated with that representation.

Unfortunately, the Defendant has provided no evidence in support of its position. In fact, the only testimony in support of the Defendant's denial of the claim has come from Ronald W. Huther. As mentioned above, when asked about his personal knowledge of the Plaintiff's invoice charges which serve as the basis of the Plaintiff's claim, Mr. Huther testified that, "I have no knowledge of any of this stuff" Huther Dep. 44:17-45:2. There is no issue as to the charges and the Defendant has no evidence to support any position denying the claim.

8. In support of the Plaintiff's claim, it provided the Notice of Disallowance of Claim executed by the Personal Representative of the Estate of Richard D' Agostino and filed by Rebecca H. Hale of Hale & Bolchoz, LLC, (attached as Exhibit "E"). The Notice of Disallowance of Claim includes the following allegation:

This claim represents fees due from the Estate of Valerie D' Agostino, 2009ES07889, whereby decedent [Richard D'Agostino] was serving as Personal Representative. These fees are due from that estate [Estate of Valerie D' Agostino]..." "Furthermore based on information and belief there is enough money in the Estate of Valerie D' Agostino to pay such fees."

In the Notice of Disallowance of Claim filed by Rebecca Hale for the Estate of Richard D' Agostino, she argues that the Plaintiff, Nicholls & Crampton, P.A. is owed the fees from the Estate of Valerie D'Agostino for services rendered.

9. During the matter of Nicholls & Crampton, P.A. v. Christopher D' Agostino, as Personal Representative of the Estate of Richard J. D'Agostino, Case No. 2011-ES-07-406, Sean Bolchoz, attorney for Christopher D' Agostino, filed a Notice of Motion and Motion to Dismiss Claims of Petitioner and Rescind Restrictions on Personal Representative (attached as Exhibit "F"). On page 1, paragraph 3, Sean Bolchoz states: "On or about January 10, 2012, the Respondent [Christopher D' Agostino, as Personal Representative of the Estate of Richard J.

D'Agostino] filed a Notice of Disallowance of Claim [Exhibit "E"], rejecting the Petitioner's claim for amounts due, asserting, amount other things, that any fees due Petition would be due from Valerie D'Agostino's Estate...". It is clear from the referenced Motion that Sean Bolchoz reaffirmed the position that the Estate of Valerie D' Agostino should pay the fees owed to the Plaintiff, Nicholls & Crampton, P.A.

The Plaintiff testified in its deposition that the Defendant owes the Plaintiff's claim, attorney Rebecca H. Hale filed documents alleging the Defendant owes the Plaintiff's claim, and attorney Sean Bolchoz filed a motion alleging the Defendant owes the Plaintiff's claim. In rebuttal, the Defendant has presented one witness who admits under oath the with regard to the invoice charges, he has "no knowledge of any of this stuff." Huther Dep. 44:17-45:2. Additionally, by and through the Defendant's attorney, Defendant admits that "all those fees are reasonable". Huther Dep. 46:8-9.

10. Furthermore, although the Defendant denied the Plaintiff's claim, the Defendant's attorney received \$4,929.08 from the Estate of Richard D' Agostino for the purpose of settling the Plaintiff's claim. When asked whether the \$4,929.08 had anything to do with the claim that was filed, the Defendant testified that "the \$4,900.00 was to be the amount we [Defendant] were going to pay Mr. Nicholls [Plaintiff], plus any additional interest that might have popped up between the time it was going to take to sort out all this stuff." Huther Dep. 50:22-51:2. Even though the Defendant received \$4,929.08 from the Estate of Richard D'Agostino, for the purpose of settling the Plaintiff's claim, the Defendant has not paid any of those funds to the Plaintiff. In fact, according to the Defendant's sworn testimony, the Defendant's attorney still holds the full amount of \$4,929.08.

11. The transfer of these funds from the Estate of Richard D'Agostino to the Estate

of Valerie D' Agostino was memorialized in a Settlement Agreement and General Release (attached as Exhibit "G") signed by the respective parties (not including Nicholls & Crampton, P.A.). The Settlement Agreement and General Release includes the following statement on page two, paragraph four:

Christopher D'Agostino [Personal Representative for the Estate of Richard D'Agostino] will also pay to the order of Twenge + Twombly Law Firm, in certified funds, the sum of Four Thousand Nine Hundred Twenty-Nine and 08/100 (\$4,929.08) Dollars (the "Fee Fund"), to be held in escrow by Twenge + Twombly Law Firm ("Escrow Agent") pending final resolution of any and all claims of Nicholls & Crampton, P.A. ("Nicholls") against the Estate of Richard D' Agostino.

It is undisputed that the Estate of Richard D'Agostino transferred funds to Twenge + Twombly Law Firm to be held in escrow by Twenge + Twombly Law Firm to be used in order to resolve any and all claims of the Plaintiff, Nicholls & Crampton, P.A.

12. The Defendant's counsel, J. Ashley Twombly, has made it clear to the parties through electronic mail, (attached as Exhibit "H"), that the Defendant wants "to get the case resolved, and at this point, I really do not care who resolves it or how they resolve it." Therefore, the Plaintiff requests that this motion for summary judgment is granted in order to resolve this case quickly and efficiently.

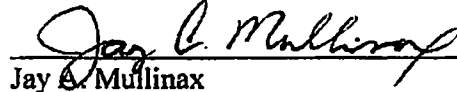
WHEREFORE, for the above reasons and to avoid further unnecessary delay, the Plaintiff respectfully moves that there is no genuine issue of material fact and would move that the Court grant the Plaintiff summary judgment as a matter of law, and that the Defendant pay the Plaintiff, Nicholls & Crampton, P.A. for the amount owed for services rendered including interest as stated in the Petition for Allowance of Claim. As of April 23, 2014 the accumulating

interest of one and one-half (1 ½) percent per month has brought the balance approximately to \$7,188.68.

Furthermore, the Plaintiff requested any additional relief that the Court deems just and proper, including attorney's fees.

Respectfully submitted.

LAW OFFICE OF JAY A. MULLINAX, LLC

A handwritten signature in cursive script, reading "Jay A. Mullinax", is written over a horizontal line.

Jay A. Mullinax
ATTORNEY FOR THE PLAINTIFF
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Tel: (843) 785-6101
Fax: (843) 785-6104

Hilton Head Island, South Carolina
Date: April 22, 2014

CERTIFICATE OF SERVICE

The undersigned, Kayla Meaux, hereby avers that she is the Paralegal to The Law Office of Jay A. Mullinax, Attorney for Plaintiff, and that on the 22th day of April, 2014 a true and accurate copy of the attached was placed in an envelope with first class postage thereon prepared through the United States Postal Service, and mailed to the following:

J. Ashley Twombly, Esquire
Twenge & Twombly Law Firm, LLC
311 Carteret Street
Beaufort, SC 29902

By: Kayla Meaux
Kayla Meaux, Paralegal to
The Law Office of Jay A. Mullinax

EXHIBIT" A "

STATE OF SOUTH CAROLINA)
COUNTY OF: BEAUFORT)
IN THE MATTER OF ESTATE OF)
VALERIE D'AGOSTINO:

IN THE PROBATE COURT
PETITION FOR ALLOWANCE OF CLAIM

NICHOLLS & CRAMPTON, P.A.

Petitioner

) CASE NUMBER: 2009ES0700889

vs.

Estate of Valerie D'Agostino

Respondent(s) (if applicable)

FILED
2013 MAY -3 PM 4:47
BEAUFORT COUNTY, SC

The undersigned petitions the Court to allow the following claims against the estate in the amounts set forth below:

Creditor Name and Address	Amount of Claim
Nicholls & Crampton, P.A.	\$6,013.00
3700 Glenwood Avenue, Suite 500	(Includes interest)
Raleigh, NC 27612	

In support of this Petition, Petitioner states that each claim is valid, was presented within the period for the presentation of claims as provided by law, and has not been paid, and, as to those claims which were presented to the Personal Representative and not filed with the Court, that a copy of the statement of each such claim is attached to this Petition and made a part hereof.

(Other:)

1. Memorandum in Support of Petition for Allowance of Claim
 - a. Exhibit A: Signed Engagement Letter
 - b. Exhibit B: Invoice dated 06/08/10-09/23/10
 - c. Exhibit C: Invoice dated 11/30/11
 - d. Exhibit D: Statement of Creditor's Claim (Estate of Richard D'Agostino)
 - e. Exhibit E: Notice of Disallowance of Claim from Rebecca H. Hale
 - f. Exhibit F: Statement of Creditor's Claim (Estate of Valerie D'Agostino)
 - g. Exhibit G: Notice of Disallowance of Claim from J. Ashley Twombly

Executed this 7 day of May, 2013.

Signature:

Name: Jay A. Mullinax, Esquire
Attorney for the Petitioners

Address: _____
Telephone(O): _____
(H): _____
Attorney: Jay A. Mullinax, Esquire
Address: 2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Telephone: (843)-785-6101

ORDER FOR ALLOWANCE OF CLAIM

On the basis of the within Petition and upon hearing for allowance of claims, IT IS HEREBY ORDERED that the following claims against the estate be ☐ ALLOWED ☐ DISALLOWED in the amounts set forth below:

Creditor Name and Address

Amount of Claim

Executed this day of , 20 .

_____, Probate Court Judge

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
IN THE MATTER OF ESTATE OF)
VALERIE D'AGOSTINO:)
)
NICHOLLS & CRAMPTON, P.A..)
)
Petitioner,)
v.)
)
ESTATE OF VALERIE D' AGOSTINO.)
)
Respondent.)
_____)

IN THE PROBATE COURT
CASE NUMBER: 2009ES0700889

**MEMORANDUM IN SUPPORT OF
PETITION FOR ALLOWANCE OF CLAIM**

FILED
2013 MAY -3 PM 4:10
CLERK OF COURT
BEAUFORT COUNTY, SC

1. Valerie D' Agostino died on October 17, 2009, domiciled in Beaufort County, South Carolina. She was survived by her husband, Richard D' Agostino, Ronald Hether (son) and Heidi Pallesen (daughter). The Beaufort County Probate Court subsequently appointed Mr. Richard D'Agostino as Personal Representative of his wife's estate.
2. On June 10, 2010, Richard D'Agostino, Personal Representative for the Estate of Valerie D'Agostino, consented to, approved, and signed an Engagement Letter with Nicholls & Crampton, P.A., regarding professional legal service fees, costs, disbursements, and payment policy relating to the Engagement Letter's subject: "Estate of Valerie D'Agostino". (A copy of the signed Engagement Letter is attached as **Exhibit A.**)
3. The payment policy in the Nicholls & Crampton, P.A. Engagement Letter approved and signed by Richard D' Agostino on June 10, 2010 states "We will send you detailed, itemized monthly bills reflecting our charges. All statements sent to you are payable within thirty (30) days. Any charges not paid within said thirty days will accrue interest from the due date at the rate of one and one-half (1 ½) percent per month until paid".
4. Legal Services rendered for Mr. D'Agostino relating to actions taken related to his responsibility as Personal Representative of the Estate of Valerie D'Agostino are dated

June 8, 2010 through September 23, 2010 resulting in fees of \$13,289.75; Nicholls & Crampton, P.A. received three checks from Mr. D'Agostino in payment for its services:

- i. 7/16/10 – Payment- Check # 13894 for \$1,500.00
- ii. 9/23/10 – Payment - Check # 1803 for \$1,200.00
- iii. 9/23/10 – Payment - Check #14006 for \$6,800.00

Total =\$9,500.00

(A copy of this invoice is attached as **Exhibit B.**)

5. Therefore, Mr. D'Agostino paid \$9,500.00 towards his charges of \$13,289.75, leaving a remaining balance of \$3,789.75.
6. Richard D' Agostino ("Decedent") died on April 11, 2011.
7. Christopher D'Agostino subsequently petitioned the Probate Court for the State of South Carolina, County of Beaufort, to open the Estate of Richard D'Agostino.
8. The Court, thereafter, appointed Mr. Christopher D' Agostino, as the Personal Representative of his father's estate.
9. Nicholls & Crampton, P.A., made demands upon Mr. Richard D' Agostino prior to his death, and on Christopher D' Agostino, as Personal Representative of Estate of Richard J. D'Agostino, for payment of an outstanding balance for services provided to Mr. D'Agostino that were related to the Estate of Valcrie D'Agostino.
10. Despite Nicholls & Crampton P.A. demands, Richard D'Agostino and Christopher D' Agostino, as Personal Representative of Estate of Richard J. D'Agostino failed and refused to pay the outstanding balance for services provided by or expenses paid and incurred by Petitioner.
11. As of November 30, 2011, Mr. D'Agostino's invoice had a remaining principle of \$3,789.75, plus an accumulated interest charge of \$753.19 resulting in a total balance of \$4,542.94. (A copy of this invoice is attached as **Exhibit C.**)

12. Nicholls & Crampton, P.A. filed a Statement of Creditor's Claim against the Estate of Richard D'Agostino on December 27, 2011 for \$4,542.94 for legal services (including interest) rendered to Richard D'Agostino. (A copy of Creditor's Claim is attached as **Exhibit D.**)

13. On January 10, 2012, a Notice for Disallowance of Claim was executed by Rebecca H. Hale of Hale & Bolchoz, L.L.C., and signed by Christopher D' Agostino disallowing the claim against the Estate of Richard D'Agostino for \$4,542.94. The Notice of Disallowance of Claim included the following statement:

This claim represents fees due from the Estate of Valerie D' Agostino, 2009ES07889, whereby decedent was serving as Personal Representative. These fees are due from that estate rather than the decedent's estate. The engagement letter signed by decedent did not in anyway make him personally liable for such fees, and therefore his estate is not liable for such payment either. Furthermore based on information and belief there is enough money in the Estate of Valerie D' Agostino to pay such fees.

(A copy of the Disallowance of Claim and Proof of Delivery is attached as **Exhibit E.**)

14. The Beaufort County Probate Court subsequently dismissed the Petitioner's claim against the Estate of Richard D'Agostino.

15. On September 26, 2013, Petitioner filed a Statement of Creditor's Claim against the Estate of Valerie D'Agostino in the amount of \$3,789.75, plus interest and attorney fees, for "legal services provided to Richard J. D'Agostino as Personal Representative of the Estate of Valerie D' Agostino." (A copy of Statement of Creditor's Claim is attached as **Exhibit F.**)

16. On April 8, 2013, Respondent's counsel, J. Ashley Twombly of Twenge & Twombly Law Firm mailed to Petitioner, Nicholls & Crampton, P.A., and its counsel a Notice of Disallowance of Petitioner's claim in its entirety. The Notice of Disallowance included the following statement:

Richard D' Agostino was contracted with Nicholls & Crampton, P.A. personally and not in his representative capacity as the Personal Representative of the Estate of Valerie D' Agostino. Because the services you provided were provided to Richard D' Agostino personally, the Estate of Valerie D' Agostino is not responsible for paying the fees associated with that representation.

(A copy of the Disallowance of Claim and Proof of Delivery is attached as **Exhibit G.**)

17. The Respondent provides no evidence of his allegations.

18. Conversely, the Petitioner has provided the Court with the following prima facie evidence of its claim: An engagement letter (with the subject matter: Estate of Valerie D'Agostino and details of the services and charges) signed by the Respondent and Petitioner; detailed invoices with time entries and subject matter exclusively related to the administration of the Estate of Valerie D'Agostino; a Court filing by an attorney (Rebecca Hales) representing Richard D' Agostino which alleges that the Estate of Valerie D'Agostino owes the claim.

19. The remaining principle balance of \$3,789.75 has accrued interest since Sept, 23, 2010 at the rate of one and one-half (1½) percent per month. in accordance with the referenced engagement letter and its terms (as proscribed in South Carolina Code of Laws §62-3-806(d)), resulting in the principal and interest total amount of \$6,013.00 (through May 1, 2013, representing 31 months of interest)

20. Decedent, Mr. Richard J. D'Agostino. Personal Representative of the Estate of Valerie D'Agostino, knowingly accepted the benefits of the services provided by and expenses incurred by Petitioner.

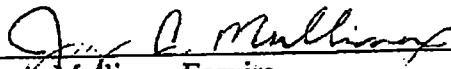
21. The services provided by the Petitioner, Nicholls & Crampton, P.A., resulted in the following benefits to the estate: Dismissal of unnecessary and improper venue of estate administration in North Carolina (with anticipated ancillary estate administration in South Carolina); proper efficient venue for estate; reduction in administrative costs of dual

estate administrations; recovering of attorney fees from another law firm for improper venue proceedings in North Carolina.

22. The hourly rates and interest are in accordance with the engagement letter and the services provided by the Petitioner, Nicholls & Crampton, P.A., as outlined and described in the invoice entries, are reasonably worth \$3,789.75, plus interest of \$2,223.25, resulting in the total amount of \$6,013.00. The Respondent has provided no evidence to the contrary.
23. The Petitioner made every reasonable effort to negotiate a settlement with the Respondent, even though the Petitioner was excluded from all negotiations with other parties during several months of a negotiated "global settlement" to settle all matters related to this case. In fact, the Petitioner provided a specific number in settlement and welcomed the Respondent to provide a counter offer. The Respondent provided no counter offer.
24. The Petitioner withdraws its claim regarding attorney fees related to this action. Although the contract was made with a North Carolina law firm, related to a matter initiated in a North Carolina court, and North Carolina courts have awarded attorney fees with similar criteria, the effort to prosecute the claim outweighs the prospect for equity to be achieved. Likewise, the effort to prosecute a companion claim under South Carolina law, which specifically proscribes the allowance of attorney fees, outweighs the prospect for equity to be achieved for the Petitioner. It should be noted that the Respondent never produced, cited, or directed Petitioner to any support for Respondent's position in regard to this matter.
25. The Petitioner respectfully prays that this Court, consider the foregoing and grant the Petitioner's claim based on the evidence presented.

Respectfully submitted,

LAW OFFICE OF JAY A. MULLINAX, LLC


Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Tel: (843) 785-6101
Fax: (843) 785-6104
Attorney for the Petitioner

Dated: May 7, 2013
Hilton Head Island, South Carolina

FILED

EXHIBIT

2013 MAY -8 PM 4:16

NICHOLLS & CRAMPTON, P. A.
ATTORNEYS AT LAW

3700 Glenwood Avenue
Suite 500
Raleigh, North Carolina 27612

PO Box 18237
Raleigh, North Carolina 27619

Telephone: (919) 781-1311

Facsimile: (919) 782-0465

June 8, 2010

Mr. Rich D'Agostino
c/o Anthony E. Griffis, Esq.
322 Moss Creek Village Drive
Hilton Head Island, SC 29926

via: giffis@hargray.com

Re: Estate of Valerie V. D'Agostino

Dear Mr. D'Agostino

1. Scope of Representation. You have requested that we provide legal services on your behalf in connection with the administration of your deceased wife's estate in Wake County, NC (the "Matter").

2. Professional Service. Our services in the Matter will be provided at our existing hourly rates for the lawyers and paralegals who will be working on the Matter as follows:

Senior Attorneys	\$275 per hour
Associate Attorneys	\$200 per hour
Certified Paralegals	\$135 per hour
Legal Assistants	\$ 80 per hour

Our services shall include, without limitation, our time to review and draft of documents, legal research, depositions, mediation, settlement discussions, court appearances, appearances before the Clerk, conferences, and any other tasks necessary to represent you in the Matter.

3. Retainer. In consideration of the services performed, or to be performed, you shall wire transfer to us the sum of One Thousand Five Hundred Dollars (\$1,500) as a retainer. This amount will be credited, from time to time, as a payment on account of our services and expenses incurred. This retainer is not an estimate of anticipated fees in this matter. In the event that the hours expended in the Matter are less than the total retainer, we will refund the balance to you.

4. Costs and Disbursements. You are also responsible for all necessary and reasonable costs and expenses incurred or paid out in the performance of our services. We will bill you, or ask you to pay directly, for out-of-pocket costs. These costs and expenses shall include, but not be limited to: expert witness

charges, travel expenses, duplication expenses, transmittal charges, long distance charges, courier charges, and any other necessary expenses. If we advance any costs or expenses, you shall reimburse us upon our furnishing you information as to the amount unless said amount can be charged against any available retainer remaining in your account.

5. Payment Policy. We will send you detailed, itemized monthly bills reflecting our charges. All statements sent to you are payable within thirty (30) days. Any charges not paid within said thirty days will accrue interest from the due date at the rate of one and one-half (1 1/2) percent per month until paid.

6. Discharge or Withdrawal. You have the right to discharge us for any reason at any time. We reserve the right to withdraw from representing you at any time. Upon termination, for any reason, we will promptly turn over your file to you upon request, however, you will remain responsible for all fees and costs incurred through the date of termination, but payment of our final statement shall not be a precondition to the release of your file.

7. Disclaimer. In representing you in this matter, we cannot and do not warrant or predict results or final developments. Be assured that it is our desire to afford you conscientious, faithful, and diligent service, seeking at all times to achieve solutions that are just and reasonable to you.

If the foregoing meets with approval, kindly signify consent and approval by having the agreement signed in the space provided below, insert the date, and return the original of this letter to us, along with the retainer fee.

Sincerely,

NICHOLLS & CRAMPTON, P. A.

/s/ Tim Nicholls

CONSENTED TO AND APPROVED


Rich D'Agostino
June 2, 2010

In Account With
NICHOLLS & CRAMPTON, P.A.
 ATTORNEYS AT LAW

3700 Glenwood Avenue - Suite 500
 Post Office Box 18237
 Raleigh, North Carolina 27612
 Telephone: 919/781-1311 Fax: 919/782-0465

Federal ID #
 56-1201204

Rich D'Agostino
 c/o Anthony E. Griffin, Esq.
 322 Moss Creek Village Drive
 Hilton Head Island, SC 29926

Invoice Date: September 23, 2010
 Invoice No. 108938
 Client/Matter ID: 102245.001

RE: FTM - VALERIE D'AGOSTINO ESTATE

Amount Paid:

For legal services rendered, including but not limited to

Date	Initials	Description	Hours	Amount
06/08/2010	NIC	Telephone conference with Mr. Griffis re: estate; draft engagement letter.	0.80	220.00
06/09/2010	PAR	Obtain documents from Estates Division.	1.20	162.00
06/10/2010	NIC	Review guardianship and estate filings; e-mail Mr. Griffis.	0.70	192.50
06/11/2010	NIC	Conference with associate re: procedural matters; review intestacy law.	0.70	192.50
	NIC	Telephone conference with Mr. Griffis; telephone call with Mr. Alexander; call Mr. Belcher.	1.20	330.00
06/14/2010	NIC	Review and respond to Mr. Garris's e-mail.	0.20	55.00
06/21/2010	NIC	Telephone conference with Mr. Griffis; telephone conference with Assistant Clerk of Court; conference with Mr. Dombalis; review Hearing Notice; e-mail Mr. Belcher.	1.10	302.50
	DOM	Conference with Mr. Nicholls re: strategy; review memo to Charlotte attorney.	0.70	192.50
06/22/2010	NIC	Revise and finalize e-mail to Charlotte attorney; e-mail to Mr. Griffis; conference with intern re: domicile.	1.10	302.50
06/24/2010	NIC	Draft fax to Mr. Alexander; e-mail to Mr. Griffis.	0.80	220.00
07/01/2010	NIC	Telephone conference with Mr. D'Agostino; review letter from D. Alexander.	0.50	137.50
07/02/2010	DOM	Draft Motion for Sanctions.	0.70	192.50
	NIC	Conference with Mr. Dombalis; review and file Motion for Sanctions.	0.70	192.50

A finance charge is computed on account balances unpaid 30 days
 after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

			Hours	
	DOM	Conference with Mr. Nicholls.	0.30	82.50
07/07/2010	NIC	Review e-mails from Mr. Garris; conference with Mr. Dombalis re: strategy; telephone conference with Mr. Garris; telephone conference with Mr. D'Agostino; research.	1.20	330.00
	DOM	Conference with Mr. Nicholls; telephone conference with South Carolina counsel and Mr. Nicholls.	0.50	137.50
07/08/2010	NIC	Review file in preparation for hearing; telephone conference with Messrs. Dombalis and Garris; telephone conference with Mr. Glass; telephone conference with Mr. D'Agostino; research jurisdiction and other matters for hearing.	7.50	2,062.50
	DOM	Telephone conference with Mr. Nicholls and South Carolina counsel.	1.30	357.50
07/09/2010	PAR	Preparation of all Qualification Documents; meeting with Mr. Nicholls re: estate administration.	1.80	243.00
	PAR	Draft application, Oath, etc. for Mr. D'Agostino.	1.80	243.00
	NIC	Conference with Mr. Dombalis; telephone conference with Mr. Griffis; telephone conference with Mr. D'Agostino; review application, etc.	1.40	385.00
	DOM	Conference with Mr. Nicholls.	0.20	55.00
07/12/2010	NIC	Review Petition and Exhibits; telephone conferences with Messrs. D'Agostino, Griffis and Glass; prepare for hearing before Clerk.	2.10	577.50
	NIC	Hearing before Clerk; e-mail Mr. Garris; telephone conference with Mr. D'Agostino.	1.80	495.00
07/13/2010	NIC	Draft amendment to Motion for Sanctions; telephone conference with Mr. D'Agostino.	0.60	185.00
07/14/2010	DOM	Review and comment on amendment to motion.	0.30	82.50
	NIC	Various e-mails to Messrs. Griffis and Glass; telephone conference with Mr. Alexander; draft Notice of Hearing.	1.30	357.50
07/16/2010	NIC	Conference with paralegal.	0.50	137.50
	PAR	Conference with Mr. Nicholls re: filing Application for letters.	0.50	67.50
	NIC	Telephone conference with Mr. Griffis and Mr. Glass; review Alexander e-mail.	0.50	137.50
	PAR	Meeting with Mr. Nicholls re: qualification documents.	0.60	81.00
07/17/2010	NIC	Prepare for hearing.	1.00	275.00
07/18/2010	NIC	Prepare for hearing.	1.60	440.00

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

			Hours	
07/19/2010	NIC	Prepare for hearing; various telephone conferences with Messrs. Griffis and Alexander; conference with Mr. Dombalis; revise motion for sanctions.	3.00	825.00
	DOM	Various conferences with Mr. Nicholls re: sanctions.	1.00	275.00
	DOM	Review sanction case law; conference with Mr. Nicholls re: same.	0.05	13.75
07/22/2010	NIC	Various telephone conferences with Messrs. Glass, Alexander and Griffis re: settlement; draft e-mail re: settlement.	2.30	632.50
07/23/2010	NIC	Various e-mails re: continuance of hearing.	0.40	110.00
07/27/2010	NIC	Respond to Mr. Griffis.	0.20	55.00
07/29/2010	NIC	Review and revise Settlement Agreement; e-mail Mr. Griffis; telephone conference with Mr. Griffis; revise Agreement and e-mails; various e-mails; telephone conference with Assistant Clerk.	2.30	632.50
08/02/2010	NIC	Revise Agreement; respond to Mr. Alexander's e-mail re: changes.	0.20	55.00
08/09/2010	NIC	Review and reply to various e-mails.	0.70	192.50
08/12/2010	NIC	Review and respond to Mr. Glass e-mail and Mr. Griffis e-mail.	0.40	110.00
08/13/2010	NIC	Conference with Messrs. Griffis and Glass re: changes to Settlement Agreement; review revised Agreement.	0.80	220.00
09/01/2010	NIC	Review and respond to various e-mails re: settlement.	0.30	82.50
09/10/2010	NIC	Various e-mail communications re: settlement.	0.80	220.00
09/17/2010	NIC	Review various emails.	0.30	82.50
09/20/2010	NIC	Review and respond to various emails.	0.40	110.00
09/23/2010	NIC	Prepare and file withdrawal of motion; various emails.	0.70	192.50
		FEES BILLED	51.05	13,212.75

FEE SUMMARY

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
F T Nicholls	40.10	\$275.00	\$11,027.50
N J Dombalis	5.05	275.00	1,388.75
L C Connolly	5.90	135.00	796.50

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

DISBURSEMENTS

	Copies, Parking	30.00
	Federal Express charges	22.00
	Delivery charge	25.00
	TOTAL DISBURSEMENTS through 07/09/2010	77.00
	TOTAL FEES AND DISBURSEMENTS THIS INVOICE	13,289.75
07/16/2010	Payment-Check # 13894	-1,500.00
09/23/2010	Payment-Check # 1803	-1,200.00
09/23/2010	Payment-Check # 14006	-6,800.00
	Total Payments	-9,500.00
	BALANCE DUE	<u>\$3,789.75</u>

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

EXHIBIT" C "

FILED

In Account With

2013 NOV 15
NICHOLLS & CRAMPTON, P.A.
ATTORNEYS AT LAW

3700 Glenwood Avenue - Suite 500
Beaufort County, SC Post Office Box 18237
Raleigh, North Carolina 27612

Telephone: 919/781-1311 Fax: 919/782-0465

Federal ID #
56-1201204

Rich D'Agostino
c/o Anthony E. Griffin, Esq.
322 Moss Creek Village Drive
Hilton Head Island, SC 29926

Invoice Date: November 30, 2011
Invoice No. 117498
Client/Matter ID: 102245.001

RE: FTM - VALERIE D'AGOSTINO ESTATE

Amount Paid: _____

For legal services rendered, including but not limited to

PREVIOUS BALANCE	\$4,488.74
Finance Charge	54.20
BALANCE DUE	<u>\$4,542.94</u>

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

EXHIBIT" D 88

FILED

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

IN THE MATTER OF: RICHARD J. D'AGOSTINO

IN THE PROBATE COURT

STATEMENT OF CREDITOR'S CLAIM

CASE NUMBER: 2011ES0700406

Decedent's Date of Death (if known): 04/11/2011

Decedent's Last Mailing Address: 15 Sebring Drive, Bluffton, SC 29909

Creditor: Nicholls & Crampton, P. A.

Address: 3700 Glenwood Avenue, Suite 500

Raleigh, NC 27612

Telephone: 919-781-1311

Basis of claim:

Legal services rendered in the Estate of Valerie D'Agostino for decedent Richard D'Agostino pursuant to engagement letter attached; decedent agreed to be personally liable for said fees in the event fees were not paid by the Estate of Valerie D'Agostino

Amount of claim \$ 4,542.94

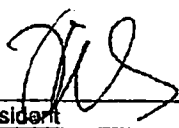
Date claim will become due (if not already due): Claim due as of 9/23/, 2010 when last services rendered.

Nature of uncertainty as to amount of claim and due date, if any:

N/A

Description of any security as to claim:

None

Signature: 

Title: President

Date: December 27, 2011

INSTRUCTIONS: Claims must be filed with the Probate Court of this county and delivered or mailed to the Personal Representative appointed to administer the estate (see section 62-3-803, 62-3-804, and 62-3-806 on next page.)

STATE OF SOUTH CAROLINA)

COUNTY OF: BEAUFORT)

IN THE MATTER OF: Estate of Richard J. D'Agostino)

IN THE PROBATE COURT

NOTICE OF DISALLOWANCE OF CLAIM

CASE NUMBER: 2011ES0700406

TO:

Name: F. Timothy Nicholls, Esquire
 Address: PO Box 18237
 Raleigh, NC 27610

The undersigned, as the Personal Representative(s)/Conservator(s) appointed to administer this estate, disallows \$ 4,542.94 of your claim for \$4,542.94 presented on 1/2/12.

Your claim was disallowed for the following reason(s):

This claim represents fees due from the Estate of Valerie D'Agostino, 2009ES07889, whereby decedent was serving as Personal Representative. These fees are due from that estate rather than the decedent's estate. The engagement letter signed by decedent did not in anyway make him personally liable for such fees, and therefore his estate is not liable for such payment either. Furthermore based on information and belief there is enough money in the Estate of Valerie D'Agostino to pay such fees..

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

Executed this 10th day of Jan, 2012

Signature: 

Name: Christopher d'Agostino

Address: 13710 Trinity Leaf Place
Riverview, FL 33579

E-mail:

Telephone (O): 813 393-4576

(H): 813 677-0284

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

IN THE MATTER OF: ESTATE OF RICHARD J.
D'AGOSTINO

IN THE PROBATE COURT

PROOF OF DELIVERY

CASE NUMBER: 2011ES070406

On the 7th day of June, 2011, I mailed or delivered the following document, Notice of Dissallowance of Claim of Anthony E. Griffis, and Notice of Dissallowance of Claim of F. Timothy Nicholls, Esquire

- ☐ A copy of which is attached hereto and incorporated herein, or
☒ The original of which is on file with the court and incorporated herein,

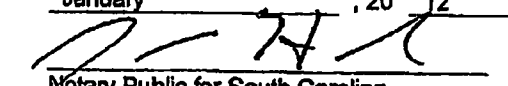
Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery ☒ ordinary first class mail
☐ certified mail ☐ registered mail

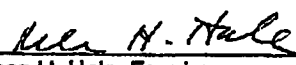
to each of the following persons at the address shown:

NAME	ADDRESS
J. Ashley Twombly, Esquire	311 Carteret Street, Beaufort, SC 29902
Anthony E. Griffis, Esquire	355 Park Avenue, SW, Aiken, SC 29801
F. Timothy Nicholls, Esquire	3700 Glenwood Avenue, Suite 500, Raleigh, NC 27612

SWORN to before me this 12 day of
January, 2012


Notary Public for South Carolina

My Commission Expires: 12/12/16

Signature: 
Name: Rebecca H. Hale, Esquire
Address: PO Box 22561
Hilton Head Island, SC 29925
Telephone (O): (843) 837-3000
(H): _____
E-mail: rhalehaleandbolchoz.com

Signature: _____
Name: _____
Address: _____

Telephone (O): _____
(H): _____
E-mail: _____

EXHIBIT " F "

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE MATTER OF The Estate of Valerie)
D'Agostino)

IN THE PROBATE COURT

STATEMENT OF CREDITOR'S CLAIM

CASE NUMBER: 2009ES0700889

Decedent's Date of Death (if known): October 17, 2009

Decedent's Last Mailing Address: 15 Sebring Drive, Bluffton, SC 29909

Creditor: Nicholls & Crampton, P.A.
Address: c/o Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Telephone: (843) 765-6101

BEAUFORT COUNTY, SC

2012 SEP 26 PM 4:17

FILED

Basis of claim:

Legal services provided to Richard J. D'Agostino as Personal Representative of the Estate of Valerie D'Agostino.

Amount of claim \$ \$3,789.75 plus interest and attorney
fees

Date claim will become due (if not already due): 20

Nature of uncertainty as to amount of claim and due date, if any:

Description of any security as to claim:

Signature: Jay A. Mullinax

Title: Jay A. Mullinax, Esquire

Date: September 26, 2012

INSTRUCTIONS: Claims must be filed with the Probate Court of this county and delivered or mailed to the Personal Representative appointed to administer the estate (see section 62-3-803, 62-3-804, and 62-3-806 on next page.)

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

PROBATE COURT

IN THE MATTER OF THE ESTATE OF VALERIE D'AGOSTINO, DECEASED
CASE NUMBER: 2009ES0700889

PROOF OF DELIVERY

On the 26 day of September, 2012, I mailed or delivered a copy of the Statement of Creditor's Claim.

☒ A copy of which is attached hereto and incorporated herein, or
☐ The original is on file with the court and incorporated herein.

Delivery was accomplished by the following method (check appropriate box):

☐ Personal delivery ☒ Ordinary First Class Mail
☐ Certified Mail with Return Receipt requested ☐ Registered Mail

to each of the following persons at the addresses shown:

J. Ashley Twombly, Esquire Twenge & Twombly, LLC
311 Carteret Street
Beaufort, SC 29902

LAW OFFICE OF JAY A. MULLINAX, LLC

By: Jay A. Mullinax
Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC. 29928
843-785-6101
Attorney for the Estate

SWORN to before me this 26 day
of September, 2012.

[Signature]
Notary Public for South Carolina
My Commission Expires: 10/14/19

STATE OF SOUTH CAROLINA)
)
 COUNTY OF: BEAUFORT)
)
 IN THE MATTER OF: ESTATE OF)
 VALERIE D'AGOSTINO)

IN THE PROBATE COURT
 NOTICE OF DISALLOWANCE OF CLAIM

CASE NUMBER: 2009ES0700889

TO:

Name: Nicholls & Crampton, P.A.
 Address: c/o Law Office of Jay A. Mullinax, LLC
 2 Park Lane, Suite 303
 Hilton Head, SC 29928

RECEIVED
 PROBATE COURT
 BEAUFORT COUNTY
 SOUTH CAROLINA
 SEP 26 2012

The undersigned, as the Personal Representative(s)/Conservator(s) appointed to administer this estate, disallows \$ 3,789.75 plus claimed interest and claimed attorney fees of your claim for \$3,789.75 plus interest and attorney fees presented on September 26, 2012.

Your claim was disallowed for the following reason(s):

Richard D'Agostino contracted with Nicholls & Crampton, P.A. personally and not in his representative capacity as the Personal Representative of the Estate of Valerie D'Agostino. Because the services you provided were provided to Richard D'Agostino personally, the Estate of Valerie D'Agostino is not responsible for paying the fees associated with that representation.

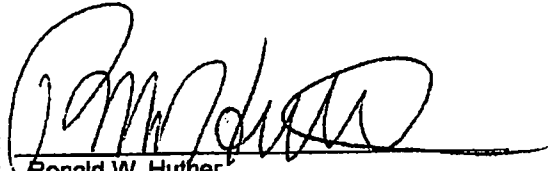
In addition, the amount of the claim is unreasonable in light of the service that was provided.

Finally, under no circumstances would anyone be responsible for paying the attorney's fees Claimant's lawyer (Jay A. Mullinax) incurred in attempting to pursue this claim. Significantly, Claimant and his attorney have repeatedly been asked to identify any case, statute or other legal principal that would allow Claimant to recover attorney's fees incurred in filing and pursuing a probate creditor's claim. Despite numerous requests, Claimant has been unable to produce, cite, direct or otherwise reference any authority to support Claimant's claim for attorney's fees on top of the face amount of his creditor's claim. Claimant has been warned in writing numerous times, pursuant to South Carolina Rules of Civil Procedure 11 and other relevant law, that he must have a legitimate basis in law and fact to advance his claim for attorney's fees.

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

Executed this

day of March , 2013.

Signature: 

Name: Ronald W. Huther

Address: 3402 Tennessee Drive
Alexandria, VA 22303

E-mail: _____

Telephone (O): (240) 486-1703

(H): _____

STATE OF SOUTH CAROLINA
COUNTY OF: BEAUFORT
IN THE MATTER OF: ESTATE OF
VALERIE D'AGOSTINO

IN THE PROBATE COURT
FILED
PROOF OF DELIVERY

CASE NUMBER: 2009ES0700889

BEAUFORT COUNTY, SC

On the 8th day of April, 2013, I mailed or delivered the following document, Notice of Disallowance of Claim

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original of which is on file with the court and incorporated herein,

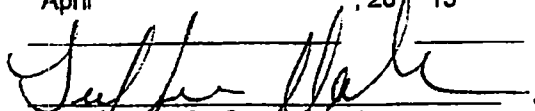
Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery
☐ certified mail
☒ ordinary first class mail
☐ registered mail

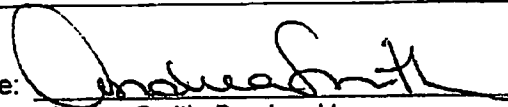
to each of the following persons at the address shown:

NAME	ADDRESS
Jay A. Mullinax, Esquire	2 Park Lane, Ste 303, Hilton Head, SC 29910
Anthony E. Griffis, Esquire	10 Fording Island Road Extension, Hilton Head, SC 29926
Sean M. Bolchoz, Esquire	P.O. Box 828, Bluffton, SC 29910

SWORN to before me this 8th day of
April, 2013


Notary Public for South Carolina
My Commission Expires: _____



Signature: 
Name: Andrea Smith, Paralegal to
Twenge + Twombly Law Firm
Address: 311 Carteret Street
Beaufort, SC 29902
Telephone (O): _____
(H): (843) 982-0100
E-mail: andrea@twlawfirm.com

Signature: _____
Name: _____
Address: _____
Telephone (O): _____
(H): _____
E-mail: _____

STATE OF SOUTH CAROLINA,
COUNTY OF BEAUFORT
NICHOLLS & CRAMPTON, P.A.
Petitioner,
vs.
ESTATE OF VALERIE D'AGOSTINO
Respondent(s).

IN THE PROBATE COURT

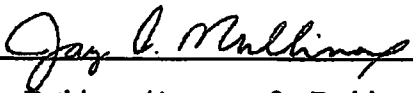
SUMMONS

CASE NO. 2009ES0700889

TO THE RESPONDENT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition herein, a copy of which was served upon you, and to serve a copy of your Answer to this Petition upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Petition, judgment by default will be rendered against you for the relief demanded in the Petition.

Hilton Head Island, South Carolina


Petitioner/Attorney for Petitioner

Dated: May 8, 2013

Address: 2 Park Lane, Suite 303
Hilton Head Island, SC 29928
(843)785-6101

FILED
2013 MAY -3 PM 4:15
BEAUFORT COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

PROBATE COURT

IN THE MATTER OF THE ESTATE OF VALERIE D'AGOSTINO, DECEASED
CASE NUMBER: 2009ES0700889

PROOF OF DELIVERY

On the 8th day of May, 2013, I mailed or delivered a copy of
the Summons for the Petition for Allowance of Claim.

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original is on file with the court and incorporated herein.

Delivery was accomplished by the following method (check appropriate box):

- ☐ Personal delivery ☒ Ordinary First Class Mail
☐ Certified Mail with Return Receipt requested ☐ Registered Mail

to each of the following persons at the addresses shown:

Sean Michael Bolchoz, Esquire

Bolchoz Law Firm, PA
6 Buckingham Plantation Drive, Suite B
Post Office Box 828
Bluffton, SC 29910

J. Ashley Twombly, Esquire

Twenge & Twombly Law Firm, LLC
311 Carteret Street
Beaufort, SC 29902

BEAUFORT COUNTY, SC

2013 MAY -8 PM 4:15

FILED

LAW OFFICE OF JAY A. MULLINAX, LLC

By:

Jay A. Mullinax
Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC, 29928
843-785-6101
Attorney for the Petitioner

SWORN to before me this 8th day
of May, 2013.

Mullinax
Notary Public for South Carolina
My Commission Expires: 12-31-13

1
2 IN THE COURT OF COMMON PLEAS
3 STATE OF SOUTH CAROLINA
4 COUNTY OF BEAUFORT
5

6 IN RE:
7 ESTATE OF VALERIE D'AGOSTINO,
8
9 NICHOLLS & CRAMPTON, P.A.

10 Plaintiff,
11

12 vs. CIVIL ACTION NUMBER
13 2013-CP-07-01491
14

15 ESTATE OF VALERIE D'AGOSTINO,
16 Defendant.
17

18 -----/

19 The deposition of FREDERICK TIMOTHY
20 NICHOLLS, a witness in the above-entitled cause,
21 taken pursuant to Notice and agreement, before
22 Ceil Weser, Certified Court Reporter and Notary
23 Public, at the Offices of Twenge & Twombly, 311
24 Carteret Street, Beaufort, South Carolina, on
25 the 9th day of December, 2013, commencing at or
 about the hour of 10:46 a.m.

1 TWOMBLEY - NICHOLS (DIRECT EXAMINATION)

2 whether or not Richard D'Agostino is
3 individually responsible for these fees, or in
4 the alternative whether or not an estate is
5 responsible for the fees?

6 MR. MULLINAX: Object to the form.

7 THE WITNESS: I mean I know
8 what -- it was clear to me, and I think
9 it was clear to him; and that is that
10 we were representing him in connection
11 with the administration of his wife's
12 estate in North Carolina I mean.

13 BY MR. TWOMBLEY:

14 Q But my question to you is the letter
15 does not specify whether or not Mr. D'Agostino
16 is individually responsible for the fees or if
17 the estate is responsible for the fees, isn't
18 that right?

19 MR. MULLINAX: Object to the form.

20 THE WITNESS: Yeah, I don't think
21 it is clear, yes.

22 (Whereupon, Defendant's Exhibit
23 Number 7 was marked for
24 identification.)

25 BY MR. TWOMBLEY:

1
2 IN THE COURT OF COMMON PLEAS
3 STATE OF SOUTH CAROLINA
4 COUNTY OF BEAUFORT

5 IN RE:
6 ESTATE OF VALERIE D'AGOSTINO,

7
8
9 NICHOLLS & CRAMPTON, P.A.
10 Plaintiff,

11
12 vs.

CIVIL ACTION NUMBER
2013-CP-07-01491

13
14 ESTATE OF VALERIE D'AGOSTINO,
15 Defendant.
16 -----/

COPY

17
18 The deposition of RONALD W. HUTHER, a
19 witness in the above-entitled cause, taken
20 pursuant to Notice and agreement, before Ceil
21 Weser, Certified Court Reporter and Notary
22 Public, at the Offices of Twenge + Twombly, 311
23 Carteret Street, Beaufort, South Carolina, on
24 the 9th day of December, 2013, commencing at or
25 about the hour of 4:16 p.m.

COASTAL COURT REPORTING & VIDEO SERVICES
POST OFFICE BOX 7349 HILTON HEAD, SOUTH CAROLINA 29938
BEAUFORT - HILTON HEAD - SAVANNAH
843-525-9600 FAX 843-785-5837

1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 MR. TWOMBLEY: Wait to respond. I
3 want to use the restroom for a minute.

4 If you don't mind, Jay?

5 MR. MULLINAX: Yes, you are good.

6 (Whereupon, a short break was
7 taken.)

8 THE WITNESS: I really don't
9 understand your question.

10 BY MR. MULLINAX:

11 Q To ask the question, Mr. Huther, we are
12 looking at a document here entitled, "Nicholls &
13 Crampton. An Account with Nicholls & Crampton",
14 Defendant's Exhibit Number 18.

15 And do you see a list of items there, a
16 list of entries?

17 A I do.

18 Q And in that list of entries I will
19 represent to you that those are entries made by
20 Nicholls & Crampton on the account for
21 Mrs. D'Agostino as you can see there on the top
22 left-hand corner of the page.

23 My question to you is what personal
24 knowledge do you have of any of these particular
25 activities by the law firm of Nicholls &

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Crampton, if any?

3 A I don't have any. I just recognize a
4 couple of names on here. Like Belcher was a
5 lawyer I hired. Glass was a lawyer I hired.

6 But what they talked about I have no
7 knowledge of.

8 Q Do you have any personal knowledge of
9 these activities at all without looking at this
10 document?

11 A Well, this just looked like stuff his
12 lawyer did. Obtain documents. I mean it makes
13 sense to me, but until I saw this I -- well,
14 this is the day-to-day activities of his lawyer.

15 Q I am going to refer, Mr. Huther, to I
16 think the next-to-last page in that same
17 exhibit.

18 A Okay.

19 Q And do you see the number \$3,789.75?

20 A I do.

21 Q And does that number mean anything to
22 you? Does that ring a bell to you?

23 A It doesn't ring a bell, but what I get
24 out of that is after he received his payments
25 from Alexander in May, he is owed 3789.

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 Q Okay.

3 A And a payment from Richard D'Agostino.
4 So he took in 95 and he is owed 3789.

5 Q And if you turn the page once more,
6 could you tell us what the date at the top right
7 corner of that document is you are looking at
8 right now?

9 A November 2011.

10 Q And what is the amount at the bottom
11 right?

12 A 4,542.94.

13 Q And do you know what that number
14 represents?

15 A That is the balance due Nicholls &
16 Crampton per his statement.

17 Q Mr. Huther, these activities that we
18 are referring to that are itemized here, are you
19 aware of any of these activities that did not
20 occur?

21 A Like I said these look like the
22 day-to-day activities of his lawyer. I don't
23 know whether they occurred or they didn't occur.
24 I assume they occurred.

25 I have no knowledge of any of this

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 stuff.

3 Q Mr. Huther, prior to this litigation
4 can you tell me what interactions you have had
5 with attorneys and lawsuits?

6 A Oh, before this?

7 Q Before this?

8 A Just when I was going on a deployment
9 at the Army, the Army lawyer made a will and a
10 power of attorney and that was it. Never had a
11 lawsuit.

12 Q Are you at all familiar with outside of
13 this lawsuit, do you have any personal knowledge
14 of attorney's hourly rate or billable rate or
15 the way that they bill for their services?

16 A I mean I just learned in this process
17 how they do it.

18 Q Would it surprise you if I told you
19 that an attorney might charge as much as \$275 an
20 hour for the services that are represented on
21 this page?

22 A No, it would not surprise me.

23 Q Would it surprise you if I said that
24 some attorneys charge \$400 per hour for these
25 type of services?

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A No.

3 Q Would it surprise you if I told you
4 that paralegals might be charged at a rate of
5 somewhere between 135 or more for these type of
6 services?

7 A Nothing on this regard surprises me.

8 MR. TWOMBLEY: We will stipulate
9 that all those fees are reasonable. I
10 mean if you want us to do that or you
11 can ask him about it, I mean as far as
12 the rates and all that stuff.

13 BY MR. MULLINAX:

14 Q Mr. Huther, what is your personal
15 knowledge of -- strike that.

16 Mr. Huther, were you involved in the
17 negotiations between the Estate of Valerie
18 D'Agostino and Richard D'Agostino's estate
19 regarding everything covered in the Family
20 Settlement Agreement? Were you involved in
21 that?

22 MR. TWOMBLEY: Object to the form
23 of the question.

24 THE WITNESS: I was involved in
25 the negotiations of the Family

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 A That was the number of the claim that
3 Mr. Nicholls I guess you filed for Mr. Nicholls
4 in the court against Mr. D'Agostino's estate
5 that was -- I don't know what the correct legal
6 term, but was disapproved by the court.

7 Q When you say the claim, are you
8 referring to a client claim in Mr. D'Agostino's
9 estate?

10 A Mr. Nicholls filed a claim against the
11 Estate of Richard D'Agostino for the amount of
12 roughly \$4500 is what I recall.

13 Q And are you familiar with a claim
14 subsequently filed against your mother's estate?

15 A Right.

16 Q And do you know roughly what that
17 number was?

18 A I believe it was 4500 or so also.

19 Q Does this number, this 4,929.08, does
20 that have anything to do with the claim that was
21 filed --

22 A Yes, the \$4900 was to be the amount we
23 were going to pay Mr. Nicholls, plus any
24 additional interest that might have popped up
25 between the time it was going to take to sort

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1 MULLINAX - HUTHER (DIRECT EXAMINATION)

2 out all this stuff.

3 Q And do you know who came up with that
4 number there, Mr. Huther?

5 A I know the number is based on the claim
6 that Mr. Nicholls filed, plus I believe Ashley
7 probably figured in a few extra bucks for
8 interest is kind of how I recall it.

9 Q Okay.

10 Did you get a chance to read this
11 entire paragraph, Mr. Huther, just now?

12 A I didn't read the whole thing.

13 Q Let me give you an opportunity to read
14 the whole thing.

15 A Okay.

16 Q And I apologize for what seemed like a
17 silly question, but can you tell me what your
18 understanding is from this document you signed,
19 what the purpose of that 4,929.08 was?

20 A The purpose was there was going to be a
21 hearing to determine whether or not
22 Mr. D'Agostino's estate had to pay Mr. Nicholls.
23 And if the court said Mr. D'Agostino had to pay
24 Mr. Nicholls' fees, then we were going to give
25 them that money back to pay Mr. Nicholls' fees.

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NICHOLLS & CRAMPTON, P. A.

ATTORNEYS AT LAW

3700 Glenwood Avenue
Suite 500
Raleigh, North Carolina 27612PO Box 18237
Raleigh, North Carolina 27619

Telephone: (919) 781-1311

Facsimile: (919) 782-0465

June 8, 2010

Mr. Rich D'Agostino
c/o Anthony E. Griffis, Esq.
322 Moss Creek Village Drive
Hilton Head Island, SC 29926vla: griffis@hargray.com

Re: Estate of Valerie V. D'Agostino

Dear Mr. D'Agostino

1. Scope of Representation. You have requested that we provide legal services on your behalf in connection with the administration of your deceased wife's estate in Wake County, NC (the "Matter").
2. Professional Service. Our services in the Matter will be provided at our existing hourly rates for the lawyers and paralegals who will be working on the Matter as follows:

Senior Attorneys	\$275 per hour
Associate Attorneys	\$200 per hour
Certified Paralegals	\$135 per hour
Legal Assistants	\$ 80 per hour

Our services shall include, without limitation, our time to review and draft of documents, legal research, depositions, mediation, settlement discussions, court appearances, appearances before the Clerk, conferences, and any other tasks necessary to represent you in the Matter.

3. Retainer. In consideration of the services performed, or to be performed, you shall wire transfer to us the sum of One Thousand Five Hundred Dollars (\$1,500) as a retainer. This amount will be credited, from time to time, as a payment on account of our services and expenses incurred. This retainer is not an estimate of anticipated fees in this matter. In the event that the hours expended in the Matter are less than the total retainer, we will refund the balance to you.

4. Costs and Disbursements. You are also responsible for all necessary and reasonable costs and expenses incurred or paid out in the performance of our services. We will bill you, or ask you to pay directly, for out-of-pocket costs. These costs and expenses shall include, but not be limited to: expert witness

charges, travel expenses, duplication expenses, transmittal charges, long distance charges, courier charges, and any other necessary expenses. If we advance any costs or expenses, you shall reimburse us upon our furnishing you information as to the amount unless said amount can be charged against any available retainer remaining in your account.

5. Payment Policy. We will send you detailed, itemized monthly bills reflecting our charges. All statements sent to you are payable within thirty (30) days. Any charges not paid within said thirty days will accrue interest from the due date at the rate of one and one-half (1 1/2) percent per month until paid.

6. Discharge or Withdrawal. You have the right to discharge us for any reason at any time. We reserve the right to withdraw from representing you at any time. Upon termination, for any reason, we will promptly turn over your file to you upon request, however, you will remain responsible for all fees and costs incurred through the date of termination, but payment of our final statement shall not be a precondition to the release of your file.

7. Disclaimer. In representing you in this matter, we cannot and do not warrant or predict results or final developments. Be assured that it is our desire to afford you conscientious, faithful, and diligent service, seeking at all times to achieve solutions that are just and reasonable to you.

If the foregoing meets with approval, kindly signify consent and approval by having the agreement signed in the space provided below, insert the date, and return the original of this letter to us, along with the retainer fee.

Sincerely,

NICHOLLS & CRAMPTON, P. A.

/s/ Tim Nicholls

CONSENTED TO AND APPROVED


Rich D'Agostino
June 20, 2010

In Account With
NICHOLLS & CRAMPTON, P.A.
 ATTORNEYS AT LAW

3700 Glenwood Avenue - Suite 500
 Post Office Box 18237
 Raleigh, North Carolina 27612
 Telephone: 919/781-1311 Fax: 919/782-0465

Federal ID #
 56-1201204

Rich D'Agostino
 c/o Anthony E. Griffin, Esq.
 322 Moss Creek Village Drive
 Hilton Head Island, SC 29928

Invoice Date: September 23, 2010
 Invoice No. 108998
 Client/Matter ID: 102245.001

RE: FTM - VALERIE D'AGOSTINO ESTATE

Amount Paid: _____

For legal services rendered, including but not limited to

			Hours	
05/08/2010	NIC	Telephone conference with Mr. Griffin re: estate; draft engagement letter.	0.80	220.00
06/09/2010	PAR	Obtain documents from Estates Division.	1.20	182.00
06/10/2010	NIC	Review guardianship and estate filings; e-mail Mr. Griffin.	0.70	182.50
06/11/2010	NIC	Conference with associate re: procedural matters; review intestacy law.	0.70	192.50
	NIC	Telephone conference with Mr. Griffin; telephone call with Mr. Alexander; call Mr. Belcher.	1.20	330.00
06/14/2010	NIC	Review and respond to Mr. Garfo's e-mail.	0.20	55.00
08/21/2010	NIC	Telephone conference with Mr. Griffin; telephone conference with Assistant Clerk of Court; conference with Mr. Dombalis; review Hearing Notice; e-mail Mr. Belcher.	1.10	302.50
	DOM	Conference with Mr. Nicholls re: strategy; review memo to Charlotte attorney.	0.70	182.50
08/22/2010	NIC	Revise and finalize e-mail to Charlotte attorney; e-mail to Mr. Griffin; conference with Intern re: domicile.	1.10	302.50
08/24/2010	NIC	Draft fax to Mr. Alexander; e-mail to Mr. Griffin.	0.80	220.00
07/01/2010	NIC	Telephone conference with Mr. D'Agostino; review letter from D. Alexander.	0.60	137.50
07/02/2010	DOM	Draft Motion for Sanctions.	0.70	182.50
	NIC	Conference with Mr. Dombalis; review and file Motion for Sanctions.	0.70	182.50

A finance charge is computed on account balances unpaid 30 days
 after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102246.001

			Hours	
	DOM	Conference with Mr. Nicholls.	0.30	82.50
07/07/2010	NIC	Review e-mails from Mr. Garris; conference with Mr. Dombalis re: strategy; telephone conference with Mr. Garris; telephone conference with Mr. D'Agostino; research.	1.20	330.00
	DOM	Conference with Mr. Nicholls; telephone conference with South Carolina counsel and Mr. Nicholls.	0.50	137.50
07/08/2010	NIC	Review file in preparation for hearing; telephone conference with Messrs. Dombalis and Garris; telephone conference with Mr. Glass; telephone conference with Mr. D'Agostino; research jurisdiction and other matters for hearing.	7.50	2,062.50
	DOM	Telephone conference with Mr. Nicholls and South Carolina counsel.	1.30	357.50
07/08/2010	PAR	Preparation of all Qualification Documents; meeting with Mr. Nicholls re: estate administration.	1.80	243.00
	PAR	Draft application, Oath, etc. for Mr. D'Agostino.	1.80	243.00
	NIC	Conference with Mr. Dombalis; telephone conference with Mr. Griffin; telephone conference with Mr. D'Agostino; review application, etc.	1.40	385.00
	DOM	Conference with Mr. Nicholls.	0.20	55.00
07/12/2010	NIC	Review Petition and Exhibits; telephone conferences with Messrs. D'Agostino, Griffin and Glass; prepare for hearing before Clerk.	2.10	577.50
	NIC	Hearing before Clerk; e-mail Mr. Garris; telephone conference with Mr. D'Agostino.	1.80	495.00
07/13/2010	NIC	Draft amendment to Motion for Sanctions; telephone conference with Mr. D'Agostino.	0.80	165.00
07/14/2010	DOM	Review and comment on amendment to motion.	0.30	82.50
	NIC	Various e-mails to Messrs. Griffin and Glass; telephone conference with Mr. Alexander; draft Notice of Hearing.	1.30	357.50
07/16/2010	NIC	Conference with paralegal.	0.50	137.50
	PAR	Conference with Mr. Nicholls re: filing Application for letters.	0.50	87.50
	NIC	Telephone conference with Mr. Griffin and Mr. Glass; review Alexander e-mail.	0.50	137.50
	PAR	Meeting with Mr. Nicholls re: qualification documents.	0.60	81.00
07/17/2010	NIC	Prepare for hearing.	1.00	275.00
07/18/2010	NIC	Prepare for hearing.	1.60	440.00

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%);

NICHOLLS & CRAMPTON, P.A.
ATTORNEYS AT LAW

Page No. 4

Rich D'Agostino
RE: FTM - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
N J Domballe	8.05	276.00	1,388.75
L C Connoily	5.90	135.00	796.50

DISBURSEMENTS

Copies, Parking	30.00
Federal Express charges	22.00
Delivery charge	25.00
TOTAL DISBURSEMENTS through 07/09/2010	77.00

TOTAL FEES AND DISBURSEMENTS THIS INVOICE 13,289.75

07/16/2010	Payment-Check # 13894	-1,500.00
09/23/2010	Payment-Check # 1803	-1,200.00
09/23/2010	Payment-Check # 14008	-6,800.00
	Total Payments	-9,500.00

BALANCE DUE **\$3,789.75**

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

EXHIBIT" D "

STATE OF SOUTH CAROLINA)

COUNTY OF: BEAUFORT)

IN THE MATTER OF: ESTATE OF)
VALERIE D'AGOSTINO)

IN THE PROBATE COURT

NOTICE OF DISALLOWANCE OF CLAIM

CASE NUMBER: 2009ES0700889

TO:

Name: Nicholls & Crampton, P.A.
Address: c/o Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head, SC 29928

The undersigned, as the Personal Representative(s)/Conservator(s) appointed to administer this estate, disallows \$ 3,789.75 plus claimed interest and claimed attorney fees of your claim for \$3,789.75 plus interest and attorney fees presented on September 26, 2012.

Your claim was disallowed for the following reason(s):

Richard D'Agostino contracted with Nicholls & Crampton, P.A. personally and not in his representative capacity as the Personal Representative of the Estate of Valerie D'Agostino. Because the services you provided were provided to Richard D'Agostino personally, the Estate of Valerie D'Agostino is not responsible for paying the fees associated with that representation.

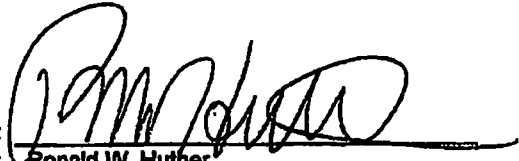
In addition, the amount of the claim is unreasonable in light of the service that was provided.

Finally, under no circumstances would anyone be responsible for paying the attorney's fees Claimant's lawyer (Jay A. Mullinax) incurred in attempting to pursue this claim. Significantly, Claimant and his attorney have repeatedly been asked to identify any case, statute or other legal principal that would allow Claimant to recover attorney's fees incurred in filing and pursuing a probate creditor's claim. Despite numerous requests, Claimant has been unable to produce, cite, direct or otherwise reference any authority to support Claimant's claim for attorney's fees on top of the face amount of his creditor's claim. Claimant has been warned in writing numerous times, pursuant to South Carolina Rules of Civil Procedure 11 and other relevant law, that he must have a legitimate basis in law and fact to advance his claim for attorney's fees.

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

Executed this

day of March , 2013.

Signature: 

Name: Ronald W. Huther

Address: 3402 Tennessee Drive
Alexandria, VA 22303

E-mail: _____

Telephone (O): (240) 486-1703
(H): _____

STATE OF SOUTH CAROLINA
COUNTY OF: BEAUFORT
IN THE MATTER OF: ESTATE OF
VALERIE D'AGOSTINO

)
)
)
)
)

IN THE PROBATE COURT
PROOF OF DELIVERY

CASE NUMBER: 2009ES0700889

On the 8th day of April, 2013, I mailed or delivered the following document, Notice of Disallowance of Claim

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original of which is on file with the court and incorporated herein,

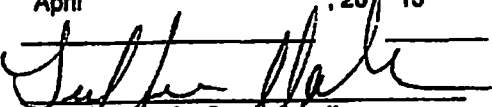
Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery ☒ ordinary first class mail
☐ certified mail ☐ registered mail

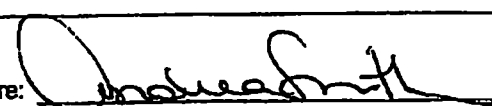
to each of the following persons at the address shown:

NAME	ADDRESS
Jay A. Mullinax, Esquire	2 Park Lane, Ste 303, Hilton Head, SC 29910
Anthony E. Griffis, Esquire	10 Fording Island Road Extension, Hilton Head, SC 29926
Sean M. Bolchoz, Esquire	P.O. Box 828, Bluffton, SC 29910

SWORN to before me this 8th day of
April, 2013


Notary Public for South Carolina
My Commission Expires: _____



Signature: 
Name: Andrea Smith, Paralegal to
Twenge + Twombly Law Firm
Address: 311 Carteret Street
Beaufort, SC 29902
Telephone (O): _____
(H): (843) 982-0100
E-mail: andrea@twlawfirm.com

Signature: _____
Name: _____
Address: _____
Telephone (O): _____
(H): _____
E-mail: _____

EXHIBIT" E "

STATE OF SOUTH CAROLINA)

COUNTY OF: BEAUFORT)

IN THE MATTER OF: Estate of Richard J. D'Agostino)

IN THE PROBATE COURT

NOTICE OF DISALLOWANCE OF CLAIM

CASE NUMBER: 2011ES0700406

TO:

Name: F. Timothy Nicholls, Esquire
Address: PO Box 18237
Raleigh, NC 27610

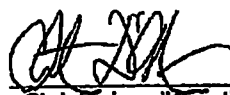
The undersigned, as the Personal Representative(s)/Conservator(s) appointed to administer this estate, disallows \$ 4,542.94 of your claim for \$ 4,542.94 presented on 1/2/12.

Your claim was disallowed for the following reason(s):

This claim represents fees due from the Estate of Valerie D'Agostino, 2009ES07889, whereby decedent was serving as Personal Representative. These fees are due from that estate rather than the decedent's estate. The engagement letter signed by decedent did not in anyway make him personally liable for such fees, and therefore his estate is not liable for such payment either. Furthermore based on information and belief there is enough money in the Estate of Valerie D'Agostino to pay such fees..

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

Executed this 10th day of Jan, , 20

Signature: 

Name: Christopher d'Agostino

Address: 13710 Trinity Leaf Place

Riverview, FL 33579

E-mail:

Telephone (O): 813 393-4576

(H): 813 677-0284

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

IN THE MATTER OF: ESTATE OF RICHARD J.
D'AGOSTINO

IN THE PROBATE COURT

PROOF OF DELIVERY

) CASE NUMBER: 2011ES070408

On the 7th day of June, 2011, I mailed or delivered the following document, Notice of Disallowance of Claim of Anthony E. Griffiths, and Notice of Disallowance of Claim of F. Timothy Nicholls, Esquire

- ☐ A copy of which is attached hereto and incorporated herein, or
☒ The original of which is on file with the court and incorporated herein,

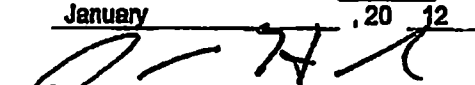
Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery ☒ ordinary first class mail
☐ certified mail ☐ registered mail

to each of the following persons at the address shown:

NAME	ADDRESS
J. Ashley Twombly, Esquire	311 Carteret Street, Beaufort, SC 29902
Anthony E. Griffiths, Esquire	355 Park Avenue, SW, Aiken, SC 29801
F. Timothy Nicholls, Esquire	3700 Glenwood Avenue, Suite 500, Raleigh, NC 27612

SWORN to before me this 12 day of
January, 2012


Notary Public for South Carolina

My Commission Expires: 12/12/16

Signature: Rebecca H. Hale

Name: Rebecca H. Hale, Esquire

Address: PO Box 22581

Hilton Head Island, SC 29925

Telephone (O): (843) 837-3000

(H):

E-mail: rhalehaleandbolchoz.com

Signature: _____

Name: _____

Address: _____

Telephone (O): _____

(H): _____

E-mail: _____

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
IN RE:)
ESTATE OF RICHARD J. D'AGOSTINO)
_____)
NICHOLLS & CRAMPTON, P.A.,)
Petitioner,)
v.)
CHRISTOPHER D'AGOSTINO, as)
Personal Representative of THE ESTATE)
OF RICHARD J. D'AGOSTINO,)
Respondent.)
_____)

IN THE PROBATE COURT
CASE NO. 2011-ES-07-406

**NOTICE OF MOTION
AND MOTION TO DISMISS
CLAIMS OF PETITIONER AND
RESCIND RESTRICTIONS ON
PERSONAL REPRESENTATIVE**

TO: THE ABOVE-NAMED PETITIONER, AND ATTORNEY:

PLEASE TAKE NOTICE THAT the Respondent, Christopher D'Agostino, as Personal Representative ("P.R.") of the Estate of Richard J. D'Agostino, hereby moves the Presiding Judge of the Beaufort County Probate Court, at the Beaufort County Courthouse in Beaufort, South Carolina, for an order dismissing the Petitioner's claim(s) against the within estate, rescinding the restrictions placed on its P.R. and , and as grounds therefor, would respectfully state as follows:

1. On or about January 3, 2012, the Petitioner filed a Statement of Creditor's Claim ("Statement") in the within estate; in the Statement, Petitioner asserts that the basis of the claim is for legal services "rendered in the Estate of Valerie D'Agostino", and that Richard D'Agostino ("Decedent"), who, prior to his death, was serving as Personal Representative of the Estate of Valerie D'Agostino, was "personally liable for said fees".
2. The Statement reflects that the amount due Petitioner for legal services rendered to Valerie D'Agostino's Estate is \$4,542.94.
3. On or about January 10, 2012, the Respondent filed a Notice of Disallowance of

Claim, rejecting the Petitioner's claim for amounts due, asserting, among other things, that any fees due Petitioner would be due from Valerie D'Agostino's Estate and that the Decedent was in no way personally liable for such fees.

4. On or about January 31, 2012, the Petitioner filed a Petition for Allowance of Claim (the "Petition") against the within estate, asserting that the Decedent "personally, and not in a representative capacity, contracted" for the legal services rendered to the Estate of Valerie D'Agostino.
5. Via letter dated February 7, 2012, this Court informed the Petitioner that it had received the Petition, but that "in order to commence such an action, it is necessary also to file a Summons and filing fee of \$150.00". Petitioner was further informed that the "Summons and Petition must be served on the [Respondent] in accordance with *Rule 4, SCRPC*".
6. South Carolina Code Section 62-3-806 requires that a claimant serve both a Summons and his Petition for Allowance of Claim upon the P.R. no later than thirty (30) days after the mailing of a notice of disallowance of the claim by the P.R.
7. Despite the foregoing, the Petitioner has *never* served a Summons and his Petition upon the Respondent to commence a proceeding on the Petitioner's claim against the Decedent's estate (and, upon information and belief, apparently never paid the \$150.00 filing fee).¹
8. Furthermore, the Respondent is currently restrained from exercising any powers as P.R. of the within estate, by operation of S.C. Code Section 62-3-605, as a consequence of that certain Demand for Bond dated May 20, 2011 and filed against the within estate.²
9. The Respondent is informed and believes that, given the Respondent's recent settlement of all claims with the Demandant of the aforesaid bond, the Demandant

¹It should also be noted that the Petitioner recently filed a creditor's claim against the Estate of Valerie D'Agostino on the same grounds for which it filed its claim against the Decedent's estate a year ago, further underscoring the fact that the Petitioner has no valid (or perfected) claim against the Decedent's estate.

²The Demandant(s) of the Bond was Ronald Huthar (and Heidi Pallesen), via counsel.

is no longer requesting that such bond be required of the P.R., any necessity for such bond has ceased and, accordingly, any and all restraint against or restrictions of his powers should be immediately rescinded, lifted and/or canceled by this Court.

10. Finally, the Respondent is informed and believes that the Demandant is currently seeking the appointment of personal representative for the Estate of Valerie D'Agostino.
11. Given the Respondent's settlement of all claims with the Demandant, the Respondent hereby joins in the Demandant's request for such appointment, and requests that this Court hold that the Respondent has no further obligation associated with the Estate of Valerie D'Agostino.
12. In light of the foregoing, the Respondent is informed and believes that the Petition and all associated claims of the Petitioner against the Decedent's estate should be dismissed pursuant to the applicable statutory law, common law, SCRCP and SCRPC, that any restrictions on the powers of the Respondent as P.R. should be lifted , allowing the Respondent to commence the closing of the within estate forthwith, and that the Respondent should be immediately relieved of any and all obligation to the Estate of Valerie D'Agostino.

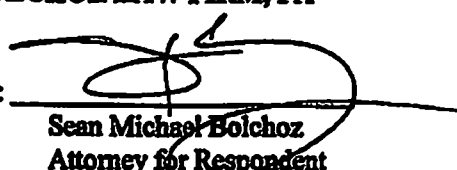
This motion shall be supported by the pleadings and any applicable memoranda, as well as the statutory and common law of the State of South Carolina, as necessary and applicable.

WHEREFORE, the Respondent, Christopher D'Agostino, as Personal Representative of the Estate of Richard J. D'Agostino, hereby prays this Court inquire into the matter and award him the relief prayed for hereinabove, as well as any such other and further relief as this Court deems just and proper.

(Signature on next page following.)

Respectfully submitted,

BOLCHOZ LAW FIRM, PA

By: 

Sean Michael Bolchoz
Attorney for Respondent
6 Buckingham Plantation Drive, Suite B
P.O. Box 828
Bluffton, SC 29910
(843) 836-3033

Bluffton, South Carolina

February 1, 2013

HALE & BOLCHOZ, L.L.C.

ATTORNEYS AND COUNSELORS AT LAW

1533 FORDING ISLAND ROAD, SUITE 294

MOSS CREEK VILLAGE

P.O. BOX 22561

HILTON HEAD ISLAND, SOUTH CAROLINA

29925-2561

JAMES O. HALE (1990-2012)
REBECCA H. HALE
SEAN MICHAEL BOLCHOZ*

*Certified Circuit Court Mediator

TELEPHONE (843) 837-3000
FACSIMILE (843) 837-3001

WWW.HALEANDBOLCHOZ.COM

December 5, 2012

VIA HAND DELIVERY

The Honorable Kenneth E. Fulp, Jr.
Beaufort County Probate Court
PO Drawer 1083
Beaufort, SC 29901

RE: *Estate of Richard J. D'Agostino*
Case No. 2011-ES-07-0406

Estate of Valerie V. D'Agostino
Case No. 2009-ES-07-889

Dear Judge Fulp:

As Your Honor may recall, I represent Chris D'Agostino, the personal representative ("P.R.") of the Estate of Richard D'Agostino. I am pleased to report that counsel for Ronald Huther and Heidi Pallesen, Ashley Twombly, and I have settled our clients' differences in both of the above-referenced matters (as well as the now-defunct litigation in the circuit court) and the parties are ready to proceed with closing these Estates.

To that end, please find enclosed a fully-executed copy of the parties' settlement agreement. I believe all we need to do at this point is: (1) have the Court lift the restrictions I understand it previously imposed upon my client as P.R. of his father's Estate, so that the settlement can be funded pursuant to the terms of the agreement, and, in turn, (2) Mr. Twombly's client(s) can be appointed as P.R. of Valerie D'Agostino's Estate.

As a review of these matters will reveal, there are no perfected claims currently existing against the Estate of Richard D'Agostino, as no actions have been timely brought in the Probate Court against the same. Although the North Carolina law firm of Nicholls and Crampton, P.A. has recently filed a creditors claim with the Court, by that claimant's own admission, the claim cannot be addressed until a P.R. is appointed for the Estate of Valerie D'Agostino. Accordingly, the two tasks referenced hereinabove are critical to bringing this matter to conclusion for all interested parties.

Upon Your Honor's receipt of this letter, I would appreciate it if you would have your office inform me and/or Mr. Twombly on how the Court wishes to proceed with this matter. I look forward to hearing from the Court soon.

The Honorable Kenneth E. Fulp, Jr.
December 5, 2012
Page 2

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L.L.C.



Sean Michael Bolchoz

SENDER'S E-MAIL ADDRESS

SBOLCHOZ@HALEANDBOLCHOZ.COM

SMB/

Enclosures

cc: Mr. Christopher D'Agostino
J. Ashley Twombly, Esquire (w/enc) (via email only to twombly@twlawfirm.com)
Anthony E. Griffiths, Esquire (w/enc) (via email only to tonygriffis@gmail.com)
Jay A. Mullinax, Esquire (w/enc) (jay@sc-estateplanning.com)

E:\Client Files\ID to G Clients\D'Agostino, Richard - 4250\Estate of Richard D'Agostino - 03\Fulp ltr re lifting restrictions.wpd

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

)
)
)
)

**SETTLEMENT AGREEMENT
AND GENERAL RELEASE**

THIS AGREEMENT, by and among Ronald W. Huther, Heidi M. Pallesen, Vanessa Huther, Christopher D'Agostino, as the Personal Representative of and on behalf of The Estate of Richard J. D'Agostino and as Personal Representative of and on behalf of The Estate of Valerie D'Agostino and Anthony E. Griffis is effective as of this, the _____ day of October, 2012;

WHEREAS, Huther and Pallesen filed suit against Richard J. D'Agostino for breach of fiduciary duty, accounting and declaratory judgment with regard to affairs of Valerie D'Agostino and The Estate of Valerie D'Agostino, such lawsuit captioned as *Ronald W. Huther and Heidi M. Pallesen v. Richard J. D'Agostino*, Case No. 2010-CP-07-5030 (the "2010 Action");

WHEREAS, Richard J. D'Agostino died on April 11, 2011;

WHEREAS, Huther and Pallesen subsequently filed suit against Christopher D'Agostino, as the Personal Representative of and on behalf of The Estate of Richard J. D'Agostino, asserting numerous causes of action with regard to The Estate of Valerie D'Agostino, such lawsuit captioned as *Ronald W. Huther and Heidi M. Pallesen v. Christopher D'Agostino, as Personal Representative of and on behalf of the Estate of Richard J. D'Agostino*, Case No. 2011-CP-07-2614 (the "2011 Action");

WHEREAS, at various times, claims were asserted by Richard J. D'Agostino against Ron Huther, Heidi Pallesen and Vanessa Huther related to Valerie D'Agostino and other matters;

WHEREAS, by Consent Order dated September 22, 2011, the 2011 Action was consolidated into the 2010 Action (the "Consolidated Action");

WHEREAS, Anthony E. Griffis, and F. Timothy Nicholls (individually and on behalf of Nicholls & Crampton, P.A.) have filed, or caused to be filed, claims against the Estate of Richard D'Agostino and Valerie D'Agostino, and may have other claims against other parties herein;

WHEREAS, the parties have now reached an agreement (hereinafter, the "Agreement") to bring to a conclusion any and all disputes between them of any nature whatsoever, including but not limited to the pending Consolidated Action, and desire to resolve with finality all claims and counterclaims asserted therein, as well as any all claims that were asserted previously or could have been asserted therein, or that are in any way associated with the named parties and Estates, and the parties now desire to record and document the terms of such Agreement, as reflected herein:

NOW, THEREFORE, THE TERMS OF THE AGREEMENT are as follows:

1. Christopher D'Agostino (individually and on behalf of the Estate of Richard D'Agostino) will execute all necessary Probate Court claim releases and/or waivers in favor of the Estate of Valerie D'Agostino and will release any and all claims to any assets of the Estate of Valerie D'Agostino. Christopher D'Agostino further agrees that all assets of the Valerie D'Agostino's Estate belong exclusively to Ron Huther and Heidi Pallesen.
2. Christopher D'Agostino will address, resolve and/or satisfy the attorneys' fee claims of Anthony E. Griffis currently existing against the Estate of Richard D'Agostino.
3. Christopher D'Agostino will pay to the order of Twenge + Twombly Law Firm, as counsel for Huther and Pallesen, in certified funds, the sum of Twenty Thousand and 00/100 (\$20,000.00) Dollars, as a full and complete settlement of their claims against Christopher D'Agostino, individually and as Personal Representative of the Estate of Richard D'Agostino, and/or any claims against the Estate of Richard D'Agostino.¹
4. Christopher D'Agostino will also pay to the order of Twenge + Twombly Law Firm, in certified funds, the sum of Four Thousand Nine Hundred Twenty-Nine and 08/100 (\$4,929.08) Dollars (the "Fee Fund"), to be held in escrow by Twenge + Twombly Law Firm ("Escrow Agent") pending final resolution of any and all claims of Nicholls & Crampton, P.A. ("Nicholls") against the Estate of Richard D'Agostino. In the event Nicholls' claim(s) against the Estate of Richard D'Agostino for Nicholls' is upheld, said claim shall be paid to Nicholls out of the Fee Fund by the Escrow Agent; any award in excess of the Fee Fund ordered by the Probate Court to be paid to Nicholls shall be the sole responsibility of Huther and Pallesen, who shall indemnify and hold Christopher D'Agostino harmless against the same. In the event Nicholls's claim(s) against the Estate of Richard D'Agostino is denied, Escrow Agent is then authorized to release the Fee Fund to Huther and Pallesen as additional settlement funds. The parties further agree and understand that Huther and Pallesen shall thereafter be solely responsible for any further claim(s) by Nicholls, and shall indemnify and hold Christopher D'Agostino harmless against the same.
5. Christopher D'Agostino agrees not to object to or otherwise challenge Ron Huther applying to serve and serving as Personal Representative of the Estate of Valerie D'Agostino.
6. Huther and Pallesen will execute all necessary Probate Court claim releases and/or waivers in favor of Christopher D'Agostino, individually and as Personal Representative of the Estate of Richard D'Agostino, and/or the Estate of Richard D'Agostino.

¹The parties hereto acknowledge that these funds will originate from funds currently held in the Estate of Richard D'Agostino, and cannot be dispersed until Huther and Pallesen's claims against said Estate are released and waived.

7. Huther and Pallesen hereby release Christopher D'Agostino, individually and as Personal Representative of the Estate of Richard D'Agostino and as Personal Representative of the Estate of Valerie D'Agostino, from any and all causes of action, whether known or unknown.
8. Huther and Pallesen hereby release Attorney Anthony E. Griffis from any and all causes of action, whether known or unknown.
9. Christopher D'Agostino (individually and as personal representative of the Estate of Richard D'Agostino) hereby releases Ron Huther, Vanessa Huther, Pallesen, and the Estate of Valerie D'Agostino from any and all causes of action existing now, whether known or unknown.
10. Anthony E. Griffis hereby releases Ron Huther, Vanessa Huther, Heidi Pallesen, and the Estate of Valerie D'Agostino from any and all claim or causes of action existing now, whether known or unknown, or any nature whatsoever. Anthony E. Griffis also agrees not to not to object to or otherwise challenge Ron Huther applying to serve and serving as Personal Representative of the Estate of Valerie D'Agostino.
11. The Consolidated Action, and all associated claims and counterclaims, will be dismissed,² with prejudice.

THIS AGREEMENT shall be interpreted under the internal laws, not the conflict of laws, of the State of South Carolina.

THE SINGULAR, whenever used in this Agreement, shall be construed to mean the plural when applicable, and the necessary grammatical changes required to make the provisions apply shall in all cases be assumed as though in each case fully expressed.

THIS AGREEMENT may be executed in counterparts, and each and every one shall be deemed an original. It is hereby mutually agreed upon by all parties that, if necessary, a telegraph, facsimile or electronic mail communication shall be an acceptable and binding form of communication.

THIS AGREEMENT shall be deemed effective upon the date in which it is signed and delivered and when the funds payable to Huther and Pallesen clear the trust account of Twenge + Twombly Law Firm.

IN WITNESS WHEREOF, this Agreement has been executed and sealed by the parties hereto as of the day and year first above written.

²As well as any associated case(s), to the extent necessary.

WITNESSES:

Allegman
Ali Yaman

Veronika Schlecht
Veronika Schlecht

Ronald W. Huther
Ronald W. Huther

Heidi M. Pallesen

Vanessa Huther

Christopher D'Agostino, as Personal
Representative of and on behalf of the Estate
of Richard J. D'Agostino

Anthony Griffiths

Ronald W. Huther

Evan Ball

Heidi M. Pallesen
Heidi M. Pallesen

Barney Kropp

Kathryn McLaughlin

Vanessa V. Huther
Vanessa Huther

Jessica L. Bonars

Christopher D'Agostino, as Personal

Representative of and on behalf of the Estate
of Richard J. D'Agostino

Anthony Griffin

WITNESSES:

Ronald W. Huther

Heidi M. Pallesen

Vanessa Huther

Christopher D'Agostino, as Personal
Representative of and on behalf of the Estate
of Richard J. D'Agostino

[Handwritten signature]
[Handwritten signature]

Anthony Griffin

Ronald W. Hurter

Heidi M. Pallesen

Vanessa Hurter

Christopher D'Agostino, as Personal
Representative of and on behalf of the Estate
of Richard J. D'Agostino

Anthony Griffiths

EXHIBIT" H "

From: McLeod, Heather [mailto:hmcleod@bcgov.net]
Sent: Tuesday, February 18, 2014 2:01 PM
To: Jay A. Mullinax
Cc: Dukes, Marvin; Ashley Twombly; Andrea Smith
Subject: RE: Nicholls & Crampton, P.A. vs. Estate of Valerie D'Agostino

I have talked with Judge Dukes on all of this and he does want to do a conference call. How are parties on February 21 at 2:30 p.m., 24th from 8:30 to 10:30 a.m., 25th from 8:30 to 10:30 a.m or anytime in the afternoon, 27th at 8:30 a.m., 9:00 a.m. or 3:00 p.m., or 28th at 8:30 a.m. or 2:30 p.m. Let me know if any of these date and time works for you.

Also, Judge Dukes was wondering if Judge Mullen issued an Order that said she would not hear this case by Jury Trial or was this something she just said from the bench?

Please contact us immediately if you are waiting on a ruling and it has been more than 30 days.

If you have a motion older than 30 days, needing a hearing, please email me a filed copy and I will work with you on scheduling. Please note, there may be jurisdiction or conflict issues resulting in Judge Dukes' inability to hear a motion.

Thanking You in Advance,

**Heather R. H. McLeod,
Judicial Assistant to
Hon. Marvin H. Dukes, III
Beaufort County Master In Equity
And Special Circuit Court Judge
P. (843) 255-5710
F. (843) 255-9505
hmcleod@bcgov.net**

**Beaufort County Courthouse
102 Ribaut Rd., 2nd Floor, Room 212
Beaufort, SC 29902
Post Office Drawer 1228
Beaufort, SC 29901**

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From: Ashley Twombly [<mailto:twombly@twlawfirm.com>]
Sent: 02/18/2014 2:14 PM
To: McLeod, Heather; Jay A. Mullinax
Cc: Dukes, Marvin; Andrea Smith
Subject: RE: Nicholls & Crampton, P.A. vs. Estate of Valerie D'Agostino

She just said that on a t/c one day, I'm not sure she meant it to be honest with you. I think she was simply understandably frustrated and wanted to try and get the parties to resolve the case (which we have been unable to do). I of course do not want to put words in her mouth, that was just my take from the situation. I just want to get the case resolved, and at this point, I really do not care who resolves it or how they resolve it. I am of course not waiving any rights by this email, I'm just saying.

I am available on the 21st at 2:30 pm, the 24th at 8:30 am, the 25th all day, the 27th all day, and the 28th all day.

Thanks Heather.

Table of Contents

1. Petition for Allowance of Claim against Estate of Valerie
D'Agostino with Memorandum
 - A. Signed Engagement Letter
 - B. Nicholls & Crampton, P.A. Invoice dated 06/08/10 through
09/23/10
 - C. Nicholls & Crampton, P.A. Invoice dated 11/30/11
 - D. Statement of Creditor's Claim against Estate of Richard
D'Agostino
 - E. Notice of Disallowance of Claim from Rebecca Hale
 - F. Statement of Creditor's Claim against Estate of Valerie
D'Agostino
 - G. Notice of Disallowance of Claim from Ashley Twombly
 - H. Summons and Proof of Delivery
2. Global Settlement and correspondence from Bolchoz
3. Interim Accounting as of October 2013
4. Family Settlement Agreement
5. Probate Law – Title 62 – Effective Date
6. §62-1-111 – Attorney's Fees



STATE OF SOUTH CAROLINA)
)
COUNTY OF: BEAUFORT)
)
IN THE MATTER OF ESTATE OF)
VALERIE D'AGOSTINO:

IN THE PROBATE COURT
PETITION FOR ALLOWANCE OF CLAIM

NICHOLLS & CRAMPTON, P.A.

Petitioner

) CASE NUMBER: 2009ES0700889

vs.

Estate of Valerie D'Agostino

Respondent(s) (if applicable)

FILED
2013 MAY -3 PM 4:56
BEAUFORT COUNTY, SC

The undersigned petitions the Court to allow the following claims against the estate in the amounts set forth below:

Creditor Name and Address

Amount of Claim

Nicholls & Crampton, P.A.
3700 Glenwood Avenue, Suite 500

\$6,013.00

(Includes
interest)

Raleigh, NC 27612

In support of this Petition, Petitioner states that each claim is valid, was presented within the period for the presentation of claims as provided by law, and has not been paid, and, as to those claims which were presented to the Personal Representative and not filed with the Court, that a copy of the statement of each such claim is attached to this Petition and made a part hereof.

(Other:)

1. Memorandum in Support of Petition for Allowance of Claim
 - a. Exhibit A: Signed Engagement Letter
 - b. Exhibit B: Invoice dated 06/08/10-09/23/10
 - c. Exhibit C: Invoice dated 11/30/11
 - d. Exhibit D: Statement of Creditor's Claim (Estate of Richard D'Agostino)
 - e. Exhibit E: Notice of Disallowance of Claim from Rebecca H. Hale
 - f. Exhibit F: Statement of Creditor's Claim (Estate of Valerie D'Agostino)
 - g. Exhibit G: Notice of Disallowance of Claim from J. Ashley Twombly

Executed this **7** day of May, 2013.

Signature:


Name: Jay A. Mullinax, Esquire
Attorney for the Petitioners

Address: _____
Telephone(O): _____
(H): _____
Attorney: Jay A. Mullinax, Esquire
Address: 2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Telephone: (843)-785-6101

ORDER FOR ALLOWANCE OF CLAIM

On the basis of the within Petition and upon hearing for allowance of claims, IT IS HEREBY ORDERED that the following claims against the estate be ☐ ALLOWED ☐ DISALLOWED in the amounts set forth below:

Creditor Name and Address

Amount of Claim

Executed this day of , 20 .

, Probate Court Judge

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)
IN THE MATTER OF ESTATE OF)
VALERIE D'AGOSTINO:)
NICHOLLS & CRAMPTON, P.A.,)
Petitioner,)
v.)
ESTATE OF VALERIE D' AGOSTINO,)
Respondent.)

IN THE PROBATE COURT

CASE NUMBER: 2009ES0700889

**MEMORANDUM IN SUPPORT OF
PETITION FOR ALLOWANCE OF CLAIM**

FILED
2013 MAY - 8 PM 1:10
BEAUFORT COUNTY, SOUTH CAROLINA

1. Valerie D' Agostino died on October 17, 2009, domiciled in Beaufort County, South Carolina. She was survived by her husband, Richard D' Agostino, Ronald Hauer (son) and Heidi Pallesen (daughter). The Beaufort County Probate Court subsequently appointed Mr. Richard D'Agostino as Personal Representative of his wife's estate.
2. On June 10, 2010, Richard D'Agostino, Personal Representative for the Estate of Valerie D'Agostino, consented to, approved, and signed an Engagement Letter with Nicholls & Crampton, P.A., regarding professional legal service fees, costs, disbursements, and payment policy relating to the Engagement Letter's subject: "Estate of Valerie D'Agostino". (A copy of the signed Engagement Letter is attached as **Exhibit A.**)
3. The payment policy in the Nicholls & Crampton, P.A. Engagement Letter approved and signed by Richard D' Agostino on June 10, 2010 states "We will send you detailed, itemized monthly bills reflecting our charges. All statements sent to you are payable within thirty (30) days. Any charges not paid within said thirty days will accrue interest from the due date at the rate of one and one-half (1 ½) percent per month until paid".
4. Legal Services rendered for Mr. D'Agostino relating to actions taken related to his responsibility as Personal Representative of the Estate of Valerie D'Agostino are dated

June 8, 2010 through September 23, 2010 resulting in fees of \$13,289.75; Nicholls & Crampton, P.A. received three checks from Mr. D'Agostino in payment for its services:

- i. 7/16/10 – Payment- Check # 13894 for \$1,500.00
- ii. 9/23/10 – Payment - Check # 1803 for \$1,200.00
- iii. 9/23/10 – Payment - Check #14006 for \$6,800.00

Total =\$9,500.00

(A copy of this invoice is attached as **Exhibit B.**)

5. Therefore, Mr. D'Agostino paid \$9,500.00 towards his charges of \$13,289.75, leaving a remaining balance of \$3,789.75.
6. Richard D' Agostino ("Decedent") died on April 11, 2011.
7. Christopher D'Agostino subsequently petitioned the Probate Court for the State of South Carolina, County of Beaufort, to open the Estate of Richard D'Agostino.
8. The Court, thereafter, appointed Mr. Christopher D' Agostino, as the Personal Representative of his father's estate.
9. Nicholls & Crampton, P.A.. made demands upon Mr. Richard D' Agostino prior to his death, and on Christopher D' Agostino, as Personal Representative of Estate of Richard J. D'Agostino, for payment of an outstanding balance for services provided to Mr. D'Agostino that were related to the Estate of Valerie D'Agostino.
10. Despite Nicholls & Crampton P.A. demands, Richard D'Agostino and Christopher D' Agostino, as Personal Representative of Estate of Richard J. D'Agostino failed and refused to pay the outstanding balance for services provided by or expenses paid and incurred by Petitioner.
11. As of November 30, 2011, Mr. D'Agostino's invoice had a remaining principle of \$3,789.75, plus an accumulated interest charge of \$753.19 resulting in a total balance of \$4,542.94. (A copy of this invoice is attached as **Exhibit C.**)

12. Nicholls & Crampton, P.A. filed a Statement of Creditor's Claim against the Estate of Richard D'Agostino on December 27, 2011 for \$4,542.94 for legal services (including interest) rendered to Richard D'Agostino. (A copy of Creditor's Claim is attached as **Exhibit D.**)

13. On January 10, 2012, a Notice for Disallowance of Claim was executed by Rebecca H. Hale of Hale & Bolchoz, L.L.C., and signed by Christopher D' Agostino disallowing the claim against the Estate of Richard D'Agostino for \$4,542.94. The Notice of Disallowance of Claim included the following statement:

This claim represents fees due from the Estate of Valerie D' Agostino, 2009ES07889, whereby decedent was serving as Personal Representative. These fees are due from that estate rather than the decedent's estate. The engagement letter signed by decedent did not in anyway make him personally liable for such fees, and therefore his estate is not liable for such payment either. Furthermore based on information and belief there is enough money in the Estate of Valerie D' Agostino to pay such fees.

(A copy of the Disallowance of Claim and Proof of Delivery is attached as **Exhibit E.**)

14. The Beaufort County Probate Court subsequently dismissed the Petitioner's claim against the Estate of Richard D'Agostino.

15. On September 26, 2013. Petitioner filed a Statement of Creditor's Claim against the Estate of Valerie D'Agostino in the amount of \$3,789.75, plus interest and attorney fees, for "legal services provided to Richard J. D'Agostino as Personal Representative of the Estate of Valerie D' Agostino." (A copy of Statement of Creditor's Claim is attached as **Exhibit F.**)

16. On April 8, 2013, Respondent's counsel, J. Ashley Twombly of Twenge & Twombly Law Firm mailed to Petitioner, Nicholls & Crampton, P.A., and its counsel a Notice of Disallowance of Petitioner's claim in its entirety. The Notice of Disallowance included the following statement:

Richard D' Agostino was contracted with Nicholls & Crampton, P.A. personally and not in his representative capacity as the Personal Representative of the Estate of Valerie D' Agostino. Because the services you provided were provided to Richard D' Agostino personally, the Estate of Valerie D' Agostino is not responsible for paying the fees associated with that representation.

(A copy of the Disallowance of Claim and Proof of Delivery is attached as **Exhibit G.**)

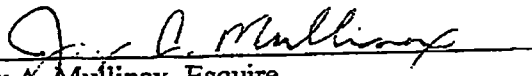
17. The Respondent provides no evidence of his allegations.
18. Conversely, the Petitioner has provided the Court with the following prima facie evidence of its claim: An engagement letter (with the subject matter: Estate of Valerie D'Agostino and details of the services and charges) signed by the Respondent and Petitioner; detailed invoices with time entries and subject matter exclusively related to the administration of the Estate of Valerie D'Agostino; a Court filing by an attorney (Rebecca Hales) representing Richard D' Agostino which alleges that the Estate of Valerie D'Agostino owes the claim.
19. The remaining principle balance of \$3,789.75 has accrued interest since Sept, 23, 2010 at the rate of one and one-half (1½) percent per month, in accordance with the referenced engagement letter and its terms (as proscribed in South Carolina Code of Laws §62-3-806(d)), resulting in the principal and interest total amount of \$6,013.00 (through May 1, 2013, representing 31 months of interest)
20. Decedent, Mr. Richard J. D'Agostino, Personal Representative of the Estate of Valerie D'Agostino, knowingly accepted the benefits of the services provided by and expenses incurred by Petitioner.
21. The services provided by the Petitioner, Nicholls & Crampton, P.A., resulted in the following benefits to the estate: Dismissal of unnecessary and improper venue of estate administration in North Carolina (with anticipated ancillary estate administration in South Carolina); proper efficient venue for estate; reduction in administrative costs of dual

estate administrations; recovering of attorney fees from another law firm for improper venue proceedings in North Carolina.

22. The hourly rates and interest are in accordance with the engagement letter and the services provided by the Petitioner, Nicholls & Crampton, P.A., as outlined and described in the invoice entries, are reasonably worth \$3,789.75, plus interest of \$2,223.25, resulting in the total amount of \$6,013.00. The Respondent has provided no evidence to the contrary.
23. The Petitioner made every reasonable effort to negotiate a settlement with the Respondent, even though the Petitioner was excluded from all negotiations with other parties during several months of a negotiated "global settlement" to settle all matters related to this case. In fact, the Petitioner provided a specific number in settlement and welcomed the Respondent to provide a counter offer. The Respondent provided no counter offer.
24. The Petitioner withdraws its claim regarding attorney fees related to this action. Although the contract was made with a North Carolina law firm, related to a matter initiated in a North Carolina court, and North Carolina courts have awarded attorney fees with similar criteria, the effort to prosecute the claim outweighs the prospect for equity to be achieved. Likewise, the effort to prosecute a companion claim under South Carolina law, which specifically proscribes the allowance of attorney fees, outweighs the prospect for equity to be achieved for the Petitioner. It should be noted that the Respondent never produced, cited, or directed Petitioner to any support for Respondent's position in regard to this matter.
25. The Petitioner respectfully prays that this Court, consider the foregoing and grant the Petitioner's claim based on the evidence presented.

Respectfully submitted,

LAW OFFICE OF JAY A. MULLINAX, LLC


Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Tel: (843) 785-6101
Fax: (843) 785-6104
Attorney for the Petitioner

Dated: May 7, 2013
Hilton Head Island, South Carolina

FILED

EXHIBIT" A "

2013 MAY -8 PM 4:16

NICHOLLS & GRAMPTON, P. A.
ATTORNEYS AT LAW

3700 Glenwood Avenue
Suite 500
Raleigh, North Carolina 27612

PO Box 18237
Raleigh, North Carolina 27619

Telephone: (919) 781-1311

Facsimile: (919) 782-0465

June 8, 2010

Mr. Rich D'Agostino
c/o Anthony E. Griffis, Esq.
322 Moss Creek Village Drive
Hilton Head Island, SC 29926

via: griffis@hargray.com

Re: Estate of Valerie V. D'Agostino

Dear Mr. D'Agostino

1. Scope of Representation. You have requested that we provide legal services on your behalf in connection with the administration of your deceased wife's estate in Wake County, NC (the "Matter").

2. Professional Service. Our services in the Matter will be provided at our existing hourly rates for the lawyers and paralegals who will be working on the Matter as follows:

Senior Attorneys	\$275 per hour
Associate Attorneys	\$200 per hour
Certified Paralegals	\$135 per hour
Legal Assistants	\$ 80 per hour

Our services shall include, without limitation, our time to review and draft of documents, legal research, depositions, mediation, settlement discussions, court appearances, appearances before the Clerk, conferences, and any other tasks necessary to represent you in the Matter.

3. Retainer. In consideration of the services performed, or to be performed, you shall wire transfer to us the sum of One Thousand Five Hundred Dollars (\$1,500) as a retainer. This amount will be credited, from time to time, as a payment on account of our services and expenses incurred. This retainer is not an estimate of anticipated fees in this matter. In the event that the hours expended in the Matter are less than the total retainer, we will refund the balance to you.

4. Costs and Disbursements. You are also responsible for all necessary and reasonable costs and expenses incurred or paid out in the performance of our services. We will bill you, or ask you to pay directly, for out-of-pocket costs. These costs and expenses shall include, but not be limited to: expert witness

charges, travel expenses, duplication expenses, transmittal charges, long distance charges, courier charges, and any other necessary expenses. If we advance any costs or expenses, you shall reimburse us upon our furnishing you information as to the amount unless said amount can be charged against any available retainer remaining in your account.

5. Payment Policy. We will send you detailed, itemized monthly bills reflecting our charges. All statements sent to you are payable within thirty (30) days. Any charges not paid within said thirty days will accrue interest from the due date at the rate of one and one-half (1 ½) percent per month until paid.

6. Discharge or Withdrawal. You have the right to discharge us for any reason at any time. We reserve the right to withdraw from representing you at any time. Upon termination, for any reason, we will promptly turn over your file to you upon request, however, you will remain responsible for all fees and costs incurred through the date of termination, but payment of our final statement shall not be a precondition to the release of your file.

7. Disclaimer. In representing you in this matter, we cannot and do not warrant or predict results or final developments. Be assured that it is our desire to afford you conscientious, faithful, and diligent service, seeking at all times to achieve solutions that are just and reasonable to you.

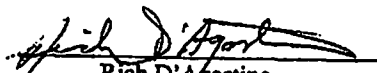
If the foregoing meets with approval, kindly signify consent and approval by having the agreement signed in the space provided below, insert the date, and return the original of this letter to us, along with the retainer fee.

Sincerely,

NICHOLLS & CRAMPTON, P. A.

/s/ Tim Nicholls

CONSENTED TO AND APPROVED


Rich D'Agostino
June 2, 2010

In Account With
NICHOLLS & CRAMPTON, P.A.
 ATTORNEYS AT LAW

3700 Glenwood Avenue - Suite 500
 Post Office Box 18237
 Raleigh, North Carolina 27612
 Telephone: 919/781-1311 Fax: 919/782-0465

Federal ID #
 56-1201204

Rich D'Agostino
 c/o Anthony E. Griffin, Esq.
 322 Moss Creek Village Drive
 Hilton Head Island, SC 29926

Invoice Date: September 23, 2010
 Invoice No. 108938
 Client/Matter ID: 102245.001

RE: FTN - VALERIE D'AGOSTINO ESTATE

Amount Paid:

For legal services rendered, including but not limited to

Date	Initials	Description	Hours	Amount
06/08/2010	NIC	Telephone conference with Mr. Griffis re: estate; draft engagement letter.	0.80	220.00
06/09/2010	PAR	Obtain documents from Estates Division.	1.20	162.00
06/10/2010	NIC	Review guardianship and estate filings; e-mail Mr. Griffis.	0.70	192.50
06/11/2010	NIC	Conference with associate re: procedural matters; review intestacy law.	0.70	192.50
	NIC	Telephone conference with Mr. Griffis; telephone call with Mr. Alexander; call Mr. Belcher.	1.20	330.00
06/14/2010	NIC	Review and respond to Mr. Garris's e-mail.	0.20	55.00
06/21/2010	NIC	Telephone conference with Mr. Griffis; telephone conference with Assistant Clerk of Court; conference with Mr. Dombalis; review Hearing Notice; e-mail Mr. Belcher.	1.10	302.50
	DOM	Conference with Mr. Nicholls re: strategy; review memo to Charlotte attorney.	0.70	192.50
06/22/2010	NIC	Revise and finalize e-mail to Charlotte attorney; e-mail to Mr. Griffis; conference with intern re: domicile.	1.10	302.50
06/24/2010	NIC	Draft fax to Mr. Alexander; e-mail to Mr. Griffis.	0.80	220.00
07/01/2010	NIC	Telephone conference with Mr. D'Agostino; review letter from D. Alexander.	0.50	137.50
07/02/2010	DOM	Draft Motion for Sanctions.	0.70	192.50
	NIC	Conference with Mr. Dombalis; review and file Motion for Sanctions.	0.70	192.50

A finance charge is computed on account balances unpaid 30 days
 after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

			Hours	
	DOM	Conference with Mr. Nicholls.	0.30	82.50
07/07/2010	NIC	Review e-mails from Mr. Garris; conference with Mr. Dombalis re: strategy; telephone conference with Mr. Garris; telephone conference with Mr. D'Agostino; research.	1.20	330.00
	DOM	Conference with Mr. Nicholls; telephone conference with South Carolina counsel and Mr. Nicholls.	0.50	137.50
07/08/2010	NIC	Review file in preparation for hearing; telephone conference with Messrs. Dombalis and Garris; telephone conference with Mr. Glass; telephone conference with Mr. D'Agostino; research jurisdiction and other matters for hearing.	7.50	2,062.50
	DOM	Telephone conference with Mr. Nicholls and South Carolina counsel.	1.30	357.50
07/09/2010	PAR	Preparation of all Qualification Documents; meeting with Mr. Nicholls re: estate administration.	1.80	243.00
	PAR	Draft application, Oath, etc. for Mr. D'Agostino.	1.80	243.00
	NIC	Conference with Mr. Dombalis; telephone conference with Mr. Griffis; telephone conference with Mr. D'Agostino; review application, etc.	1.40	385.00
	DOM	Conference with Mr. Nicholls.	0.20	55.00
07/12/2010	NIC	Review Petition and Exhibits; telephone conferences with Messrs. D'Agostino, Griffis and Glass; prepare for hearing before Clerk.	2.10	577.50
	NIC	Hearing before Clerk; e-mail Mr. Garris; telephone conference with Mr. D'Agostino.	1.80	495.00
07/13/2010	NIC	Draft amendment to Motion for Sanctions; telephone conference with Mr. D'Agostino.	0.60	165.00
07/14/2010	DOM	Review and comment on amendment to motion.	0.30	82.50
	NIC	Various e-mails to Messrs. Griffis and Glass; telephone conference with Mr. Alexander; draft Notice of Hearing.	1.30	357.50
07/16/2010	NIC	Conference with paralegal.	0.50	137.50
	PAR	Conference with Mr. Nicholls re: filing Application for letters.	0.50	67.50
	NIC	Telephone conference with Mr. Griffis and Mr. Glass; review Alexander e-mail.	0.50	137.50
	PAR	Meeting with Mr. Nicholls re: qualification documents.	0.60	81.00
07/17/2010	NIC	Prepare for hearing.	1.00	275.00
07/18/2010	NIC	Prepare for hearing.	1.60	440.00

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

			Hours	
07/19/2010	NIC	Prepare for hearing; various telephone conferences with Messrs. Griffis and Alexander; conference with Mr. Dombalis; revise motion for sanctions.	3.00	825.00
	DOM	Various conferences with Mr. Nicholls re: sanctions.	1.00	275.00
	DOM	Review sanction case law; conference with Mr. Nicholls re: same.	0.05	13.75
07/22/2010	NIC	Various telephone conferences with Messrs. Glass, Alexander and Griffis re: settlement; draft e-mail re: settlement.	2.30	632.50
07/23/2010	NIC	Various e-mails re: continuance of hearing.	0.40	110.00
07/27/2010	NIC	Respond to Mr. Griffis.	0.20	55.00
07/29/2010	NIC	Review and revise Settlement Agreement; e-mail Mr. Griffis; telephone conference with Mr. Griffis; revise Agreement and e-mails; various e-mails; telephone conference with Assistant Clerk.	2.30	632.50
08/02/2010	NIC	Revise Agreement; respond to Mr. Alexander's e-mail re: changes.	0.20	55.00
08/09/2010	NIC	Review and reply to various e-mails.	0.70	192.50
08/12/2010	NIC	Review and respond to Mr. Glass e-mail and Mr. Griffis e-mail.	0.40	110.00
08/13/2010	NIC	Conference with Messrs. Griffis and Glass re: changes to Settlement Agreement; review revised Agreement.	0.80	220.00
09/01/2010	NIC	Review and respond to various e-mails re: settlement.	0.30	82.50
09/10/2010	NIC	Various e-mail communications re: settlement.	0.80	220.00
09/17/2010	NIC	Review various emails.	0.30	82.50
09/20/2010	NIC	Review and respond to various emails.	0.40	110.00
09/23/2010	NIC	Prepare and file withdrawal of motion; various emails.	0.70	192.50
		FEES BILLED	51.05	13,212.75

FEE SUMMARY

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
F T Nicholls	40.10	\$275.00	\$11,027.50
N J Dombalis	5.05	275.00	1,388.75
L C Connolly	5.90	135.00	796.50

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

Rich D'Agostino
RE: FTN - VALERIE D'AGOSTINO ESTATE

Invoice Date: 09/23/2010
Invoice No. 108938
Client/Matter ID. 102245.001

DISBURSEMENTS

Copies, Parking	30.00
Federal Express charges	22.00
Delivery charge	25.00
TOTAL DISBURSEMENTS through 07/09/2010	77.00

TOTAL FEES AND DISBURSEMENTS THIS INVOICE	13,289.75
--	------------------

07/16/2010	Payment-Check # 13894	-1,500.00
09/23/2010	Payment-Check # 1803	-1,200.00
09/23/2010	Payment-Check # 14006	-6,800.00
	Total Payments	-9,500.00

BALANCE DUE	<u>\$3,789.75</u>
--------------------	--------------------------

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

FILED

In Account With

2013 MAY 14
NICHOLLS & CRAMPTON, P.A.
ATTORNEYS AT LAW3700 Glenwood Avenue - Suite 500
Post Office Box 18237
BEAUFORT COUNTY, SC Raleigh, North Carolina 27612

Telephone: 919/781-1311 Fax: 919/782-0465

Federal ID #
56-1201204Rich D'Agostino
c/o Anthony E. Griffin, Esq.
322 Moss Creek Village Drive
Hilton Head Island, SC 29926Invoice Date: November 30, 2011
Invoice No. 117498
Client/Matter ID: 102245.001

RE: FTN - VALERIE D'AGOSTINO ESTATE

Amount Paid: _____

=====

For legal services rendered, including but not limited to

PREVIOUS BALANCE	\$4,488.74
Finance Charge	54.20
BALANCE DUE	<u>\$4,542.94</u>

A finance charge is computed on account balances unpaid 30 days
after the billing date at a periodic rate of 1 1/2% per month (Annual percentage rate of 18%)

EXHIBIT" D

08

FILED

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

2013 MAY -8 } PM 4:17

IN THE PROBATE COURT

STATEMENT OF CREDITOR'S CLAIM

IN THE MATTER OF: RICHARD J. D'AGOSTINO

BEAUFORT COUNTY, SC

CASE NUMBER: 2011ES0700406

Decedent's Date of Death (if known): 04/11/2011

Decedent's Last Mailing Address: 15 Sebring Drive, Bluffton, SC 29909

Creditor: Nicholls & Crampton, P. A.

Address: 3700 Glenwood Avenue, Suite 500

Raleigh, NC 27612

Telephone: 919-781-1311

Basis of claim:

Legal services rendered in the Estate of Valerie D'Agostino for decedent Richard D'Agostino pursuant to engagement letter attached; decedent agreed to be personally liable for said fees in the event fees were not paid by the Estate of Valerie D'Agostino

Amount of claim \$ 4,542.94

Date claim will become due (if not already due): Claim due as of 9/23/, 2010 when last services rendered.

Nature of uncertainty as to amount of claim and due date, if any:

N/A

Description of any security as to claim:

None

Signature: 

Title: President

Date: December 27, 2011

INSTRUCTIONS: Claims must be filed with the Probate Court of this county and delivered or mailed to the Personal Representative appointed to administer the estate (see section 62-3-803, 62-3-804, and 62-3-806 on next page.)

STATE OF SOUTH CAROLINA)

COUNTY OF: BEAUFORT)

IN THE MATTER OF: Estate of Richard J. D'Agostino)

IN THE PROBATE COURT

NOTICE OF DISALLOWANCE OF CLAIM

CASE NUMBER: 2011ES0700406

TO:

Name: F. Timothy Nicholls, Esquire

Address: PO Box 18237

Raleigh, NC 27610

FILED
2013 MAY -8 PM 4:17
BEAUFORT COUNTY, S.C.

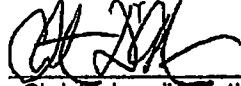
The undersigned, as the Personal Representative(s)/Conservator(s) appointed to administer this estate, disallows \$ 4,542.94 of your claim for \$4,542.94 presented on 1/2/12.

Your claim was disallowed for the following reason(s):

This claim represents fees due from the Estate of Valerie D'Agostino, 2009ES07889, whereby decedent was serving as Personal Representative. These fees are due from that estate rather than the decedent's estate. The engagement letter signed by decedent did not in anyway make him personally liable for such fees, and therefore his estate is not liable for such payment either. Furthermore based on information and belief there is enough money in the Estate of Valerie D'Agostino to pay such fees..

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

Executed this 10th day of Jan, , 20

Signature: 

Name: Christopher d'Agostino

Address: 13710 Trinity Leaf Place
Riverview, FL 33579

E-mail:

Telephone (O): 813 393-4576

(H): 813 677-0284

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

IN THE MATTER OF: ESTATE OF RICHARD J.
D'AGOSTINO

IN THE PROBATE COURT

PROOF OF DELIVERY

CASE NUMBER: 2011ES070406

On the 7th day of June, 2011, I mailed or delivered the following document, Notice of Dissallowance of Claim of Anthony E. Griffis, and Notice of Dissallowance of Claim of F. Timothy Nicholls, Esquire



A copy of which is attached hereto and incorporated herein, or
The original of which is on file with the court and incorporated herein,

Delivery was accomplished by the following method (check appropriate box):

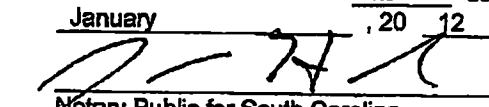
☐ personal delivery
☐ certified mail

☒ ordinary first class mail
☐ registered mail

to each of the following persons at the address shown:

NAME	ADDRESS
J. Ashley Twombly, Esquire	311 Carteret Street, Beaufort, SC 29902
Anthony E. Griffis, Esquire	355 Park Avenue, SW, Aiken, SC 29801
F. Timothy Nicholls, Esquire	3700 Glenwood Avenue, Suite 500, Raleigh, NC 27612

SWORN to before me this 12 day of
January, 2012


Notary Public for South Carolina

My Commission Expires: 12/12/16

Signature: Rebecca H. Hale

Name: Rebecca H. Hale, Esquire

Address: PO Box 22561

Hilton Head Island, SC 29925

Telephone (O): (843) 837-3000

(H):

E-mail: rhalehaleandbolchoz.com

Signature: _____

Name: _____

Address: _____

Telephone (O): _____

(H): _____

E-mail: _____

EXHIBIT" F

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

IN THE MATTER OF The Estate of Valerie)
D'Agostino)

IN THE PROBATE COURT

STATEMENT OF CREDITOR'S CLAIM

CASE NUMBER: 2009ES0700889

Decedent's Date of Death (if known): October 17, 2009

Decedent's Last Mailing Address: 15 Sebring Drive, Bluffton, SC 29909

Creditor: Nicholls & Crampton, P.A.
Address: c/o Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
Telephone: (843) 785-6101

BEAUFORT COUNTY, SC

2013 MAY -3 PM 4:17

FILED

Basis of claim:

Legal services provided to Richard J. D'Agostino as Personal Representative of the Estate of Valerie D'Agostino.

Amount of claim \$ \$3,789.75 plus interest and attorney fees

Date claim will become due (if not already due): , 20

Nature of uncertainty as to amount of claim and due date, if any:

Description of any security as to claim:

Signature: Jay A. Mullinax
Title: Jay A. Mullinax, Esquire
Date: September 26, 2012

INSTRUCTIONS: Claims must be filed with the Probate Court of this county and delivered or mailed to the Personal Representative appointed to administer the estate (see section 62-3-803, 62-3-804, and 62-3-806 on next page.)

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

PROBATE COURT

IN THE MATTER OF THE ESTATE OF VALERIE D'AGOSTINO, DECEASED
CASE NUMBER: 2009ES0700889

PROOF OF DELIVERY

On the 26 day of September, 2012, I mailed or delivered a copy of the Statement of Creditor's Claim.

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original is on file with the court and incorporated herein.

Delivery was accomplished by the following method (check appropriate box):

- ☐ Personal delivery ☒ Ordinary First Class Mail
☐ Certified Mail with Return Receipt requested ☐ Registered Mail

to each of the following persons at the addresses shown:

J. Ashley Twombly, Esquire

Twenge & Twombly, LLC
311 Carteret Street
Beaufort, SC 29902

LAW OFFICE OF JAY A. MULLINAX, LLC

By: Jay A. Mullinax
Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC. 29928
843-785-6101
Attorney for the Estate

SWORN to before me this 26 day
of September, 2012.

[Signature]
Notary Public for South Carolina
My Commission Expires: 10/14/19

STATE OF SOUTH CAROLINA)

COUNTY OF: BEAUFORT)

IN THE MATTER OF: ESTATE OF)
VALERIE D'AGOSTINO)

IN THE PROBATE COURT

NOTICE OF DISALLOWANCE OF CLAIM

CASE NUMBER: 2009ES0700889

BEAUFORT COUNTY, SC

2012 MAY -3 PM 5:17

FILED

TO:

Name: Nicholls & Crampton, P.A.

Address: c/o Law Office of Jay A. Mullinax, LLC

2 Park Lane, Suite 303

Hilton Head, SC 29928

The undersigned, as the Personal Representative(s)/Conservator(s) appointed to administer this estate, disallows \$ 3,789.75 plus claimed interest and claimed attorney fees of your claim for \$3,789.75 plus interest and attorney fees presented on September 26, 2012.

Your claim was disallowed for the following reason(s):

Richard D'Agostino contracted with Nicholls & Crampton, P.A. personally and not in his representative capacity as the Personal Representative of the Estate of Valerie D'Agostino. Because the services you provided were provided to Richard D'Agostino personally, the Estate of Valerie D'Agostino is not responsible for paying the fees associated with that representation.

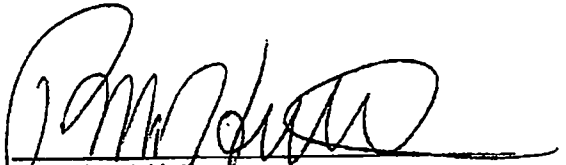
In addition, the amount of the claim is unreasonable in light of the service that was provided.

Finally, under no circumstances would anyone be responsible for paying the attorney's fees Claimant's lawyer (Jay A. Mullinax) incurred in attempting to pursue this claim. Significantly, Claimant and his attorney have repeatedly been asked to identify any case, statute or other legal principal that would allow Claimant to recover attorney's fees incurred in filing and pursuing a probate creditor's claim. Despite numerous requests, Claimant has been unable to produce, cite, direct or otherwise reference any authority to support Claimant's claim for attorney's fees on top of the face amount of his creditor's claim. Claimant has been warned in writing numerous times, pursuant to South Carolina Rules of Civil Procedure 11 and other relevant law, that he must have a legitimate basis in law and fact to advance his claim for attorney's fees.

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

Executed this

day of March , 2013.

Signature: 

Name: Ronald W. Huther

Address: 3402 Tennessee Drive
Alexandria, VA 22303

E-mail: _____

Telephone (O): (240) 486-1703

(H): _____

STATE OF SOUTH CAROLINA
COUNTY OF: BEAUFORT
IN THE MATTER OF: ESTATE OF
VALERIE D'AGOSTINO

IN THE PROBATE COURT
FILED
PROOF OF DELIVERY

2013 JUL -3 PM 4:47
CASE NUMBER: 2009ES0700889

BEAUFORT COUNTY, SC

On the 8th day of April, 2013, I mailed or delivered the following document, Notice of Disallowance of Claim

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original of which is on file with the court and incorporated herein,

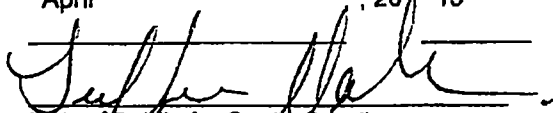
Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery
☐ certified mail
☒ ordinary first class mail
☐ registered mail

to each of the following persons at the address shown:

NAME	ADDRESS
Jay A. Mullinax, Esquire	2 Park Lane, Ste 303, Hilton Head, SC 29910
Anthony E. Griffis, Esquire	10 Fording Island Road Extension, Hilton Head, SC 29926
Sean M. Bolchoz, Esquire	P.O. Box 828, Bluffton, SC 29910

SWORN to before me this 8th day of
April, 2013


Notary Public for South Carolina
My Commission Expires: _____



Signature: 
Name: Andrea Smith, Paralegal to
Twenge + Twombly Law Firm
Address: 311 Carteret Street
Beaufort, SC 29902
Telephone (O): _____
(H): (843) 982-0100
E-mail: andrea@twlawfirm.com

Signature: _____
Name: _____
Address: _____
Telephone (O): _____
(H): _____
E-mail: _____

STATE OF SOUTH CAROLINA,
COUNTY OF BEAUFORT
NICHOLLS & CRAMPTON, P.A.
Petitioner,
vs.
ESTATE OF VALERIE D'AGOSTINO
Respondent(s).

IN THE PROBATE COURT

SUMMONS

CASE NO. 2009ES0700889

TO THE RESPONDENT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Petition herein, a copy of which was served upon you, and to serve a copy of your Answer to this Petition upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Petition, judgment by default will be rendered against you for the relief demanded in the Petition.

Hilton Head Island, South Carolina


Petitioner/Attorney for Petitioner

Dated: May 8, 2013

Address: 2 Park Lane, Suite 303
Hilton Head Island, SC 29928
(843)785-6101

FILED
2013 MAY -8 PM 4:15
BEAUFORT COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

PROBATE COURT

IN THE MATTER OF THE ESTATE OF VALERIE D'AGOSTINO, DECEASED
CASE NUMBER: 2009ES0700889

PROOF OF DELIVERY

On the 8th day of May, 2013, I mailed or delivered a copy of
the Summons for the Petition for Allowance of Claim.

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original is on file with the court and incorporated herein.

Delivery was accomplished by the following method (check appropriate box):

- ☐ Personal delivery ☒ Ordinary First Class Mail
☐ Certified Mail with Return Receipt requested ☐ Registered Mail

to each of the following persons at the addresses shown:

Sean Michael Bolchoz, Esquire

Bolchoz Law Firm, PA
6 Buckingham Plantation Drive, Suite B
Post Office Box 828
Bluffton, SC 29910

J. Ashley Twombly, Esquire

Twenge & Twombly Law Firm, LLC
311 Carteret Street
Beaufort, SC 29902

BEAUFORT COUNTY, SC

2013 MAY -8 PM 4:15

FILED

LAW OFFICE OF JAY A. MULLINAX, LLC

By: Jay A. Mullinax
Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC, 29928
843-785-6101
Attorney for the Petitioner

SWORN to before me this 8th day
of May, 2013.

Butter
Notary Public for South Carolina
My Commission Expires: 12-3

Form #120PC (2/2004)
SCPC 1-401, 3-1003, general

JAMES O. HALE (1959-2012)
REBECCA H. HALE
SEAN MICHAEL BOLCHOZ*

*Certified Circuit Court Mediator

HALE & BOLCHOZ, L.L.C.
ATTORNEYS AND COUNSELORS AT LAW
1533 FORDING ISLAND ROAD, SUITE 294
MOSS CREEK VILLAGE
P.O. BOX 22561
HILTON HEAD ISLAND, SOUTH CAROLINA
29925-2561

TELEPHONE (843) 837-3000
FACSIMILE (843) 837-3001

WWW.HALEANDBOLCHOZ.COM

December 5, 2012

VIA HAND DELIVERY

The Honorable Kenneth E. Fulp, Jr.
Beaufort County Probate Court
PO Drawer 1083
Beaufort, SC 29901

RE: *Estate of Richard J. D'Agostino*
Case No. 2011-ES-07-0406

Estate of Valerie V. D'Agostino
Case No. 2009-ES-07-889

Dear Judge Fulp:

As Your Honor may recall, I represent Chris D'Agostino, the personal representative ("P.R.") of the Estate of Richard D'Agostino. I am pleased to report that counsel for Ronald Huther and Heidi Pallesen, Ashley Twombly, and I have settled our clients' differences in both of the above-referenced matters (as well as the now-defunct litigation in the circuit court) and the parties are ready to proceed with closing these Estates.

To that end, please find enclosed a fully-executed copy of the parties' settlement agreement. I believe all we need to do at this point is: (1) have the Court lift the restrictions I understand it previously imposed upon my client as P.R. of his father's Estate, so that the settlement can be funded pursuant to the terms of the agreement, and, in turn, (2) Mr. Twombly's client(s) can be appointed as P.R. of Valerie D'Agostino's Estate.

As a review of these matters will reveal, there are no perfected claims currently existing against the Estate of Richard D'Agostino, as no actions have been timely brought in the Probate Court against the same. Although the North Carolina law firm of Nicholls and Crampton, P.A. has recently filed a creditors claim with the Court, by that claimant's own admission, the claim cannot be addressed until a P.R. is appointed for the Estate of Valerie D'Agostino. Accordingly, the two tasks referenced hereinabove are critical to bringing this matter to conclusion for all interested parties.

Upon Your Honor's receipt of this letter, I would appreciate it if you would have your office inform me and/or Mr. Twombly on how the Court wishes to proceed with this matter. I look forward to hearing from the Court soon.

The Honorable Kenneth E. Fulp, Jr.
December 5, 2012
Page 2

With kind, personal regards, I am

Sincerely,

HALE & BOLCHOZ, L.L.C.



Sean Michael Bolchoz

SENDER's E-MAIL ADDRESS

SBOLCHOZ@HALEANDBOLCHOZ.COM

SMB/

Enclosures

cc: Mr. Christopher D'Agostino

J. Ashley Twombly, Esquire (w/enc) (via email only to twombly@twlawfirm.com)

Anthony F. Griffiths, Esquire (w/enc) (via email only to tonygriffis@gmail.com)

Jay A. Mullinax, Esquire (w/enc) (jay@sc-stateplanning.com)

E:\Client Files\D to G Clients\D'Agostino, Richard - 4250\Estate of Richard D'Agostino - 03\Fulp ltr re lifting restrictions.wpd

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

)
)
)
)

**SETTLEMENT AGREEMENT
AND GENERAL RELEASE**

THIS AGREEMENT, by and among Ronald W. Huther, Heidi M. Pallesen, Vanessa Huther, Christopher D'Agostino, as the Personal Representative of and on behalf of The Estate of Richard J. D'Agostino and as Personal Representative of and on behalf of The Estate of Valerie D'Agostino and Anthony E. Griffis is effective as of this, the _____ day of October, 2012;

WHEREAS, Huther and Pallesen filed suit against Richard J. D'Agostino for breach of fiduciary duty, accounting and declaratory judgment with regard to affairs of Valerie D'Agostino and The Estate of Valerie D'Agostino, such lawsuit captioned as *Ronald W. Huther and Heidi M. Pallesen v. Richard J. D'Agostino*, Case No. 2010-CP-07-5030 (the "2010 Action");

WHEREAS, Richard J. D'Agostino died on April 11, 2011;

WHEREAS, Huther and Pallesen subsequently filed suit against Christopher D'Agostino, as the Personal Representative of and on behalf of The Estate of Richard J. D'Agostino, asserting numerous causes of action with regard to The Estate of Valerie D'Agostino, such lawsuit captioned as *Ronald W. Huther and Heidi M. Pallesen v. Christopher D'Agostino, as Personal Representative of and on behalf of the Estate of Richard J. D'Agostino*, Case No. 2011-CP-07-2614 (the "2011 Action");

WHEREAS, at various times, claims were asserted by Richard J. D'Agostino against Ron Huther, Heidi Pallesen and Vanessa Huther related to Valerie D'Agostino and other matters;

WHEREAS, by Consent Order dated September 22, 2011, the 2011 Action was consolidated into the 2010 Action (the "Consolidated Action");

WHEREAS, Anthony E. Griffis, and F. Timothy Nicholls (individually and on behalf of Nicholls & Crampton, P.A.) have filed, or caused to be filed, claims against the Estate of Richard D'Agostino and Valerie D'Agostino, and may have other claims against other parties herein;

WHEREAS, the parties have now reached an agreement (hereinafter, the "Agreement") to bring to a conclusion any and all disputes between them of any nature whatsoever, including but not limited to the pending Consolidated Action, and desire to resolve with finality all claims and counterclaims asserted therein, as well as any all claims that were asserted previously or could have been asserted therein, or that are in any way associated with the named parties and Estates, and the parties now desire to record and document the terms of such Agreement, as reflected herein;

NOW, THEREFORE, THE TERMS OF THE AGREEMENT are as follows:

1. Christopher D'Agostino (individually and on behalf of the Estate of Richard D'Agostino) will execute all necessary Probate Court claim releases and/or waivers in favor of the Estate of Valerie D'Agostino and will release any and all claims to any assets of the Estate of Valerie D'Agostino. Christopher D'Agostino further agrees that all assets of the Valerie D'Agostino's Estate belong exclusively to Ron Huther and Heidi Pallesen.
2. Christopher D'Agostino will address, resolve and/or satisfy the attorneys' fee claims of Anthony E. Griffis currently existing against the Estate of Richard D'Agostino.
3. Christopher D'Agostino will pay to the order of Twenge + Twombly Law Firm, as counsel for Huther and Pallesen, in certified funds, the sum of Twenty Thousand and 00/100 (\$20,000.00) Dollars, as a full and complete settlement of their claims against Christopher D'Agostino, individually and as Personal Representative of the Estate of Richard D'Agostino, and/or any claims against the Estate of Richard D'Agostino.¹
4. Christopher D'Agostino will also pay to the order of Twenge + Twombly Law Firm, in certified funds, the sum of Four Thousand Nine Hundred Twenty-Nine and 08/100 (\$4,929.08) Dollars (the "Fee Fund"), to be held in escrow by Twenge + Twombly Law Firm ("Escrow Agent") pending final resolution of any and all claims of Nicholls & Crampton, P.A. ("Nicholls") against the Estate of Richard D'Agostino. In the event Nicholls' claim(s) against the Estate of Richard D'Agostino for Nicholls' is upheld, said claim shall be paid to Nicholls out of the Fee Fund by the Escrow Agent; any award in excess of the Fee Fund ordered by the Probate Court to be paid to Nicholls shall be the sole responsibility of Huther and Pallesen, who shall indemnify and hold Christopher D'Agostino harmless against the same. In the event Nicholls's claim(s) against the Estate of Richard D'Agostino is denied, Escrow Agent is then authorized to release the Fee Fund to Huther and Pallesen as additional settlement funds. The parties further agree and understand that Huther and Pallesen shall thereafter be solely responsible for any further claim(s) by Nicholls, and shall indemnify and hold Christopher D'Agostino harmless against the same.
5. Christopher D'Agostino agrees not to object to or otherwise challenge Ron Huther applying to serve and serving as Personal Representative of the Estate of Valerie D'Agostino.
6. Huther and Pallesen will execute all necessary Probate Court claim releases and/or waivers in favor of Christopher D'Agostino, individually and as Personal Representative of the Estate of Richard D'Agostino, and/or the Estate of Richard D'Agostino.

¹The parties hereto acknowledge that these funds will originate from funds currently held in the Estate of Richard D'Agostino, and cannot be dispersed until Huther and Pallesen's claims against said Estate are released and waived.

7. Huther and Pallesen hereby release Christopher D'Agostino, individually and as Personal Representative of the Estate of Richard D'Agostino and as Personal Representative of the Estate of Valerie D'Agostino, from any and all causes of action, whether known or unknown.
8. Huther and Pallesen hereby release Attorney Anthony E. Griffiths from any and all causes of action, whether known or unknown.
9. Christopher D'Agostino (individually and as personal representative of the Estate of Richard D'Agostino) hereby releases Ron Huther, Vanessa Huther, Pallesen, and the Estate of Valerie D'Agostino from any and all causes of action existing now, whether known or unknown.
10. Anthony E. Griffiths hereby releases Ron Huther, Vanessa Huther, Heidi Pallesen, and the Estate of Valerie D'Agostino from any and all claim or causes of action existing now, whether known or unknown, or any nature whatsoever. Anthony E. Griffiths also agrees not to object to or otherwise challenge Ron Huther applying to serve and serving as Personal Representative of the Estate of Valerie D'Agostino.
11. The Consolidated Action, and all associated claims and counterclaims, will be dismissed,² with prejudice.

THIS AGREEMENT shall be interpreted under the internal laws, not the conflict of laws, of the State of South Carolina.

THE SINGULAR, whenever used in this Agreement, shall be construed to mean the plural when applicable, and the necessary grammatical changes required to make the provisions apply shall in all cases be assumed as though in each case fully expressed.

THIS AGREEMENT may be executed in counterparts, and each and every one shall be deemed an original. It is hereby mutually agreed upon by all parties that, if necessary, a telegraph, facsimile or electronic mail communication shall be an acceptable and binding form of communication.

THIS AGREEMENT shall be deemed effective upon the date in which it is signed and delivered and when the funds payable to Huther and Pallesen clear the trust account of Twenge + Twombly Law Firm.

IN WITNESS WHEREOF, this Agreement has been executed and sealed by the parties hereto as of the day and year first above written.

²As well as any associated case(s), to the extent necessary.

WITNESSES:

Shigam

Ali Yaman

Veronika Schlecht
Veronika Schlecht

Ronald W. Huther

Heidi M. Pallesen

Vanessa Huther

Christopher D'Agostino, as Personal
Representative of and on behalf of the Estate
of Richard J. D'Agostino

Anthony Griffis

Evan Pallen

Barry Hoyer

Kathryn McCashwell

Jennie L. Bowers

Ronald W. Huther

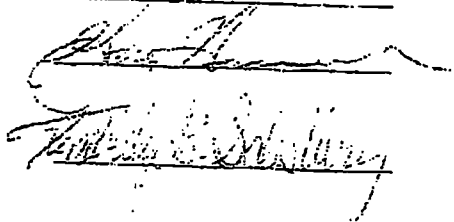
Heidi M. Pallesen
Heidi M. Pallesen

Vanessa V. Huther
Vanessa Huther

Christopher D'Agostino, as Personal
Representative of and on behalf of the Estate
of Richard J. D'Agostino

Anthony Griffiths

WITNESSES:



Ronald W. Huther

Heidi M. Pallesen

Vanessa Huther


Christopher D'Agostino, as Personal
Representative of and on behalf of the Estate
of Richard J. D'Agostino

Anthony Griffin

Ronald W. Huther

Heidi M. Pallesca

Vanessa Huther

Christopher D'Agostino, as Personal
Representative of and on behalf of the Estate
of Richard J. D'Agostino

Anthony Griffin

JOHNSON, HEARN, VINEGAR, GEE & GLASS, PLLC

ATTORNEYS AT LAW
TWO HANNOVER SQUARE, SUITE 2200
RALEIGH, NORTH CAROLINA 27601

SAMUEL H. JOHNSON
GEORGE G. HEARN
RICHARD J. VINEGAR
M. BLEN GEE, JR.*
F. STEPHEN GLASS*
P. DEVAN CULBRETH
P. LEE CRAVEN, III

JEAN WINBORNE BOYLES*
OF COUNSEL

*CERTIFIED MEDIATOR

TELEPHONE (919) 743-2200
FACSIMILE (919) 743-2201
E-MAIL: jhvagg@jhvgglaw.com
www.jhvagglaw.com

MAILING ADDRESS:
POST OFFICE BOX 1776
RALEIGH, NORTH CAROLINA 27602

RESEARCH TRIANGLE PARK OFFICE
TELEPHONE (919) 544-3302

OVERNIGHT/EXPRESS MAIL
September 22, 2010

Anthony E. Griffis, Esquire
322 Moss Creek Drive
Hilton Head Island, South Carolina 29926

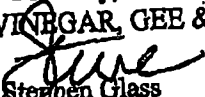
Re: *In the matter of Valerie V. D'Agostino*
Case Number 2009ES0700889, Beaufort County, South Carolina

Dear Tony:

Please find enclosed three (3) copies of the Family Settlement Agreement in the above-referenced matter. Each is signed by Ronald W. Huther and by Heidi Pallesen.

Please return one (1) fully executed copy to me and one each to counsel in this case. I will provide copies to Mr. Huther and Mrs. Pallesen.

Cordially,
JOHNSON, HEARN, VINEGAR, GEE & GLASS, PLLC


F. Stephen Glass

Copies:

F. Timothy Nicholls, Esquire
Nicholls & Crampton, P.A.
3700 Glenwood Avenue, Suite 500
Raleigh, North Carolina 27612

David B. Alexander, Esquire
The Law Firm of David B. Alexander, P.C.
5003 Southpark Drive, Suite 230
Durham, North Carolina 27713

Mr. Huther
Mrs. Pallesen

9/17/10
Final

STATE OF SOUTH CAROLINA)

PROBATE COURT

COUNTY OF BEAUFORT)

IN THE MATTER OF VALERIE V. D'AGOSTINO

CASE NUMBER: 2009ES0700889

PRIVATE FAMILY SETTLEMENT AGREEMENT

THIS AGREEMENT made and entered into this _____ day of _____, 2010, by and between Richard J. D'Agostino (herein "widower") and Ronald W. Huther and Heidi Pallesen, (herein collectively "children"), with reference to a pending Motion for Sanctions filed by Richard J. D'Agostino in the Wake County, North Carolina Superior Court, entered as Case No. 10-E-702, regarding the Estate of Valerie V. D'Agostino, regarding payment of estate costs and legal fees, and jurisdiction of the probate proceeding.

WITNESSETH THAT:

WHEREAS, Valerie V. D'Agostino, a resident of Beaufort County, South Carolina, died on October 17, 2009, intestate, survived by a husband, Richard J. D'Agostino, a legal resident of the State of South Carolina, and two children, Ronald W. Huther, a legal resident of the State of Virginia; and Heidi Pallesen, a legal resident of North Carolina. Their names and addresses are as follows:

Richard J. D'Agostino
15 Seburn Drive
Bluffton, SC 29910

Heidi Pallesen
3304 E. Annalee Dr.
Raleigh, NC 27604

Ronald W. Huther
6335 Simmer Circle
Springfield, VA 22150

WHEREAS, pursuant to Section 62-3-912, the Code of Laws of the State of South Carolina 1976 as amended, heirs may agree among themselves in writing to the settlement of any

claims, expenses, and division and distribution of all remaining real property and tangible and intangible personal property; and upon such mutually exchanged valuable and sufficient consideration and after consultation and advice of their respective attorneys as counsel, the Parties hereto desire to agree and do agree and accept the following:

1. The decedent Valerie V. D'Agostino was married at the time of her death to Richard J. D'Agostino and for all purposes he shall be considered her husband and heir, and that Ronald W. Huther and Heidi Pallesen are the only children of Valerie V. D'Agostino and are entitled to be treated as heirs under the Code of Laws of the State of South Carolina.

2. The heirs have agreed to settlement of all claims arising within the jurisdiction of the State of North Carolina (including against each other, except as specifically excluded herein) and expenses pertaining to the Motion for Sanctions filed by Richard J. D'Agostino in the Wake County, North Carolina court (10-E-702), and as to the appropriate jurisdiction for the administration of the estate of Valerie V. D'Agostino, as follows:

a. On or about August 28, 2009, Heidi Pallesen qualified as General Guardian for her mother, Valerie V. D'Agostino, before the Clerk of Court in Wake County, North Carolina in Case #09-E-002336 ("Guardianship"). The only funds then known to Heidi Pallesen to be administered on behalf of Valerie V. D'Agostino were held in a Bank of America checking account. After payments to the Cremation Society, nursing home and medical expenses for her mother, approximately \$63,740.24 remains in said account.

b. Heidi Pallesen filed the final accounting regarding the Guardianship with the Clerk of Court, Wake County, North Carolina, on August 27, 2010. Said Clerk of Court approved this final accounting as being an accurate accounting. The Guardianship funds remaining in the Bank of America checking account are to be administered in the estate of Valerie V. D'Agostino under the jurisdiction of the court in Beaufort County, South Carolina.

c. ~~Ronald W. Huther and his attorneys.~~ Attorney David B. Alexander shall pay F. Timothy Nicholls, attorney for Richard J. D'Agostino, for attorney's fees related to the Motion for Sanctions, in the total amount of \$8,000.00, payable (i) \$1,200.00 by Ronald W. Huther which shall be paid at the earliest opportunity from the Valerie V. D'Agostino estate funds administered in the Probate Court of Beaufort County, South Carolina, and charged against the funds to which he is entitled from the estate as the son of the Valerie V. D'Agostino, and (ii) \$6,800.00 from David B. Alexander directly to Mr. Nicholls, no later than August 3, nor later than September 22, 2010. It is understood and agreed by all signatories to this Agreement that this settlement is the compromise of a disputed event and that the payment made by David B. Alexander, Attorney at Law, is not to be construed as an admission of liability or any wrongdoing on his part but that it is intended merely to avoid litigation and buy the peace. ~~It is further understood and agreed that this settlement is the compromise of a disputed event and that the payment made by Ronald W. Huther is not to be construed as an admission of liability or any wrongdoing on his part but is intended merely to avoid litigation and buy the peace in Wake County, North Carolina Case Number 10-E-702.~~

d. On or about January 8th, 2010, Richard J. D'Agostino, qualified in Beaufort County, South Carolina as Personal Representative of the estate of Valerie V. D'Agostino, which is the proper jurisdiction for the probate in the above captioned case. The parties agree to immediately execute, deliver and file such documents as necessary to dismiss the Wake County, North Carolina, probate proceeding brought by Ronald W. Huther, and to cooperate in the release of all funds held by Bank of America to the estate of Valerie V. D'Agostino under the jurisdiction of the court in Beaufort County, South Carolina.

3. Legal fees and costs of each of the Parties (except the \$8,000.00 legal fees in 2(c)) related to Wake County, North Carolina Case #10-E-702 and pending NC Motion for Sanctions

will be borne by each Party and shall not be an estate reimbursement. After paying any remaining medical and funeral expenses as approved by the probate court in this matter as well as all costs of administration of the estate of Valerie V. D'Agostino in South Carolina, the estate of Valerie V D'Agostino shall pay all currently due attorney's fees to Anthony E. Griffis which are anticipated to be \$13,500.00, together with any additional attorney's fees to F. Timothy Nicholls not to exceed \$2,000.00

4. The beneficiary designations of Valerie V. D'Agostino and joint tenants with right of survivorship property (if any) shall, when properly documented, be accepted by all the Parties.

5. Payment of all costs and attorneys' fees shall be made as soon as possible.

6. The Parties hereto mutually and for valuable consideration agree to the terms set forth herein and to full cooperation for the proper and prompt administration of this estate, including as needed obtaining court approvals in Beaufort County Probate Court, as well as any cooperation in the closing of the North Carolina probate and guardianship proceedings in Wake County, North Carolina.

7. Richard J. D'Agostino, Ronald W. Huther and Heidi Pallesen each acknowledge that this Agreement represents a final settlement in regard to any issue, whether presently known or unknown, connected with NC Case 10-E-702, and with the NC guardianship proceeding brought by Heidi Pallesen Case #09-E-002336, and each does hereby release and forever discharge the other, and his/her heirs, agents, servants, insurers, representatives, successors, and all other persons, firms, associations, and corporations, of and from any and all past, present and future actions, claims and demands, damages, expenses, costs, interest, attorneys' fees and all claims of any nature or kind whatsoever now existing or which may hereafter arise out of the administration of Valerie V. D'Agostino's estate in North Carolina. Specifically excluded from this settlement agreement are such claims or other matters, if any, that might be raised by Ronald W. Huther and Heidi Pallesen as to acts or omissions, if any, by Richard J. D'Agostino which may have occurred or might occur within the jurisdiction

of the courts of South Carolina.

8. As to Richard J. D'Agostino, Ronald W. Huther and Heidi Pallesen, this settlement shall be a complete and permanent bar and estoppel against any possible future action which he/she might have against David B. Alexander, Attorney at Law, including but not limited to the filing of a grievance with the NC State Bar and/or any possible claim for legal malpractice.

9. The Agreement is to remain confidential between all parties. If required to be filed of record in the South Carolina probate proceedings, the parties shall request that the South Carolina Court designate that this agreement shall be confidential and not part of the public probate file.

NOW, THEREFORE, pursuant to Section 62-3-912 of the Code of Laws of the State of South Carolina, 1976, as amended, the heirs at law of the decedent, specifically her widower, Richard J. D'Agostino, and her children, Ronald W. Huther and Heidi Pallesen, have agreed and hereby agree for mutually exchanged and legally sufficient consideration, to all the provisions set forth hereinabove, which are specifically incorporated herein by reference and made a part hereof. Except as specifically excluded in Paragraph 7 above, the Parties waive any defenses or other matters regarding the probate of this estate in North Carolina.

If any part of this Agreement is held invalid, the remaining terms shall be considered valid. This Agreement shall be interpreted under the laws of the State of South Carolina.

This Agreement may be executed in several counterparts, each of which, when so executed, shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.

This Family Settlement Agreement is binding on each Party signing herein below and each of their respective heirs and assigns.

SIGNED SEALED AND DELIVERED
IN THE PRESENCE OF:

WITNESSES:

Witness 1

Richard J. D'Agostino

Witness 2/Notary

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

ACKNOWLEDGEMENT

I, _____, a Notary Public of the County and State
aforesaid, do hereby certify that Richard J. D'Agostino appeared before me this day and
acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this _____ day of _____, 2010.

Notary Public for South Carolina
My Commission Expires:

As attorneys for Richard J. D'Agostino, we consent:

Anthony E. Griffis, Esq.

F. Timothy Nicholls, Esq.

SIGNED SEALED AND DELIVERED
IN THE PRESENCE OF:

WITNESSES:

Umaria Saeed
Witness 1

Ronald W. Huther
Ronald W. Huther

[Signature]
Witness 2/Notary

STATE OF Virginia)
COUNTY OF Fairfax)

ACKNOWLEDGEMENT

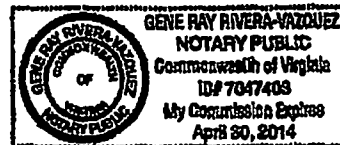
I, Gene Ray Rivera-Vazquez, a Notary Public of the County and State
aforesaid, do hereby certify that Ronald W. Huther appeared before me this day and
acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this 18th day of September, 2010.

[Signature]
Notary Public for
My Commission Expires: 4/30/2014

As attorney for Ronald W. Huther, I consent:

[Signature]
F. Stephen Glass, Esq.



SIGNED SEALED AND DELIVERED
IN THE PRESENCE OF:

WITNESSES:

Heidi Pallesen
Witness 1

Heidi Pallesen
Heidi Pallesen

Vanessa V. Huther
Witness 2/Notary

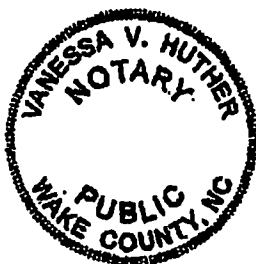
STATE OF NORTH CAROLINA)
COUNTY OF WAKE)

ACKNOWLEDGEMENT

I, Vanessa V. Huther, a Notary Public of the County and State
aforesaid, do hereby certify that Heidi Pallesen appeared before me this day and acknowledged
the due execution of the foregoing instrument.

Witness my hand and official seal this 20th day of September, 2010.

Vanessa V. Huther
Notary Public for
My Commission Expires: 5-22-2014



Rev: 8-20a-10

Rev: 9-17-10

TITLE 62

SOUTH CAROLINA PROBATE CODE

Editor's Note

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Law Review and Journal Commentaries

Coming to terms with the Uniform Probate Code's reformation of wills. Wayne M. Gazur, 64 S.C. L. Rev. 403 (Winter 2012).

ARTICLE 1

General Provisions, Definitions, and Probate Jurisdiction of Court

Editor's Note

2013 Act No. 100, § 4, provides as follows:

"SECTION 4. (A) This act [amending Articles 1, 2, 3, 4, 6, and 7] takes effect on January 1, 2014.

"(B) Except as otherwise provided in this act, on the effective date of this act:

"(1) this act applies to any estates of decedents dying thereafter and to all trusts created before, on, or after its effective date;

"(2) the act applies to all judicial proceedings concerning estates of decedents and trusts commenced on or after its effective date;

"(3) this act applies to judicial proceedings concerning estates of decedents and trusts commenced before its effective date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this act does not apply and the superseded law applies;

"(4) subject to item (5) and subsection (C) of this section, any rule of construction or presumption provided in this act applies to governing instruments executed before the effective date of the act unless there is a clear indication of a contrary intent in the terms of the governing instrument; and

"(5) an act done and any right acquired or accrued before the effective date of the act is not affected by this act. Unless otherwise provided in this act, any right in a trust accrues in accordance with the law in effect on the date of the creation of a trust and a substantive right in the decedent's estate accrues in accordance with the law in effect on the date of the decedent's death.

"(C) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of the act, that statute continues to apply to the right even if it has been repealed or superseded."

Cross References

Transfers not testamentary, see § 62-6-204.

PART 1

SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

Section

- 62-1-100. Effective date.
- 62-1-101. Short title.
- 62-1-102. Purposes; rules of construction.
- 62-1-103. Supplementary general principles of law applicable.
- 62-1-104. Severability.
- 62-1-105. Construction against implied repeal.

Section

- 62-1-106. Effect of fraud and evasion.
- 62-1-107. Evidence as to death or status.
- 62-1-108. Acts by holder of general power.
- 62-1-109. Duties and obligations of lawyer arising out of relationship between lawyer and person serving as a fiduciary.
- 62-1-110. Fiduciary-lawyer privilege.
- 62-1-111. Authority to award costs and expenses.

§ 62-1-100. Effective date.

(a) Except as otherwise provided, this Code takes effect July 1, 1987.

(b) Except as provided elsewhere in this Code, on the effective date of this Code:

(1) the Code applies to any estates of decedents dying thereafter;

(2) the procedural provisions of the Code apply to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the

255

attorney represented husband's estate and former client was a beneficiary of estate, where life insurance policy was a non-probate asset and manner in which policy was paid was not in

control of estate's personal representative. *Spence v. Wingate* (S.C. 2011) 395 S.C. 148, 716 S.E.2d 920, rehearing denied. Attorney and Client ⇐ 106

§ 62-1-110. Fiduciary-lawyer privilege.

Whenever an attorney-client relationship exists between a lawyer and a fiduciary, communications between the lawyer and the fiduciary shall be subject to the attorney-client privilege unless waived by the fiduciary, even though fiduciary funds may be used to compensate the lawyer for legal services rendered to the fiduciary. The existence of a fiduciary relationship between a fiduciary and a beneficiary does not constitute or give rise to any waiver of the privilege for communications between the lawyer and the fiduciary.

HISTORY: 2008 Act No. 211, § 1, eff May 13, 2008; 2013 Act No. 100, § 1, eff January 1, 2014.

REPORTER'S COMMENT

This section was enacted and intended to: (i) expressly reject the concept of a "fiduciary exception" to any attorney-client privilege; (ii) encourage full disclosure by the fiduciary to the lawyer to further the administration of justice; and (iii) foster confidence between a fiduciary and his lawyer that will lead to a trusting and open attorney-client dialogue. See *Estate of Kofsky*, 487 Pa. 473 (1979). This section also expressly rejects the holding set forth in the case of *Riggs Natl. Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976) (trustee's invocation of the attorney-client privilege does not shield document from disclosure to trust beneficiaries) as applied by the Court in *Floyd v. Floyd*, 365 S.C. 56, 615 S. E.2d 465 (Ct. App. 2005).

Research References

Treatises and Practice Aids

Bogert - the Law of Trusts and Trustees § 962, Duty to Furnish Information and Permit Inspection.

§ 62-1-111. Authority to award costs and expenses.

In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy.

HISTORY: 2013 Act No. 100, § 1, eff January 1, 2014.

REPORTER'S COMMENT

This section was enacted to clarify the probate court's authority to award costs and expenses. See § 62-7-1004 for a similar provision in the South Carolina Trust Code.

PART 2

DEFINITIONS

Section

62-1-201. General definitions.

§ 62-1-201. General definitions.

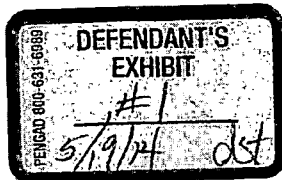
Subject to additional definitions contained in the subsequent articles which are applicable to specific articles or parts, and unless the context otherwise requires, in this Code:

(1) "Application" means a written request to the probate court for an order. An application does not require a summons and is not governed by or subject to the rules of civil procedure adopted for the circuit court.

(2) "Beneficiary", as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and, as it relates to a charitable trust, includes any person entitled to enforce the trust.

(3) "Child" includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

(4) "Claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or



STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

PROBATE COURT

IN THE MATTER OF VALERIE V. D'AGOSTINO

CASE NUMBER: 2009ES0700889

FIDUCIARY LETTERS

- ☒ **PERSONAL REPRESENTATIVE**
- ☐ **GUARDIANSHIP**
- ☐ **CONSERVATORSHIP**
- ☐ **TRUSTEESHIP**
- ☐ **SPECIAL ADMINISTRATOR**

On the 8th day of January, 2010, Richard J. D'Agostino was appointed and qualified as Fiduciary of the above matter by this Court, with all the authority granted to a Fiduciary by law, except as noted in the "Restrictions" below.

NOW, THEREFORE, LETTERS were issued as evidence of such appointment, Qualification and authority of the above Fiduciary to do and perform all acts which may be authorized by law, except as noted in the "Restrictions" below.

RESTRICTIONS: NO MONIES OR OTHER ASSETS OF THE ESTATE SHALL BE DISBURSED, TRANSFERRED, ASSIGNED, DISTRIBUTED OR OTHERWISE DISPOSED OF WITHOUT PRIOR WRITTEN AUTHORIZATION OF THIS COURT.

Executed this 8th day of January, 2010.

Francis M. Simon

FRANCIS M. SIMON, PROBATE JUDGE

Form #140PC (1/91)
62-3-103, 62-5-304, 62-5-421, 62-7-201

CERTIFICATION OF COPY
This document consisting of 10 page(s) is hereby
certified to be a true copy of the original document
on file in the Probate Court of Beaufort County,
South Carolina. In witness whereof, I have hereto set
my official signature and affixed the seal of the
Probate Court, at the County and State aforesaid.

Date 1-8-2010 Name Kaye P. [Signature] (Seal) **570**
Title Clerk Beaufort County Probate Court

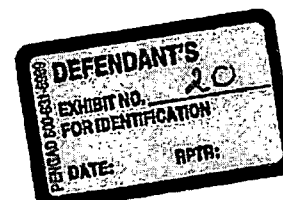
STATE OF SOUTH CAROLINA)
)
COUNTY OF: BEAUFORT)
)
NICHOLLS & CRAMPTON, P. A.)

IN THE PROBATE COURT
PETITION FOR ALLOWANCE OF CLAIM

Petitioner
vs.

CASE NUMBER: 2011ESO700406

ESTATE OF RICHARD J. D'AGOSTINO
Respondent(s) (if applicable)



The undersigned petitions the Court to allow the following claims against the estate in the amounts set forth below:

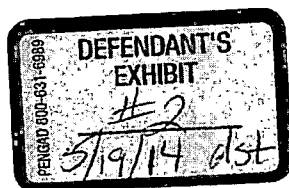
Creditor Name and Address	Amount of Claim
Nicholls & Crampton, P.A., 3700 Glenwood Avenue, Suite 500, Raleigh, NC 27612 (PO Box 18237, Raleigh, NC 27619)	\$4,542.94 plus interest

In support of this Petition, Petitioner states that each claim is valid, was presented within the period for the presentation of claims as provided by law, and has not been paid, and, as to those claims which were presented to the Personal Representative and not filed with the Court, that a copy of the statement of each such claim is attached to this Petition and made a part hereof.

(Other:)

Richard J. D'Agostino personally, and not in a representative capacity, contracted on June 8, 2010 with Petitioner for the performance of legal services in North Carolina in connectin with the administration of the Estate of Valerie D'Agostino. The charge for such services was never disputed by Richard J. D'Agostino, however, only a portion of the charge was paid prior to Mr. D'Agostino's death.

Executed this 31st day of January, 2012.



Signature: 

Name: Nicholls & Crampton, P. A.

Address: PO Box 18237
Raleigh, NC 27619

Telephone(O): 919/781-1311
(H):

Attorney: F. Timothy Nicholls / Nicholas J. Dombalis
III

Address: PO Box 18237

Telephone: Raleigh, NC 27619
919/781-1311

ORDER FOR ALLOWANCE OF CLAIM

On the basis of the within Petition and upon hearing for allowance of claims, IT IS HEREBY ORDERED that the following claims against the estate be ☐ ALLOWED ☐ DISALLOWED in the amounts set forth below:

Creditor Name and Address

Amount of Claim

Executed this day of , 20 .

, Probate Court Judge

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

IN THE MATTER OF:

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)
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)
)
)

IN THE PROBATE COURT

PROOF OF DELIVERY

CASE NUMBER: 2011ESO70406

On the 31st day of January, 2012, I mailed or delivered the following document, Form 373PC, Petition for Allowance of Claim.

- ☒ A copy of which is attached hereto and incorporated herein, or
☒ The original of which is on file with the court and incorporated herein,

Delivery was accomplished by the following method (check appropriate box):

- ☐ personal delivery ☒ ordinary first class mail
☐ certified mail ☐ registered mail

to each of the following persons at the address shown:

NAME	ADDRESS
Christopher D'Agostino	13710 Trinity Leaf Place, Riverview, FL 33579
Rebecca H. Hale, Esq.	PO Box 22561, Hilton Head Island, SC 29925
J. Ashley Twombly, Esq.	311 Carteret Street, Beaufort, SC 29902

SWORN to before me this 31st day of
January, 2012

Sheliah M. Denney
Notary Public for ~~South~~ ^{North} Carolina
My Commission Expires: June 26, 2013



Signature: [Signature]
Name: Nicholls & Crampton, P.A.
Address: PO Box 18237
Raleigh, NC 27619
Telephone (O): 919/781-1311
(H): _____
E-mail: tnicholls@nichollscrampton.com

Signature: _____
Name: _____
Address: _____
Telephone (O): _____
(H): _____
E-mail: _____

IN THE PROBATE COURT
CASE NO. 2011ES0700406

**IN THE MATTER OF ESTATE OF
RICHARD J. D'AGOSTINO:**

NICHOLLS & CRAMPTON, P.A.,

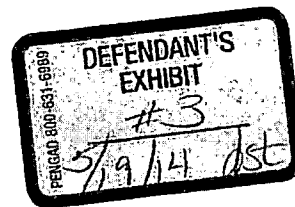
Petitioner,

v.

**CHRISTOPHER D'AGOSTINO, as
Personal Representative of ESTATE OF
RICHARD J. D'AGOSTINO,**

Respondent.

ORDER DISMISSING CLAIM



This matter comes before the Court on the *Notice of Motion and Motion to Dismiss Claims of Petitioner and Rescind Restrictions on Personal Representative* (“Motion”) of Christopher D’Agostino, Personal Representative of the above-referenced estate (“Respondent”), by counsel. The Motion was served on February 1, 2013, and filed herein on February 5, 2013.

By letter of February 6, 2013, the Court notified all counsel of record that the Motion would be determined on written briefs, without oral argument. Written arguments were timely filed by counsel for Ronald W. Huther and Heidi Pallesen (“Bond Demandants”), Nicholls & Crampton, P.A. (“Petitioner”), and Respondent, respectively.

After careful consideration of the Motion, the record herein, the arguments of counsel, and the applicable law, this Court grants the Motion in part, by dismissing Petitioner's Petition for Allowance of Claim as hereinafter provided, based on the following findings and conclusions.

FILED

2013MAR-6 AM 9:34

PROBATE COURT
BEAUFORT COUNTY.
JAN 1 1900

Procedural Background/Findings of Fact

Richard J. D'Agostino ("Decedent") died on April 11, 2011, domiciled in Beaufort County, South Carolina. He was survived by his son and sole heir, Christopher D'Agostino. Decedent's Last Will and Testament, dated June 11, 2008, was admitted to probate, and Christopher D'Agostino was appointed as Personal Representative of the Decedent's estate, by orders of this Court entered on May 11, 2011.

Demand for Bond

On May 20, 2011, Bond Demandants, acting by counsel, filed a Demand for Bond to be required of Respondent, as Personal Representative, in the amount of \$250,000.00. Bond Demandants are the children of Valerie D'Agostino, who died on October 17, 2009, leaving Decedent as her surviving spouse. In the Demand for Bond, Demandants described themselves as creditors, and each filed a Statement of Creditor's Claim against Decedent's estate, purportedly based on litigation they had instituted against Decedent.

By reason of the Demand for Bond, this Court notified the respective attorneys for Respondent and Bond Demandants, by letter of May 26, 2011, that by operation of *S.C. Code Ann.* § 62-3-605, until the filing of bond or cessation of the bond requirement, Respondent was restrained from exercising any of the powers of his office, as Personal Representative, except as necessary to preserve the estate or pay the person demanding bond.

Respondent's Motion asserts that, by reason of a "recent" settlement between Bond Demandants and Respondent, the Demandants are "no longer requesting that such bond be required of [Respondent]," and "any necessity for such bond has ceased...." In written argument on the Motion, counsel for Bond Demandants acknowledges such a

settlement, to entail "a mutual release of liability" between Respondent and Demandants, who would "not object to [Respondent] concluding the administration of his father's estate as personal representative." Demandants have not filed an express withdrawal of their Demand for Bond.

Petitioner's Claim

On January 3, 2012, Petitioner filed a Statement of Creditor's Claim against Decedent's Estate in the amount of \$4,542.94, purportedly for "legal services rendered in the Estate of Valerie D'Agostino for decedent Richard D'Agostino...." On or about January 13, 2012, Respondent's counsel mailed to Petitioner and its counsel a Notice of Disallowance of Petitioner's claim in its entirety, and the Notice was filed in this Court on January 17, 2012. The Notice of Disallowance included the following statement:

Failure to protest this disallowance of your claim, (that is, failing to file your petition for its allowance (form #373PC) in the Probate Court and failing to commence a proceeding on the claim within thirty days after the mailing of this Notice of Disallowance of Claim), shall result in your claim or the disallowed portion of your claim being forever barred.

On January 31, 2012, Petitioner mailed to Respondent and his counsel a copy of Petitioner's Petition for Allowance of Claim, the original of which was filed herein on February 2, 2012. By letter of February 7, 2012, this Court acknowledged receipt of the Petition, but notified Petitioner that in order to commence such an action, a Summons also was required, as well as a filing fee of \$150.00, and that, after filing, the Summons and Petition had to be served on the Personal Representative, in accordance with Rule 4, SCRCF.

On March 28, 2012, the Court sent to Petitioner a second written notice that a Summons, to accompany its Petition for Allowance, and a \$150.00 filing fee were

required to commence a claim allowance proceeding. A Summons has never been filed or served, nor the required filing fee paid, by or on behalf of Petitioner, and Respondent's Motion asks for dismissal on that basis.

Analysis/Conclusions of Law

All requirements of the applicable statutes and rules of court regarding jurisdiction, venue, and notice have been satisfied in this matter.

Petitioner's Claim

"Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than thirty days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar." *S.C. Code Ann.* § 62-3-806(a). Under the Probate Code, "[P]etition" means a complaint as defined in the rules of civil procedure," and "requires a summons and is governed by and subject to the rules of civil procedure adopted for the circuit court and other rules of procedure in this title." *Id.* § 62-1-201(31).

Petitioner argues that, by filing its Petition for Allowance of Claim on January 31, 2012, alone, he satisfied the above-cited statutory requirement of filing a petition or commencing a proceeding. However, under the statutory definition of "petition," also cited above, a petition is not complete without a summons. *Id.* Petitioner's argument, thus, lacks merit.

Petitioner further argues that it could not properly commence a formal proceeding on its claim without serving process on a personal representative of the Estate of Valerie

D'Agostino, as an "interested person," and the Estate of Valerie D'Agostino has had no personal representative to be served since the time Petitioner filed its claim. That argument also lacks merit.

Under *S.C. Code Ann.* § 62-3-806(a), a proceeding for allowance of a claim may be commenced "against the personal representative" of the estate against which the claim is asserted. At all times relevant herein, Respondent has been the appointed Personal Representative of the Estate of Richard J. D'Agostino. Other "interested persons" did *not* have to be served in order to commence a claim allowance proceeding.

Moreover, to properly commence any proceeding in the Probate Court, the applicable filing fee must be paid. *See id.* § 8-21-770(A). The fee for filing the initial petition in a claim allowance proceeding in the Probate Court is the same as charged for filing civil actions in the Circuit Court. *See id.* § 8-21-770(C)(11). Accordingly, in addition to a Summons, a filing fee of \$150.00 was required for Petitioner's Petition and commencement of a proceeding thereon. Despite repeated notices by the Court, the fee was never paid.

Because Petitioner failed to timely file or serve a Summons with its Petition for Allowance of Claim, and pay the required filing fee, Petitioner's claim is barred under *S.C. Code Ann.* § 62-3-806(a).

Statutory Restrictions on Personal Representative

The restrictions on Respondent's fiduciary authority, by reason of the Demand for Bond, were imposed by operation of law, under *S.C. Code Ann.* § 62-3-605, not by act of this Court. The restrictions operate "until the filing of the bond or cessation of the requirement of bond." *Id.* § 62-3-605. "[T]he requirement ceases if the person or

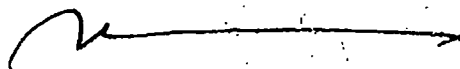
creditor demanding bond ceases to have an interest in the estate worth in excess of one thousand dollars or a claim in excess of one thousand dollars." *Id.*

While Bond Demandants' written argument acknowledges a settlement agreement with Respondent, including *executory* provisions for a mutual release, it does not appear to agree or consent expressly to an *immediate* cessation of the statutory restrictions on Respondent. Should a proposed Order to rescind the restrictions, bearing the consent of Demandants' counsel, be submitted to this Court, it will receive prompt and appropriate attention. However, without such a proposed consent order, or the filing of an instrument by which Demandants formally withdraw their claim or bond demand, it would not appear that the Court may order the cessation or rescission of the restrictions.

WHEREFORE, it is ORDERED that Respondent's Motion is granted in part, as follows:

1. Because Petitioner's claim against Decedent's estate is barred under *S.C. Code Ann.* § 62-3-806(a), Petitioner's Petition for Allowance of Claim is hereby dismissed, with prejudice.
2. Action on the Motion's request for an order rescinding the restrictions on Respondent, under *S.C. Code Ann.* § 62-3-605, is held in abeyance, pending the submission of further documentation, as indicated above.

AND IT IS SO ORDERED.

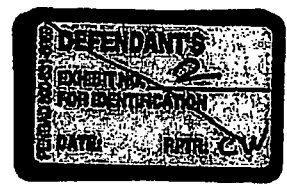


Kenneth E. Fulp, Jr., Judge
Beaufort County Probate Court

Beaufort, South Carolina

March 6, 2013

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643
1-32/10 NY 78543

RICHARD J. DAGOSTINO
BLUFFTON, SC 29909-5036

DATE: 6-10-10

PAY TO THE ORDER OF Nichols + Crompton, P.A. \$ 1500.00
fifteen hundred X DOLLARS

Bank of America Premier Banking

ACH RPT 021000322

[Signature]

[Redacted]



VALERIE V. D'AGOSTINO

BY

MOTION FOR SANCTIONS

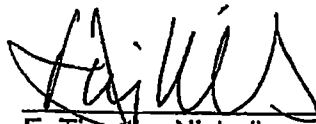
6. Counsel for Movant has sent to Huther, through two attorneys who the undersigned had reason at the time to believe were representing Huther, a demand requesting that he voluntarily withdraw as the administrator of the estate so as to avoid the necessity of further proceedings and additional attorneys fees to Movant in seeking to have Huther removed as Administrator. As of the filing of this Motion the undersigned has received no communication indicating that Huther will voluntarily withdraw as administrator.

7. The conduct of Huther in filing such Application knowing that material facts in the Application were being misrepresented is a violation of Rule 11 of the North Carolina Rules of Civil Procedure and justifies the imposition of sanctions against Huther, including without limitation an order directing that he pay the attorneys fees and costs incurred by Movant in this matter.

8. Movant therefore moves that sanctions be imposed against Huther for his violation of Rule 11 or any other statute or rule that justifies the imposition of sanctions.

WHEREFORE, Movant Richard D' Agostino, moves that the Court impose appropriate sanctions upon Ronald W. Huther.

This the 2nd day of July, 2010.



F. Timothy Nicholls
Attorney for Richard D'Agostino
Post Office Box 18237
Raleigh, NC 27619
Telephone: 919-781-1311
Fax: 919-782-0465

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NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

WAKE COUNTY

2010 JUL 14 BEFORE THE CLERK

10-E-702

In the Matter of the Estate of:

BY:)

VALERIE V. D'AGOSTINO

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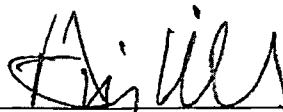
AMENDMENT TO
MOTION FOR SANCTIONS

NOW COMES RICHARD D'AGOSTINO, by and through counsel, and amends that Motion For Sanctions which he filed in this matter, on July 2, 2010, and moves that the Court impose sanctions upon RONALD W. HUTHER and/or DAVID B. ALEXANDER, Esq. of Durham, North Carolina.

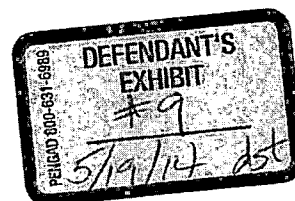
Petitioner amends his motion for sanctions as a result of statements made by Ronald W. Huther in his Petition For Approval of Resignation of Administrator of the Estate of Valerie V. D'Agostino, and Exhibits A and B attached thereto, which was filed with the Court by Ronald W. Huther, through counsel, on July 12, 2010.

WHEREFORE, Richard D' Agostino, moves that the Court impose appropriate sanctions upon Ronald W. Huther and/or David B. Alexander for his or their violation of Rule 11, or any other statute or rule that justifies the imposition of sanctions.

This the 14th day of July, 2010.



F. Timothy Nicholls
Attorney for Richard D'Agostino
Post Office Box 18237
Raleigh, NC 27619
Telephone: 919-781-1311
Fax: 919-782-0465



NORTH CAROLINA

WAKE COUNTY

In the Matter of the Estate of:

VALERIE V. D'AGOSTINO

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2010 JUL 19 PM 3:43 File No. 10-E-702

WAKE COUNTY, N.C.
BY:)

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) AMENDMENT TO MOTION
FOR SANCTIONS AND
ATTORNEY'S FEE

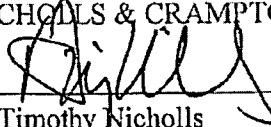
NOW COMES RICHARD D'AGOSTINO ("Petitioner"), by and through counsel, and amends that Motion For Sanctions, which he filed in the matter on July 2, 2010, and which was amended by that Amendment To Motion For Sanctions, as follows:

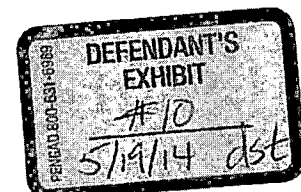
1. That the caption of this Motion is amended as above-stated.
2. That the Court impose sanctions upon RONALD W. HUTHER and/or DAVID B. ALEXANDER, Esq. in that they filed papers in the captioned matter that were not well grounded in fact or warranted by existing law, and were imposed for an improper purpose, all in violation of NC RCP section 1A-1, Rule 11 ; and/or
3. That the Court, pursuant to N.C.G.S. section 6-21.5, award a reasonable attorney's to Petitioner and against RONALD W. HUTHER in that there was a complete absence of a justiciable issue of either law or fact raised by RONALD W. HUTHER in the Application For Letters Of Administration, and supporting documents, which he filed with the Court in the captioned matter.

WHEREFORE, Petitioner moves that the Court, for the matters above stated, impose appropriate sanctions upon RONALD W. HUTHER and/or DAVID B. ALEXANDER for his or their violation of NC RCP section 1A-1, Rule 11; and, pursuant to N.C.G.S. section 6-21.5, award a reasonable attorney's fee against RICHARD W. HUTHER.

This the 19th day of July, 2010.

NICHOLLS & CRAMPTON, P.A.


F. Timothy Nicholls
Attorney for Richard J. D'Agostino
Post Office Box 18237
Raleigh, North Carolina 27619
Telephone: (919) 781-1311
Fax: (919) 782-0465



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NORTH CAROLINA

WAKE COUNTY

FILED
2010 JUL 14 PM 3:02
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK
10-E-702

In the Matter of the Estate of:

VALERIE V. D'AGOSTINO

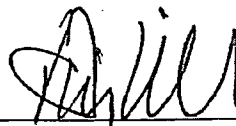
BY: _____
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NOTICE OF HEARING

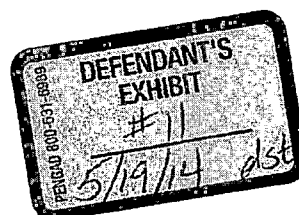
PLEASE TAKE NOTICE that the undersigned will bring on for hearing RICHARD D'AGOSTINO'S Amendment to Motion for Sanctions on the 26th day of July, 2010, in the 12th Floor Hearing Room for the Clerk of Superior Court, Wake County Courthouse, 316 Fayetteville Street, Raleigh, North Carolina, at 3:00 P.M. or as soon thereafter as the case may be heard.

THIS, the 14th day of July, 2010.

NICHOLLS & CRAMPTON, P.A.



F. Timothy Nicholls
NC Bar No. 3227
Attorneys for Richard D'Agostino
PO Box 18237
Raleigh, NC 27619
Telephone: 919-781-1311
Facsimile: 919-782-0465



D12

NORTH CAROLINA

WAKE COUNTY

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2010 SEP 23 PM 3:54 BEFORE THE CLERK
10-E-702

FILED IN THE U.S.C.
BY: _____

In the Matter of the Estate of:)

VALERIE V. D'AGOSTINO)

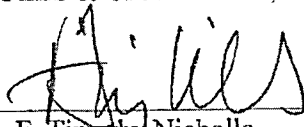
WITHDRAWAL OF
MOTION FOR SANCTIONS

NOW COMES the Movant, RICHARD D'AGOSTINO, by and through his counsel, and hereby withdraws the Motion for Sanctions and Attorney Fees filed by him in this matter against RONALD W. HUTHER and DAVID B. ALEXANDER.

This the 23rd day of September, 2010.

NICHOLLS & CRAMPTON, PA

By



F. Timothy Nicholls

State Bar # 3227

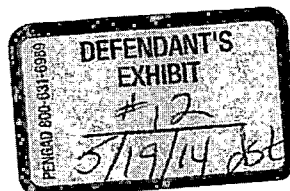
Attorney for Movant Richard D'Agostino

Post Office Box 18237

Raleigh, NC 27619

Telephone: 919-781-1311

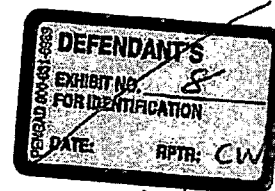
Fax: 919-782-0465



14

Tim Nicholls

From: Tim Nicholls
Sent: Tuesday, July 06, 2010 9:48 AM
To: 'Tony Griffis'
Subject: RE: d'agostino



Tony

I understand your feeling, however, I am concerned that having SC open will raise the Clerk's eyebrows (if Huther brings it up).

NC intestacy laws permit:

1. Rich to receive a small amount (probably about \$1500) as an administrator's fee (assuming he's appointed)
2. He will be entitled to the first \$30,000, plus 1/3rd of balance
3. We will ask for the \$10,000 "widower's allowance, as well.

From what I understand, this is more favorable to Rich than SC. Based upon your earlier comments, it seems NC intestacy is more favorable to Rich and that we should continue here. However, if you feel differently, let me know.

We will ask for your fees and mine to be paid by Huther. The Clerk, I'm sure will want an Itemization. It may be the Clerk will allow only that part of your fees not related to SC administration. I will remind Rich that he'll owe us both for our fees, whether the Clerk awards any from the estate or not.

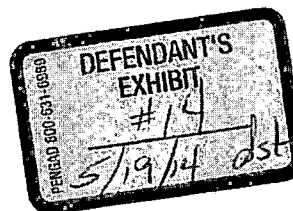
I'm getting ready to send Rich another invoice and request for an additional retainer. I'll copy you on it, Right now I'm about \$3,000 so I'm going to ask him for \$3,000 additional. Let me know if you have any problem with that.

I've received nothing on the "pre-nup". Rich thinks he may have signed something regarding the children and/or grandchildren getting something, but he's not sure.

Have a good vacation. (I'm leaving now for DC to see a baseball game tonite. I'll be back in the office Thursday AM).

Tim

F. Timothy Nicholls
Nicholls & Crampton, P.A.
3700 Glenwood Avenue, Suite 500 (PO Box 18237)
Raleigh, NC 27612 (27619)
T: 919-781-1311
F: 919-782-0465



IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, recommending to another party any transaction or matter addressed in this communication (or in any attachment).

CONFIDENTIALITY NOTICE: This e-mail message has been sent by a lawyer and may contain information that is confidential, privileged, proprietary, or otherwise legally exempt from disclosure.

Tim Nicholls

From: tonygriffis@gmail.com on behalf of tony griffis [griffis@hargray.com]
Sent: Monday, January 30, 2012 4:17 PM
To: Tim Nicholls
Subject: Re: D'Agostino

Tim,

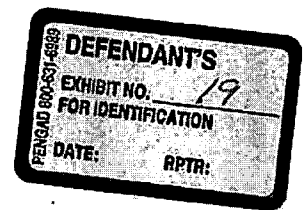
There's no need to file a claim in her estate, because direct attorneys fees/adm expenses are not subject to the normal "creditor" claim rules. Per statute, attorneys fees have priority. I have a pending Motion for attorneys fees against her estate, and I included your fees (along with copies of your engagement letter and billing) -- so we should be covered in her estate -- unless somehow the court determines that Rich acted improperly in her estate - in that event we should be able to recover from his estate... You should file Form 373 against his estate before the 30 days is up,

Tony

On Mon, Jan 30, 2012 at 3:47 PM, Tim Nicholls <TNicholls@nichollscrampton.com> wrote:

Tony.

Thanks for forwarding these to me.



One of my partners, Nick Dombalis, is assisting in this matter, so you may be hearing from him/us in the next few days.

Right now our approach is to file suite here in Wake County against Rich (and the estate) for monies owed. Had Rich been alive then there would have been sufficient minimal contacts to sue him in NC. Seems the same would be true against his estate. However, we'll probably file the 373, also, and advise that we're filing suit in NC.

We did not file a claim in the wife's estate as (i) we were never advised to do so by her estate and (ii) our claim has always been against him, personally.

Anyhow, we'll see what happens.

I really hope they don't get to "stick" you. That would be totally unfair.

589

Tim

F. Timothy Nicholls

Nicholls & Crampton, P.A.

3700 Glenwood Avenue, Suite 500 (PO Box 18237)

Raleigh, NC 27612 (27619)

T: 919-781-1311

F: 919-782-0465

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From: Tony Griffis [mailto:griffis@hargray.com]

Sent: Monday, January 30, 2012 2:27 PM

To: Tim Nicholls

Subject: D'Agostino

Tim,

Attached are Forms 373PC and 120PC which should be filed ASAP by you – just change the name, address, amount, etc. Call me (843-368-5013) to discuss before filing.

Tony

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

NICHOLLS & CRAMPTON, P. A.

IN THE PROBATE COURT

PETITION FOR ALLOWANCE OF CLAIM

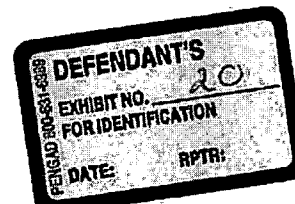
Petitioner

vs.

CASE NUMBER: 2011ESO700406

ESTATE OF RICHARD J. D'AGOSTINO

Respondent(s) (if applicable)



The undersigned petitions the Court to allow the following claims against the estate in the amounts set forth below:

Creditor Name and Address	Amount of Claim
Nicholls & Crampton, P.A., 3700 Glenwood Avenue, Suite 500, Raleigh, NC 27612 (PO Box 18237, Raleigh, NC 27619)	\$4,542.94 plus interest

In support of this Petition, Petitioner states that each claim is valid, was presented within the period for the presentation of claims as provided by law, and has not been paid, and, as to those claims which were presented to the Personal Representative and not filed with the Court, that a copy of the statement of each such claim is attached to this Petition and made a part hereof.

(Other:)

Richard J. D'Agostino personally, and not in a representative capacity, contracted on June 8, 2010 with Petitioner for the performance of legal services in North Carolina in connectin with the administration of the Estate of Valerie D'Agostino. The charge for such services was never disputed by Richard J. D'Agostino, however, only a portion of the charge was paid prior to Mr. D'Agostino's death.

Executed this 31st day of January, 2012.

Signature: 

Name: Nicholls & Crampton, P. A.

Address: PO Box 18237

Raleigh, NC 27619

Telephone(O): 919/781-1311

(H):

Attorney: F. Timothy Nicholls / Nicholas J. Dombalis
III

Address: PO Box 18237

591

Raleigh, NC 27619
Telephone: 919/781-1311

ORDER FOR ALLOWANCE OF CLAIM

On the basis of the within Petition and upon hearing for allowance of claims, IT IS HEREBY ORDERED that the following claims against the estate be ☐ ALLOWED ☐ DISALLOWED in the amounts set forth below:

Creditor Name and Address

Amount of Claim

Executed this day of , 20 .

_____, Probate Court Judge

STATE OF SOUTH CAROLINA

COUNTY OF: BEAUFORT

IN THE MATTER OF:

IN THE PROBATE COURT

PROOF OF DELIVERY

CASE NUMBER: 2011ESO70406

On the 31st day of January, 2012, I mailed or delivered the following document, Form 373PC, Petition for Allowance of Claim.

- ☒ A copy of which is attached hereto and incorporated herein, or
☒ The original of which is on file with the court and incorporated herein,

Delivery was accomplished by the following method (check appropriate box):

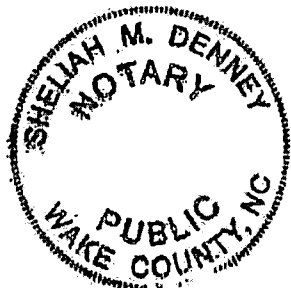
- ☐ personal delivery ☒ ordinary first class mail
☐ certified mail ☐ registered mail

to each of the following persons at the address shown:

NAME	ADDRESS
Christopher D'Agostino	13710 Trinity Leaf Place, Riverview, FL 33579
Rebecca H. Hale, Esq.	PO Box 22561, Hilton Head Island, SC 29925
J. Ashley Twombly, Esq.	311 Carteret Street, Beaufort, SC 29902

SWORN to before me this 31st day of
January, 20 12

Sheliah M. Denney
Notary Public for South Carolina
My Commission Expires: June 26, 2013



Signature: [Signature]
Name: Nicholls & Crampton, P.A.
Address: PO Box 18237
Raleigh, NC 27619
Telephone (O): 919/781-1311
(H): _____
E-mail: tnicholls@nichollscrampton.com

Signature: _____
Name: _____
Address: _____
Telephone (O): _____
(H): _____
E-mail: _____

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK
2010 JUL 12 PM 5:05
WAKE COUNTY, C.S.C. 10E-702
BY: _____

IN THE MATTER OF THE
ESTATE OF:

)
)
)
) ORDER ON PETITION
) FOR RESIGNATION OF
) ADMINISTRATOR
)
)
)

Valerie V. D'Agostino,
Decedent.

STATEMENT OF FACTS

1. Valerie V. D'Agostino died intestate on October 17, 2009.
2. Ronald W. Huther, decedent's son, was appointed administrator of the estate on March 11, 2010.
3. Richard D'Agostino signed a "Limited Waiver of Right of Election" form on November 15, 1995.
4. The attorney for Ronald Huther, David Alexander, withdrew on July 1, 2010.
5. Mr. Huther's new attorney is F. Stephen Glass.
6. On July 2, 2010, Richard D'Agostino moved for sanctions against Ronald Huther.
7. Mr. Huther filed a petition on July 12, 2010 to be removed as administrator of the estate.

CONCLUSION OF LAW

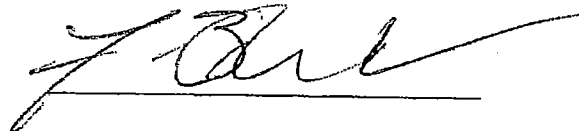
To resign a personal representative must file a verified petition with the clerk.

G.S. § 28A-10-2. The petition must also meets several requirements such as the facts relating to the appointment, names and residences of all interested person, a statement of why the administrator will be removed, a record of his conduct and an accounting. *Id.* Mr. Huther has met all of these requirements except he has not filed an accounting or a record of his conduct with the court. This must be done in order to comply with the statute for removal.

In North Carolina, there is an order of persons who are qualified to serve as a personal representative, which in this case is as an administrator. When a clerk appoints a personal representative for an intestate decedent, the clerk must follow the statutory list set out in G.S. § 28A-4-1(b). The first person on the list for a personal representative is the surviving spouse of the decedent. *Id.* Richard D'Agostino is the surviving spouse of Valerie D'Agostino and shall be considered the administrator of the estate. Richard D'Agostino should have been given first preference to become administrator of the estate.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED pursuant to statute 28A-10-2 that Ronald Huther's petition for resignation as administrator of the estate is granted. Ronald Huther shall have 30 thirty days to file the interim final. Statutory preference will be given to the application of Richard D'Agostino administrator of the estate.

This the twelfth day of July, 2010.

A handwritten signature in dark ink, appearing to be 'J. B. L.', written over a horizontal line.

Assistant Clerk of Superior Court

NORTH CAROLINA

WAKE COUNTY

FILED
IN THE GENERAL COURT OF JUSTICE
2010 JUL 12 PM 5:52
SUPERIOR COURT DIVISION
BEFORE THE CLERK
WAKE COUNTY, C.S.C. 10-E-702
BY: _____

In the Matter of the Estate of:

VALERIE V. D'AGOSTINO

**PETITION FOR APPROVAL OF
RESIGNATION OF ADMINISTRATOR
OF THE ESTATE OF
VALERIE V. D'AGOSTINO
N.C. Gen. Stat. § 28A-10-2**

NOW COMES Ronald W. Huther, Administrator of the Estate of Valerie V. D'Agostino, moving the Court that he be permitted to resign as the personal representative of this estate, showing to the Court as required by N.C. Gen. Stat. § 28A-10-2 the following:

1. Valerie V. D'Agostino ("Decedent") died intestate on October 17, 2009, a resident of Wake County, residing in Raleigh, North Carolina.
2. The Petitioner is the son of the Decedent.
3. The Petitioner was represented by attorney David B. Alexander of Durham, North Carolina at all times pertinent to this matter. Mr. Alexander prepared all documents that were filed with the Clerk's Office and necessary for the appointment of the Petitioner as Administrator of the Decedent's estate.
4. Prior to the time the Petitioner applied for Letters of Administration of the Decedent's estate, he had discussed the matter of the "Limited Waiver of Right of Election" signed on November 15, 1995, by the husband of the Decedent, Richard D'Agostino, a copy of which is attached to this Petition as Exhibit A.
5. Additionally, Mr. Alexander was well aware of the existence of Mr. D'Agostino prior to the preparation of the Application for Letters of Administration for Petitioner, as is shown in the itemized billing statement ("Billing Statement") sent to the Petitioner. A copy of this Billing Statement is attached hereto as Exhibit B.
6. As stated on the Billing Statement, on 02/22/10, Mr. Alexander sent an e-mail to the Petitioner "regarding forms previously sent to him."
7. Relying upon his attorney to properly prepare the estate administration forms and to follow the correct estate administration procedures, the Petitioner signed these forms as presented to him by his attorney, Mr. Alexander. The Petitioner returned the forms to Mr. Alexander by express mail on 02/23/10.

8. The entry for 02/23/10 on the Billing Statement for Mr. Alexander's attorney fee states: "Review documents sent by client."
9. According to the Billing Statement, on 02/25/10 Mr. Alexander "prepare cover letter and mail to Clerk of Court along with all other documents and filing fee."
10. The Clerk of Court issued the Letters of Administration to the Petitioner on March 11, 2010.
11. Petitioner at all times relevant to the matter at issue relied upon the advice given to him by his attorney, and as the Billing Statement demonstrates, his attorney was aware of the operative facts upon which his advice to Petitioner was based. In fact, when the forms were returned to Mr. Alexander, he reviewed them before sending them to the Clerk of Court.
12. Mr. Alexander has withdrawn as attorney for the Petitioner.
13. The names and residences of all interested persons known to the Petitioner are:

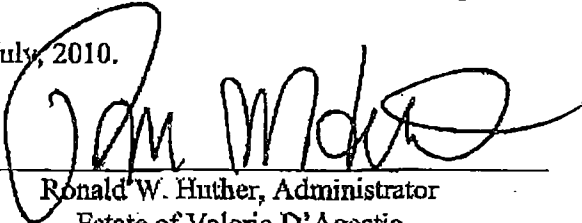
Richard D'Agostino, husband of the Decedent
c/o F. Timothy Nicholls
Attorney for Richard D'Agostino
Post Office Box 18237
Raleigh, North Carolina 27619

Heidi M. Palleson, daughter of the Decedent
3304 E. Annalee Drive
Raleigh, North Carolina 27604

Ronald W. Huther, son of the Decedent
6335 Simmer Circle
Springfield, Virginia 22150
14. The Petitioner's present attorney, F. Stephen Glass, has now made the Petitioner aware of North Carolina General Statute § 28A-4-1, regarding the proper order of appointment of persons to administer a decedent's estate and that said statute provides that the surviving spouse of the decedent has first priority in the appointment of the administrator of a decedent's estate.
15. Petitioner has not filed with the Clerk of Superior Court his accounts and a record of his conduct of the office of administrator of this estate. However, Petitioner pledges to file the same not later than the ____ day of July, 2010.

WHEREFORE, the Petitioner prays the court, after proper notice is given, to conduct a hearing in accordance with North Carolina General Statute § 28A-10-4, and to approve his Petition to Resign as Administrator of the Estate of Valerie V. D'Agostino.

This the 17th day of July, 2010.

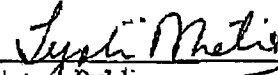

 Ronald W. Huther, Administrator
 Estate of Valerie D'Agostino

STATE OF VIRGINIA

COUNTY OF FAIRFAX

I, JYOTI BHATIA, Notary Public, do hereby certify that **Ronald W. Huther**, Administrator, personally appeared before me this day and acknowledged the due execution of the foregoing document for the purposes therein expressed.

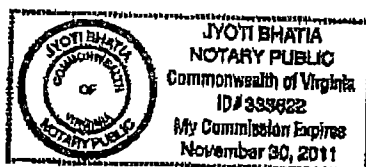
Witness my hand and notarial seal this the 17th day of July, 2010.


 Notary Public

JYOTI BHATIA
 Printed Name of Notary Public

My Commission Expires: NOV 30, 2011

(SEAL)



Petitioner is represented by F. Stephen Glass in this matter.

This the 12th day of July, 2010;



F. Stephen Glass

Johnson, Hearn, Vinegar, Gee & Glass, PLLC

P.O. Box 1776

Raleigh, North Carolina 27602

Telephone: 919-743-2200

Fax: 919-743-2201

Electronic Mail: sglass@jhvgglaw.com

ACCEPTANCE OF SERVICE

I certify that I am the attorney for Richard D'Agostino, an interested party in the above referenced matter and that I am authorized to accept service of legal process on behalf of Richard D'Agostino. In that capacity, I hereby accept service of the foregoing Petition of Ronald W. Huster, Administrator in the above-captioned matter, to resign from that capacity, and I acknowledge receipt of a the Petition served by electronic mail on July 12, 2010. I expressly waive the manner of service and the timeliness of the service of process under the North Carolina Rules of Civil Procedure.

This 12th day of July, 2010.

F. Timothy Nicholls
Attorney for Richard D'Agostino
Post Office Box 18237
Raleigh, North Carolina 28619
Telephone: 919-781-1311
Fax: did-782-0465

STATE OF NORTH CAROLINA

File No.

WAKE

County

In the General Court of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF THE ESTATE OF:

Name of Decedent/Minor/Incompetent/Trust

VALERIE V. D'AGOSTINO

OATH/AFFIRMATION

N. C. Constitution, Art. VI., Sec. 7; G.S. 11-7, 11-11; 28A-7-1

I, the undersigned, do solemnly ☒ swear ☐ affirm that I will support and maintain the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith; that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; and that I will faithfully discharge the duties of my office as indicated below;

☒ so help me, God. ☐ and this is my solemn affirmation.

(check office below)

☒ OATH OF ADMINISTRATOR

I ☒ swear ☐ affirm that I believe that the above named decedent died without leaving any Last Will and Testament; that I will well and truly administer all and singular the goods and chattels, rights and credits of the deceased and a true and perfect inventory thereof return according to law; and that all other duties appertaining to the charge reposed in me, I will well and truly perform, according to law and with my best skill and ability;

☒ so help me, God. ☐ and this is my solemn affirmation.

☐ OATH OF EXECUTOR

I ☐ swear ☐ affirm that I believe this paper writing to be and contain the Last Will and Testament of the above named decedent; and that I will well and truly execute the same by first paying the decedent's debts and then the decedent's legacies; as far as the said estate shall extend or the law shall charge me; and that I will well and faithfully execute the office of an executor, agreeably to the trust and confidence reposed in me, and according to law;

☐ so help me, God. ☐ and this is my solemn affirmation.

☐ OATH OF ADMINISTRATOR CTA

I ☐ swear ☐ affirm that I believe this paper writing to be and contain the Last Will and Testament of the above named decedent; and that I will well and truly execute the same by first paying the decedent's debts and then the decedent's legacies; as far as the said estate shall extend or the law shall charge me; and that I will well and faithfully execute the office of an administrator cta to the best of my skill and ability and according to the law;

☐ so help me, God. ☐ and this is my solemn affirmation.

☐ OATH OF FIDUCIARY

I ☐ swear ☐ affirm that I will faithfully and honestly discharge the duties reposed in me according to the best of my skill and ability, and according to law;

☐ so help me, God. ☐ and this is my solemn affirmation.

Name of Fiduciary 1 ADMINISTRATOR		Name of Fiduciary 2	
Signature of Fiduciary <i>Richard D'Agostino</i>		Signature of Fiduciary	
☒ SWORN ☐ AFFIRMED AND SUBSCRIBED TO BEFORE ME		☐ SWORN ☐ AFFIRMED AND SUBSCRIBED TO BEFORE ME	
Date 7/13/10		Date	
Signature of Person Authorized To Administer Oaths <i>Stacie Green</i>		Signature of Person Authorized To Administer Oaths	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk of Superior Court		☐ Deputy CSC ☐ Assistant CSC ☐ Clerk of Superior Court	
☒ Notary	Date My Commission Expires May 16, 2013	Date My Commission Expires	☐ Notary
SEAL	County Where Notarized Beaufort	County Where Notarized	SEAL

AOC-E-400, Rev. 3/07

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Original-File

(TYPE OR PRINT IN BLACK INK)
STATE OF NORTH CAROLINA

File No.

**In The General Court of Justice
Superior Court Division
Before The Clerk**

WAKE _____ **County**

IN THE MATTER OF THE ESTATE OF:

Name, Street Address, City, State and Zip Code of Decedent

VALERIE V. D'AGOSTINO
3304 E. ANNALEY DRIVE
RALEIGH, NC 27604

Social Security No. (Last Four Digits)
5707

County of Domicile At Time of Death
WAKE

Date of Death
10/17/2009

Place of Death (If Different From County of Domicile)	N/A
---	-----

G.S. 28A-6-1; 28A-12-4; 105-22

Name, Street Address, PO Box, City, State and Zip Code of Applicant

RICHARD J. D'AGOSTINO
15 SEBURN DRIVE
BLUFFTON, SC 29910

Name, Street Address, PO Box, City, State and Zip Code of Co-Applicant

Telephone No.

(843) 368-6102

Telephone No.

Legal Residence (County, State)

Legal Residence (County, State)

BEAUFORT COUNTY, SC

Attorney Bar No.

3227

Telephone No. _____

Name, Street Address, PO Box, City, State and Zip Code of Attorney

F. TIMOTHY NICHOLLS

POST OFFICE BOX 18237

RALEIGH, NC 27619

I, the undersigned, applying for letters of administration in the above estate, being first duly sworn, say that:

1. The decedent was domiciled in this county at the time of the decedent's death, or left property or assets in this county, or was a nonresident motorist who died in North Carolina; ☐ no other proceeding for probate or for administration is pending in any jurisdiction. (South Carolina administration being terminated)
2. ☒ a. I am the person entitled to apply for letters or am applying after all persons having prior right to apply have renounced.
☐ b. I am applying subject to G.S. 28A-6-2(1) and move that all necessary citations be issued.
☐ c. I am the public administrator appointed by the Court.
3. I am not disqualified pursuant to G.S. 28A-4-2 to administer the estate and have not renounced my right to do so.
4. After diligent inquiry, I have determined that the persons listed below are all the persons entitled to share in the decedent's estate. (If there is a court-appointed guardian for any such person(s), list the guardian's name and address on an attachment.)

[illegible]

PRELIMINARY INVENTORY

(Give values as of date of decedent's death. Continue on separate attachment if necessary.)

PART I. PROPERTY OF THE ESTATE

1. Accounts in sole name of decedent (List bank, etc., each account no. and balance.)	Est. Market Value
BANK OF AMERICA ACCOUNT #*****4347	\$63,000.00
2. Joint accounts <u>without</u> right of survivorship (List bank, etc., each account no., balance and joint owners.)	
	% Owned By Dec.
	% Owned By Dec.
	% Owned By Dec.
	% Owned By Dec.
3. Stocks/bonds/securities in sole name of decedent or jointly owned <u>without</u> right of survivorship.....	% Owned By Dec.
4. Cash and undeposited checks on hand.....	
5. Household	1,000.00
6. Farm products, livestock, equipment and	
7. Vehicles.....	
8. Interest in partnership or sole proprietor businesses.....	
9. Insurance, Retirement Plan, I.R.A., etc., payable to	
10. Notes, judgments, and other debts due	
11. Miscellaneous personal	
12. Estimated annual income of Estate.....	
(Base bond on this amount, if applicable.) TOTAL PART I.	\$ 64,000.00

Part II. PROPERTY WHICH CAN BE ADDED TO ESTATE IF NEEDED TO PAY CLAIMS

1. Joint accounts with right of survivorship (List bank, etc., each account no., balance and joint owners.)	\$
2. Stocks/bonds/securities registered in beneficiary form and immediately transferred on death or jointly owned with right of	
3. Other personal property recoverable (G.S. 28A-15-10).....	
4. Real estate owned by decedent and not listed elsewhere.....	
TOTAL PART II	\$ 0.00

PART III. OTHER PROPERTY

1. There ☒ is ☐ is not entireties real estate owned by decedent and spouse	
2. There ☐ are ☒ are not Insurance, Retirement Plan, I.R.A., accounts, etc., payable to named beneficiaries	
3. There ☐ is ☒ is not a potential claim for wrongful death arising under G.S. 28A-18.2	

Signature of Applicant <i>Richard D. Goggin</i>	Signature of Co-Applicant
SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME	SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME
Date <i>7/13/10</i> Signature of Person Authorized to Administer Oaths <i>Steve Miller</i>	Date Signature of Person Authorized to Administer Oaths
☐ Deputy CSC ☒ Assistant CSC ☐ Clerk of Superior Court	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk of Superior Court
☒ Notary Date Commission Expires <i>May 16, 2013</i>	Date Commission Expires ☐ Notary
SEAL County Where Notarized <i>Deaford</i>	County Where Notarized SEAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF: BEAUFORT)
)
IN THE MATTER OF: The Estate of Valerie)
D'Agostino)

IN THE PROBATE COURT
STATEMENT OF CREDITOR'S CLAIM

CASE NUMBER: 2009ES0700889

Decedent's Date of Death (if known): October 17, 2009

Decedent's Last Mailing Address: 15 Sebring Drive, Bluffton, SC 29909

2012 OCT -1 AM 11:04
PROBATE COURT
BEAUFORT COUNTY, SC

Creditor: Nicholls & Crampton, P.A.

Address: c/o Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head Island, SC 29928

Telephone: (843) 785-6101

Basis of claim:

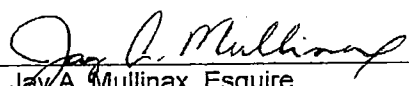
Legal services provided to Richard J. D'Agostino as Personal Representative of the Estate of Valerie D'Agostino.

Amount of claim \$ \$3,789.75 plus interest and attorney
fees

Date claim will become due (if not already due): , 20

Nature of uncertainty as to amount of claim and due date, if any:

Description of any security as to claim:

Signature: 
Title: Jay A. Mullinax, Esquire
Date: September 26, 2012

INSTRUCTIONS: Claims must be filed with the Probate Court of this county and delivered or mailed to the Personal Representative appointed to administer the estate (see section 62-3-803, 62-3-804, and 62-3-806 on next page.)

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

PROBATE COURT

IN THE MATTER OF THE ESTATE OF VALERIE D'AGOSTINO, DECEASED
CASE NUMBER: 2009ES0700889

PROOF OF DELIVERY

On the 26 day of September, 2012, I mailed or delivered a copy of
the Statement of Creditor's Claim,

- ☒ A copy of which is attached hereto and incorporated herein, or
☐ The original is on file with the court and incorporated herein.

Delivery was accomplished by the following method (check appropriate box):

- ☐ Personal delivery ☒ Ordinary First Class Mail
☐ Certified Mail with Return Receipt requested ☐ Registered Mail

to each of the following persons at the addresses shown:

J. Ashley Twombly, Esquire

Twenge & Twombly, LLC
311 Carteret Street
Beaufort, SC 29902

LAW OFFICE OF JAY A. MULLINAX, LLC

By: Jay A. Mullinax

Jay A. Mullinax, Esquire
2 Park Lane, Suite 303
Hilton Head Island, SC, 29928
843-785-6101
Attorney for the Estate

SWORN to before me this 26 day
of September, 2012.

[Signature]
Notary Public for South Carolina

My Commission Expires: 10/14/19

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE MATTER OF ESTATE OF VALERIE V. D'AGOSTINO

CASE NUMBER 2009ES0700889

FILED

PROBATE COURT

2013 MAR 21 PM 2:35

PROBATE COURT
BEAUFORT COUNTY, SC

FIDUCIARY LETTERS

- ☒ PERSONAL REPRESENTATIVE
☐ GUARDIANSHIP
☐ CONSERVATORSHIP
☐ TRUSTEESHIP
☐ _____

On the 21st day of March, 2013

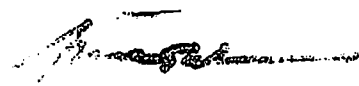
RONALD W. HUTHER

was/were appointed and qualified as Fiduciary(ies) of the above matter by this court, with all the authority granted to a fiduciary by law.

NOW, THEREFORE, LETTERS are issued, as evidence of such appointment, qualification, and authority of the above fiduciary(ies) to do and perform all acts which may be authorized by law.

RESTRICTIONS:
NONE

Executed this 21st day of March, 2013



Kenneth E. Fulp, Jr., Probate Judge

335.

RECEIVED BY
BEAUFORT COUNTY
PROBATE COURT

2013 MAY 30 AM 11:23

STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
COUNTY OF BEAUFORT	)	CASE NO. 2009-ES-07-889
IN RE:	)	
ESTATE OF VALERIE. D'AGOSTINO	)	
NICHOLLS & CRAMPTON, P.A.,	)	
Petitioner,	)	
v.	)	
ESTATE OF VALERIE D'AGOSTINO,	)	
Respondent.	)	

**ORDER FOR
REMOVAL TO CIRCUIT COURT**

The above-captioned action was commenced by the Petitioner with the filing of a Summons and Petition for Allowance of Claim on May 8, 2013. The Petition relates to the Respondent Estate's alleged breach of a fee agreement contract by failing to pay fees ~~owed~~^{claimed.} The amount of the claim is \$6,013.00. The Respondent Estate filed a Motion for Removal on May 30, 2013, and an Answer to the Petition on June 3, 2013.

Pursuant to South Carolina Probate Code § 62-1-302(d)(5), ^{actions} ~~any action~~ in which a party "has a right to trial by jury and which involve an amount in controversy of at least five thousand dollars in value" ^{*} must be removed to the circuit court. Because the Court has no discretion under these circumstances, and removal is mandatory, a hearing on the Motion for Removal is unnecessary.

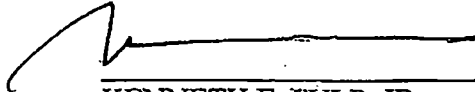
Based on the foregoing, it is ORDERED, ADJUDGED AND DECREED, that this matter be removed to the Circuit Court for Beaufort County, which shall proceed upon the matter de novo pursuant to § 62-1-302.

* on motion "made not later than ten days following the date on which all responsive pleadings must be filed."

AND IT IS SO ORDERED.

Beaufort, South Carolina

June 5, 2013


KENNETH E. FULP, JR.
Probate Court Judge

2013 JUN -5 AM 9:10
PROBATE COURT
BEAUFORT COUNTY, SC

FILED

TWENGE & TWOMBLEY, LLC
OPERATING ACCOUNT
311 CARTERET STREET
BEAUFORT, SC 29902

May 29, 2013

PAY TO THE
ORDER OF

Beaufort County Clerk of Court

\$ 150.00

*** One Hundred Fifty ***** 00/100

DOLLARS

Beaufort County Clerk of Court
P.O. Drawer 1128
Beaufort, SC 29901-112

MEMO Filing of Notice of Removal / #1602 / als


AUTHORIZED SIGNATURE

3538

DATE : May 29, 2013
CHE # : 3538
AMOUNT : \$150.00
ACCOUNT : 1
PAID TO : Beaufort County Clerk of Court
P.O. Drawer 1128
Beaufort, SC
29901-112

EXPLANATION : Filing of Notice of Removal / #1602 / als

CLIENT : Ronald Huther
MATTER : 1602

RECEIVED BY
BEAUFORT COUNTY
PROBATE COURT
2013 MAY 30 AM 11:24

3538

DATE : May 29, 2013
CHE # : 3538
AMOUNT : \$150.00
ACCOUNT : 1
PAID TO : Beaufort County Clerk of Court
P.O. Drawer 1128
Beaufort, SC
29901-112

** GENERAL BALANCES **

UNBILLED DISBS : 
A/R BALANCE : 

** TRUST BALANCES **

Filing of Notice of Removal / #1602 / als

CLIENT : Ronald Huther
MATTER : 1602
LAWYER : JAT
Estate of Valerie D'Agostino; Case #2009ES0700889
Estate of Richard D'Agostino; Case #2011ES0700406

TRUST BALANCE : 

608

TWENGE + TWOMBLEY LAW FIRM LLC

311 CARTERET STREET
BEAUFORT, SOUTH CAROLINA 29902
PH:: 843.982.0100 * FX:: 843.982.0103

WEB:: TWLAWFIRM.COM

**J. ASHLEY TWOMBLEY •
KARL D. TWENGE
JENNIFER I. CAMPBELL •**

***** LICENSED IN SC + GA
*** OF COUNSEL**

March 20, 2014

Via Hand Delivery

The Honorable Marvin H. Dukes, III
Beaufort County Master In Equity and
Special Circuit Court Judge
P.O. Drawer 1128
Beaufort SC 29901-1128

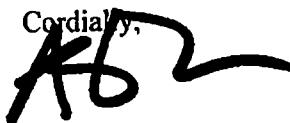
**Re: IN RE: Estate of Valerie D'Agostino
Nicholls & Crampton, P.A. v. Estate of Valerie D'Agostino
Civil Action No.: 2013-CP-07-01491**

Dear Judge Dukes:

Please find enclosed a complete copy of the Deposition of Tim Nicholls and Ron Huther along with the attached exhibits (as provided to me by the Court reporter) as well as additional authority on estoppel. Should you need anything further from me, please do not hesitate to let me know.

With kindest regards, I remain,

Cordially,



J. Ashley Twombley

cc: Mr. Ronald W. Huther, as Personal Representative of the Estate
Jay A. Mullinax, Esquire

American Jurisprudence, Second Edition
Database updated May 2014

Estoppel and Waiver
Romualdo P. Eclavea, J.D.; Eric C. Surette, J.D.

Part
One. Estoppel
III. Equitable Estoppel or Estoppel in Pais
B. Elements, Requisites, and Grounds
2. As Related to Party to Be Estopped
f. Inconsistent Positions

Topic Summary Correlation Table References

§ 65. Generally

West's Key Number Digest

West's Key Number Digest, Estoppel ↪63

Generally, a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter that is directly contrary to, or inconsistent with, one previously assumed by him or her,[1] at least where he or she had, or was chargeable with, full knowledge of the facts.[2] This doctrine against inconsistent positions is much broader than judicial estoppel in that judicial estoppel prohibits a party from manipulating the courts through inconsistent positions to gain an advantage while the doctrine against inconsistent positions may also apply to positions taken outside litigation.[3] Also, the doctrine of detrimental reliance is designed to prevent injustice by barring a party from taking a position contrary to his or her prior acts, admissions, representations, or silence.[4] Equitable estoppel is generally understood to prevent one party from taking a position that is inconsistent with an earlier action that places the other party at a disadvantage;[5] it bars a speaker from taking a position inconsistent with a prior statement when another person has reasonably and detrimentally relied on the earlier statement.[6] Under the doctrine of equitable

estoppel, the fraud is the inconsistent position subsequently taken rather than the original conduct; it is the former, rather than the latter, that operates to the injury of the other party.[7] Similarly, under the principles of quasi-estoppel, which are somewhat analogous to estoppel, the conscience of the court is repelled by the assertion of rights inconsistent with a litigant's past conduct.[8] Also, the doctrine of quasi-estoppel may be properly invoked against a person asserting a claim inconsistent with a position previously taken by him or her with knowledge of the facts and his or her rights, to the detriment of the person seeking application of the doctrine.[9] To prevail on a quasi-estoppel theory, the claimant must show: (1) that the offending party took a different position from his or her original position; and (2) that either the offending party gained an advantage or caused a disadvantage to the other party, the other party was induced to change positions, or it would be unconscionable to permit the offending party to maintain an inconsistent position from one that he or she has already derived a benefit or acquiesced in.[10] For the quasi-estoppel doctrine to apply and prevent a party from successfully asserting a position inconsistent with a previously taken position, it must be unconscionable to allow the party to be estopped from maintaining an inconsistent position; unconscionability must be shown in addition to the change of position as a change in position does not by itself establish unconscionability.[11]

[FN1] Chautauqua County Federation of Sportsmens Club, Inc. v. Caffisch, 15 A.D.2d 260, 222 N.Y.S.2d 835 (4th Dep't 1962); Obion County v. McKinnis, 211 Tenn. 183, 364 S.W.2d 356 (1962); Caldwell v. Anschutz Drilling Co., 13 Utah 2d 177, 369 P.2d 964 (1962).

[FN2] Chautauqua County Federation of Sportsmens Club, Inc. v. Caffisch, 15 A.D.2d 260, 222 N.Y.S.2d 835 (4th Dep't 1962); Obion County v. McKinnis, 211 Tenn. 183, 364 S.W.2d 356 (1962).

As to knowledge of facts as an element of estoppel, generally, see § 44.

[FN3] Dupwe v. Wallace, 355 Ark. 521, 140 S.W.3d 464 (2004).

[FN4] Suire v. Lafayette City-Parish Consol. Government, 907 So. 2d 37 (La. 2005).

[FN5] Strong v. State ex rel. The Oklahoma Police Pension and Retirement Bd., 2005 OK 45, 115 P.3d 889 (Okla. 2005).

[FN6] Sowinski v. Walker, 198 P.3d 1134 (Alaska 2008).

[FN7] Friedland v. Gales, 131 N.C. App. 802, 509 S.E.2d 793 (1998).

[FN8] Graybar Elec. Co. v. McClave, 91 Ariz. 223, 371 P.2d 350, 3 A.L.R.3d 750 (1962).

[FN9] City of Eagle v. Idaho Dept. of Water Resources, 150 Idaho 449, 247 P.3d 1037 (2011).

[FN10] Mortensen v. Stewart Title Guar. Co., 149 Idaho 437, 235 P.3d 387 (2010).

[FN11] Birdwood Subdivision Homeowners' Ass'n, Inc. v. Bulotti Const., Inc., 145 Idaho 17, 175 P.3d 179 (2007).

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AMJUR ESTOPPEL § 65

END OF DOCUMENT



May 22, 2014

VIA ELECTRONIC MAIL AT (mdukes@bcgov.net)

The Honorable Marvin H. Dukes, III
Master-in-Equity for Beaufort County
Beaufort County Courthouse
102 Ribaut Road, Room 212
Beaufort, SC 29901

Re: Nicholls & Crampton, P.A. vs. Estate of Valerie D'Agostino
Case No.: 2013-CP-07-01491

Dear Judge Dukes:

As requested, please find attached the South Carolina Probate Code sections referenced in the May 19, 2014's hearing. For the Court's convenience, the Reporter's Comments are included, along with references to the hearing subjects, exhibits and items already in the Court record. Also, some of the most pertinent sections are **bolded** for the Court's convenience, but that is not meant to diminish the importance of the remaining portions or to extract the bolded section from the context of the entire section.

The Court's recent hearing included references to the date Richard D'Agostino was appointed as fiduciary in the estate of his late wife's estate and how that related to the contract/engagement letter (Plaintiff's Exhibit #2, Tab A) at issue. (e.g. whether Richard was liable both individually and as fiduciary under the contract).

The South Carolina Probate Court appointed Richard Defendant's D'Agostino as the South Carolina Personal Representative for the Estate of Valerie D'Agostino, on January 8, 2010. (Defendant's Exhibit #1).

The North Carolina Court was unaware of the South Carolina action, and it appointed Defendant Ronald Huther as the North Carolina Fiduciary for the Estate of Valerie D'Agostino for the Estate of Valerie D'Agostino, on March 5, 2010. (See enclosed Court Records: Motion for Sanctions filed against Defendant, Ronald Huther, for allegedly making false representations on an application under oath to be appointed Administrator of the Estate of Valerie D'Agostino, in North Carolina; North Carolina Order on Petition for Resignation of Administrator (and appointment of Richard D'Agostino as Administrator), recognizing that Ronald Huther should not have been appointed as Fiduciary, and Richard D'Agostino should have been appointed as Administrator in North Carolina). In addition, Plaintiff's Exhibit #1, Tab 4, Paragraph 2c shows that Ronald Huther (Defendant)'s North Carolina attorney paid Plaintiff (Nicholls) \$8,000.00 to settle the matter.

*Chart your course.
Build your legacy.
There's still time.*

Richard D'Agostino signed the contract (engagement letter) on June 8, 2010, (Plaintiff's Exhibit #2, Tab A), hiring Plaintiff Nicholls & Crampton, PA, a North Carolina law firm, *inter alia*, to have himself, Richard D'Agostino, appointed as Fiduciary in North Carolina. The North Carolina Court, recognizing that it incorrectly appointed Defendant Ronald Huther as Fiduciary in North Carolina, subsequently appointed Richard D'Agostino as Fiduciary in North Carolina on July 12, 2010, approximately one month after Richard D'Agostino signed the contract/engagement letter with Plaintiff. Thus, as stated at the hearing, Richard D'Agostino was not the Fiduciary for his wife's estate in North Carolina on the date he signed the contract/engagement letter with Plaintiff, a North Carolina law firm.

The Plaintiff's Petition for Allowance of Claim (Defendant's Exhibit 2) references the fact that the Plaintiff asserts that "Richard J. D'Agostino personally, and not in a representative capacity, contracted on June 8, 2010 with Petitioner for the performance of legal services in North Carolina in connection with the administration of the Estate of Valerie D'Agostino." This statement as written, is consistent with the Court filings, wherein, the North Carolina Court did not appoint Richard D'Agostino as Fiduciary in North Carolina until July 12, 2010. Furthermore, the Defendant alleged in the hearing that the Plaintiff contracted in his individual capacity.

Because Richard D'Agostino was appointed as Fiduciary in North Carolina on July 12, 2010, approximately one month after Richard D'Agostino signed the contract with Plaintiff, the following North Carolina statute provides that Richard's acts before being appointed as Fiduciary in North Carolina, "The powers of a personal representative relate back to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter."

§ 28A-13-1. Time of accrual of duties and powers.

The duties and powers of a personal representative commence upon the personal representative's appointment. The powers of a personal representative relate back to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. However, a person named executor in a will may, prior to appointment, carry out written instructions of the decedent relating to the decedent's body, funeral and burial arrangements; provided that a health care agent authorized in a valid health care power of attorney to make body, funeral, and burial arrangements shall have precedence in making these arrangements, both before and after qualification of the decedent's personal representative, to the extent provided in G.S. 32A-19(b). **A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.** (1973, c. 1329, s. 3; 2007-502, s. 17; 2011-344, s. 4.)

South Carolina law provides a similar provision which "relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same

effect as those occurring thereafter.” The South Carolina provision is listed below, with Reporter’s Comments:

§ 62-3-701. Time of accrual of duties and powers.

The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Prior to appointment, a person named personal representative in a will may protect property of the decedent’s estate and carry out written instructions of the decedent relating to his body, funeral, and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

REPORTER’S COMMENT

The authority of a personal representative relates back to death upon appointment and stems from his appointment. The personal representative may ratify acts done by others prior to appointment.

Although Richard D’Agostino’s bound the estate by “relating back” to his previous actions, it did not relieve him of his personal liability, as circumscribed in SCPC § 62-3-808. In fact, the statute (SCPC § 62-3-808(c)) specifically states that such a contract claim “may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, **whether or not the personal representative is individually liable therefor.**” There has never been a proceeding to determine the “issues of liability as between the estate and the personal representative individually”, as described in SCPC § 62-3-808(d); nor has there been a proceeding to determine the liability of this estate, which is the purpose of this proceeding. (E.g. *No res judicata*)

§ 62-3-808. Individual liability of personal representative.

(a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity or identify the estate in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) **Claims based on contracts** entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate

or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding.

REPORTER'S COMMENT

This section clarifies that the personal representative is not individually liable for contracts properly entered into in his fiduciary capacity on obligations arising from ownership or control of the estate. He is liable for torts committed in the course of his administration only if he is personally at fault. It also provides for a variety of appropriate proceedings to determine the issues of liability between the estate and the personal representative.

The following statute provides protections for those persons dealing with the Personal Representative. In fact, "the protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters." Here, as noted in the North Carolina Court's Order on Petition for Resignation of Administrator (Ronald Huther), the Defendant, Ronald Huther was inappropriately appointed by the North Carolina Court -- out of priority order, apparently under the false impression that the decedent, Valerie D'Agostino, had no surviving spouse.

§ 62-3-714. Persons dealing with personal representative; protection.

A person who in good faith either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of personal representatives under Part 5 [Sections 62-3-501 et seq.] which are endorsed on letters as provided in Section 62-3-504, no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

REPORTER'S COMMENT

This section is designed to provide protection to persons who deal with a personal representative. Persons dealing with representatives generally are not charged with the duty to inquire into any restrictions pertaining to the exercise of powers by such personal representative. Any person dealing with a representative under Part 5 will be charged with knowledge of the restrictions upon exercise of power set forth in the letters.

For example, a bona fide purchaser for value dealing with a representative will be completely protected with respect to claims by interested parties. However, the personal representative will be liable to persons interested in the estate if his dealings with such bona fide purchaser were inconsistent with directions set forth in the will or other restrictions imposed by order of the probate court. However, if such a purchaser had actual knowledge of any such restrictions, then this section will not provide protection to such purchaser; instead, he is subject to having title to the property acquired from the personal representative declared void upon the petition of some interested party.

§ 62-3-202. Appointment or testacy proceedings; conflicting claim of domicile in another state.

If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this State, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this State must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this State.

REPORTER'S COMMENT

Conflicting claims of domicile arising in a formal testacy or appointment proceeding in a court of this State and a testacy or appointment proceeding after notice pending in another state are resolved by the court in which the first proceeding was commenced.

§ 62-1-111. Authority to award costs and expenses.

In a formal proceeding, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the estate that is the subject of the controversy.

REPORTER'S COMMENT

This section was enacted to clarify the probate court's authority to award costs and expenses. See § 62-7-1004 for a similar provision in the South Carolina Trust Code.

If you have any questions, please do not hesitate to contact our office. Thank you for your time and attention to this matter.

Very truly yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

A handwritten signature in black ink that reads "Jay A. Mullinax". The signature is written in a cursive, flowing style.

Jay A. Mullinax, Esquire

/Enclosures

JAM:kem

Cc: Mr. J. Ashley Twombly, Esquire (w/ enclosures)

WAKE COUNTY

VALERIE V. D'AGOSTINO

FILED
IN THE GENERAL COURT OF JUSTICE
2010 JUL - 8 **SUPERIOR COURT DIVISION**
BEFORE THE CLERK
WAKE COUNTY, NC
10-E-702

BY) _____
)
)
)
)

MOTION FOR SANCTIONS

As a basis therefore, Movant shows unto the Court that:

- 1

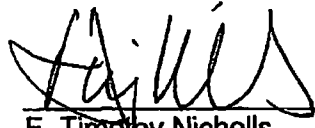
6. Counsel for Movant has sent to Huther, through two attorneys who the undersigned had reason at the time to believe were representing Huther, a demand requesting that he voluntarily withdraw as the administrator of the estate so as to avoid the necessity of further proceedings and additional attorneys fees to Movant in seeking to have Huther removed as Administrator. As of the filing of this Motion the undersigned has received no communication indicating that Huther will voluntarily withdraw as administrator.

7. The conduct of Huther in filing such Application knowing that material facts in the Application were being misrepresented is a violation of Rule 11 of the North Carolina Rules of Civil Procedure and justifies the imposition of sanctions against Huther, including without limitation an order directing that he pay the attorneys fees and costs incurred by Movant in this matter.

8. Movant therefore moves that sanctions be imposed against Huther for his violation of Rule 11 or any other statute or rule that justifies the imposition of sanctions.

WHEREFORE, Movant Richard D' Agostino, moves that the Court impose appropriate sanctions upon Ronald W. Huther.

This the 2nd day of July, 2010.



F. Timothy Nicholls
Attorney for Richard D'Agostino
Post Office Box 18237
Raleigh, NC 27619
Telephone: 919-781-1311
Fax: 919-782-0465

STATE OF NORTH CAROLINA
COUNTY OF WAKE

FILED
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE CLERK
2010 JUL 12 PM 5:05
WAKE COUNTY, C.S.C. 10E-702
BY: _____

IN THE MATTER OF THE
ESTATE OF:

)
)
)
) ORDER ON PETITION
) FOR RESIGNATION OF
) ADMINISTRATOR
)
)
)

Valerie V. D'Agostino,
Decedent.

STATEMENT OF FACTS

1. Valerie V. D'Agostino died intestate on October 17, 2009.
2. Ronald W. Huther, decedent's son, was appointed administrator of the estate on March 11, 2010.
3. Richard D'Agostino signed a "Limited Waiver of Right of Election" form on November 15, 1995.
4. The attorney for Ronald Huther, David Alexander, withdrew on July 1, 2010.
5. Mr. Huther's new attorney is F. Stephen Glass.
6. On July 2, 2010, Richard D'Agostino moved for sanctions against Ronald Huther.
7. Mr. Huther filed a petition on July 12, 2010 to be removed as administrator of the estate.

CONCLUSION OF LAW

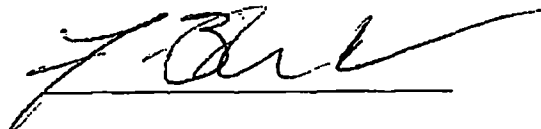
To resign a personal representative must file a verified petition with the clerk.

G.S. § 28A-10-2. The petition must also meets several requirements such as the facts relating to the appointment, names and residences of all interested person, a statement of why the administrator will be removed, a record of his conduct and an accounting. *Id.* Mr. Huther has met all of these requirements except he has not filed an accounting or a record of his conduct with the court. This must be done in order to comply with the statute for removal.

In North Carolina, there is an order of persons who are qualified to serve as a personal representative, which in this case is as an administrator. When a clerk appoints a personal representative for an intestate decedent, the clerk must follow the statutory list set out in G.S. § 28A-4-1(b). The first person on the list for a personal representative is the surviving spouse of the decedent. *Id.* Richard D'Agostino is the surviving spouse of Valerie D'Agostino and shall be considered the administrator of the estate. Richard D'Agostino should have been given first preference to become administrator of the estate.

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED pursuant to statute 28A-10-2 that Ronald Huther's petition for resignation as administrator of the estate is granted. Ronald Huther shall have 30 thirty days to file the interim final. Statutory preference will be given to the application of Richard D'Agostino administrator of the estate.

This the twelfth day of July, 2010.

A handwritten signature in dark ink, appearing to be "J. B. ...", written over a horizontal line.

Assistant Clerk of Superior Court

TWENGE TWOMBLEY LAW FIRM, LLC
311 Carteret Street
Beaufort, South Carolina 29902
Ph: 843.982.0100 Fax: 843.982.0103
Web: Twlawfirm.com

J. Ashley Twombley
Karl D. Twenge
Jennifer I. Campbell+

Licensed in SC & CA
-Of Counsel

May 27, 2014

Via Electronic Mail

The Honorable Marvin H. Dukes, III
Beaufort County Master In Equity and
Special Circuit Court Judge
P.O. Drawer 1128
Beaufort SC 29901-1128

**Re: In RE: Estate of Valerie D'Agostino
Nicholls & Crampton, P.A. v. Estate of Valerie D'Agostino
Civil Action No.: 2013-CP-07-01491**

Dear Judge Dukes:

I would like to briefly respond to Mr. Mullinax's letter of May 22, 2014 as follows:

- Mr. Mullinax is now citing North Carolina statutes and attaching orders from North Carolina that were not mentioned during our hearing or entered into evidence. Therefore, I would respectfully ask that the Court not consider the same.
- Despite the inappropriate citation and production of the North Carolina materials, they do not help Plaintiff's case.
- This is a claim against Valerie D'Agostino's Beaufort, South Carolina Probate Estate. Plaintiff argued for the past year, and for most of the hearing before your honor, that the reason Mr. D'Agostino did not sign the contract at issue in his capacity as personal representative of this estate was because he had not been appointed as personal representative of this estate at the time the contract was entered into. During the hearing, Defendant showed this was factually incorrect: the Beaufort County Probate Court issued fiduciary letters appointing Richard D'Agostino as the Personal Representative of the Estate of Valerie D'Agostino on January 8, 2010, and the contract between Plaintiff and Richard D'Agostino was signed on June 10, 2010. Plaintiff now seeks to change his entire argument and theory of the case.
- If Richard D'Agostino was personal representative of his wife's Beaufort, South Carolina estate in June of 2010 when he entered into the contract at issue, and if Plaintiff intended to have Mr. D'Agostino enter into the contract as personal representative of the Beaufort, South Carolina estate, appropriate

language could have easily been inserted into the contract by Plaintiff to clarify the same.

- Mr. Nicholls himself testified, "it's not clear" whether Mr. D'Agostino is personally liable under the contract or if the Estate of Valerie D'Agostino is liable, and that he drafted the contract.
- South Carolina law is well settled that "any ambiguity in a contract, **doubt, or uncertainty as to its meaning** should be resolved against the party who prepared the contract or is responsible for the ambiguous language." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009).
- The probate code sections cited by Mr. Mullinax have no bearing on the issues before the Court because they all deal with a situation when it is clear that some action has been properly taken by a personal representative in his fiduciary capacity on behalf of an estate. For example, S.C. Code 62-3-308 addresses when a contract is "properly entered into in his fiduciary capacity . . ." There is no evidence that this contract at issue was "properly" entered by Mr. D'Agostino "in his fiduciary capacity." In fact, Plaintiff previously stated the contact was entered in by Mr. D'Agostino "personally, and not in a representative capacity."
- Similarly, S.C. 62-3-714 deals with the situation when a person believes they are dealing with a personal representative but for some reason they are not. However, in this situation, "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Plaintiff. Therefore, this statute is inapplicable.

The threshold question before the Court is whether or not there is any doubt, any uncertainty or any ambiguity regarding the contract at issue. If the Court agrees with Plaintiff's own testimony that the contract "is not clear," the Court is then required to construe the contract "liberally and most strongly in favor of the party who did not write or prepare the contract." Ward v. West oil Co., Inc., 665 S.E.2d 618 (S.C. Ct. App. 2008). The only logical construction, much less a liberal construction, of the contract is that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Plaintiff, and therefore, the Estate of Valerie D'Agostino is not liable under the contract. Such a determination and construction is a matter of law for the Court.

With kindest personal regards, I remain,

Cordially,


J. Ashley Twombly

cc: Mr. Ronald W. Huther
Jay A. Mullinax, Esquire



May 28, 2014

VIA ELECTRONIC MAIL AT (mdukes@bcgov.net)

The Honorable Marvin H. Dukes, III
Master-in-Equity for Beaufort County
Beaufort County Courthouse
102 Ribaut Road, Room 212
Beaufort, SC 29901

Re: Nicholls & Crampton, P.A. vs. Estate of Valerie D'Agostino
Case No.: 2013-CP-07-01491

Dear Judge Dukes:

This is in response to Mr. Twombly's correspondence to the Court dated May 27th, 2014. Mr. Twombly suggests that statutory provisions listed in the correspondence were not mentioned during the recent Court hearing on this matter. However, on behalf of the Plaintiff, statutes were referenced during the hearing and the Court requested that I provide specific citations for those references that were not readily available. My correspondence of May 22nd, 2014, to the Court, provides those citations, as requested.

Additionally, during the hearing, on behalf of the Plaintiff, I asked that the Court take judicial notice of the Court records. For efficiency, it seemed inappropriate to enter mounds of Court materials into the record, even when many of those materials were referenced in the deposition transcripts, which were entered into evidence. Having the Court take judicial notice of the Court record may prevent, discourage, or later remedy any inadvertent or overt attempt to mischaracterize or omit facts already in the Court records. Additionally, it would appropriately be the ongoing ethical duty of counsel to correct any misrepresentation made to the Court anyway. Therefore, I cannot deduce why there would be any objection to the Court taking judicial notice of its own records.

Finally, with regard to the liability under the contract, the Plaintiff has maintained throughout, as argued in the hearing, that **both Richard D'Agostino and the Estate of Valerie D'Agostino had liability under the contract.** South Carolina Code of Laws §62-3-808(c) makes it absolutely clear that a Personal Representative can be liable individually as well as in his fiduciary capacity. As referred to during the hearing, if Richard D'Agostino signed the contract (on June 8, 2010) in his individual capacity, and thereafter, the North Carolina Court appointed Richard D'Agostino as Personal Representative on July 12th, 2010, his appointment relates back to his act of signing the contract, pursuant to North Carolina Code §28A-13-1. This does not diminish his personal liability, but it ratifies his acts on behalf of the estate, and thereafter the estate is also liable.

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Build your legacy.
There's still time.*

As mentioned during the hearing, it is well known that almost all prospective Personal Representatives who hire counsel for estate administration do so prior to their appointment. The probate laws directly address this issue and is the entire purpose of North Carolina's Code §28A-13-1 since 1973, and South Carolina Code §62-3-701 since 1986.

Lastly, any ambiguity in the contract is not a probative fact in this case. If, as the Defendant argues, Richard D'Agostino was personally liable at the time he signed the contract, and the North Carolina Court later appointed Richard D'Agostino as Personal Representative of the Estate of Valerie D'Agostino, then his act of seeking appointment by contracting for the legal services was ratified by his later appointment. Thus, the estate would be liable. If however, Richard D'Agostino signed the contract as Personal Representative, then the estate would be liable under that scenario as well. Whether Richard signed personally or as Personal Representative is not relevant to the liability of the estate. It is worth noting that Richard's actions, as noted in the Court records and depositions submitted in the hearing, including his appointment as Personal Representative in the North Carolina estate administration, were related to his role as Personal Representative. There was no evidence submitted that any action was taken on Richard's personal behalf, other than an analysis of how the estate would be distributed to the beneficiaries under various state laws. This analysis would be the duty of any prudent Personal Representative.

In full response to Mr. Twombly's recent correspondence, I would refer the Court to my correspondence of May 22, 2014, wherein the issues are addressed in more detail.

If you have any questions, please do not hesitate to contact our office. Thank you for your time and attention to this matter.

Very truly yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

A handwritten signature in black ink that reads "Jay A. Mullinax". The signature is written in a cursive, flowing style.

Jay A. Mullinax, Esquire

/Enclosures

JAM:kem

Cc: Mr. J. Ashley Twombly, Esquire

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J. Ashley Twombley*
Karl D. Twenge
Jennifer I. Campbell+

* Counsel in SC & GA
+ Of Counsel

May 29, 2014

Via Electronic Mail

The Honorable Marvin H. Dukes, III
Beaufort County Master In Equity and
Special Circuit Court Judge
P.O. Drawer 1128
Beaufort SC 29901-1128

**Re: In RE: Estate of Valerie D'Agostino
Nicholls & Crampton, P.A. v. Estate of Valerie D'Agostino
Civil Action No.: 2013-CP-07-01491**

Dear Judge Dukes:

I hate to continue to argue this case by letter campaign but would feel remiss if I did not address the issues that are now being presented to the Court. Therefore, please allow this letter to respond to Mr. Mullinax's letter of May 28, 2014 as follows:

- Plaintiff argues that it has maintained throughout that "both Richard D'Agostino and the Estate of Valerie D'Agostino had liability under the contract." There is simply no language in the contract whatsoever that provides for the same. Such an interpretation rewrites the contract, construes the ambiguity liberally in favor of Plaintiff and strongly against the Defendant, which is diametrically opposed to what the law in South Carolina requires the Court to do.
- Plaintiff cites both the South Carolina and North Carolina "relation back" statutes, which address acts taken by a person "prior to appointment" as personal representative. The fiduciary letters appointing Richard D'Agostino as the Personal Representative of the Estate of Valerie D'Agostino were issued on January 8, 2010, and the contract was signed on June 10, 2010. Therefore, the act at issue was not taken "prior to appointment."
- The dual liability argument is not supported by the previous claim Plaintiff filed with the Court wherein Plaintiff stated: "**Richard J. D'Agostino personally, and not in a representative capacity,** contracted" with Plaintiff.
- I have no idea what "Court records" Plaintiff would like you to take judicial notice of, and I do not believe the Court knows either. Please correct me if I am wrong.

- The Court is not forced to choose between the interpretations of advocating counsel regarding the contract at issue, as Plaintiff testified under oath that “it’s not clear” whether Mr. D’Agostino is personally liable under the contract or if the Estate of Valerie D’Agostino is liable. The Plaintiff is bound by his sworn testimony.
- South Carolina law is well settled that “any ambiguity in a contract, **doubt, or uncertainty as to its meaning** should be resolved against the party who prepared the contract or is responsible for the ambiguous language.” Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009).

Again, the threshold question before the Court is whether or not there is any doubt, any uncertainty or any ambiguity regarding the contract at issue. If the Court agrees with Plaintiff’s own sworn testimony that the contract drafted by Plaintiff “is not clear,” the Court is then required to construe the contract “liberally and most strongly in favor of the party who did not write or prepare the contract.” Ward v. West oil Co., Inc., 665 S.E.2d 618 (S.C. Ct. App. 2008). The only logical construction, much less a liberal construction, of the contract is exactly what Plaintiff alleged in his prior claim: “Richard J. D’Agostino personally, and not in a representative capacity, contracted” with Plaintiff.

With kindest personal regards, I remain,

Cordially,


J. Ashley Twombly

cc: Mr. Ronald W. Huther
Jay A. Mullinax, Esquire



May 30, 2014

VIA ELECTRONIC MAIL AT (mdukes@bcgov.net)

The Honorable Marvin H. Dukes, III
Master-in-Equity for Beaufort County
Beaufort County Courthouse
102 Ribaut Road, Room 212
Beaufort, SC 29901

Re: Nicholls & Crampton, P.A. vs. Estate of Valerie D'Agostino
Case No.: 2013-CP-07-01491

Dear Judge Dukes:

This is in response to Mr. Twombly's correspondence to the Court dated May 29th, 2014. I would like to direct the Court back to the Petition for Allowance of Claim against the Estate of Valerie D'Agostino, which is the prominent matter pending before the Court.

Plaintiff, Nicholls & Crampton, P.A. filed the Petition for Allowance of Claim against the Estate of Valerie D'Agostino in order to collect attorney's fees and expenses for work regarding the administration of the Estate of Valerie D'Agostino in North Carolina. The newest issue brought on by the Defendant is that Nicholls & Crampton, P.A. assisted Mr. Richard D'Agostino as an individual and not as the Personal Representative of the Estate of Valerie D'Agostino. Please refer to our earlier correspondence outlining the statutorily recognized practice of an appointment of a Personal Representative "relating back" to his prior acts as an individual.

Please find enclosed a copy of the Application For Letters of Administration and a copy of the Oath/Affirmation signed by Richard D'Agostino on July 13, 2010 approximately one month after Richard signed the contract with the Plaintiff. Both of these documents were prepared by his attorney of record, F. Timothy Nicholls of Nicholls & Crampton, P.A (see Application For Letters of Administration) and billed on the invoice filed with the Petition for Allowance of Claim. Together, these documents confirm that Mr. Richard D'Agostino hired Mr. Nicholls to assist him in becoming appointed as Personal Representative for the Estate of Valerie D'Agostino in North Carolina, and not as a beneficiary in an individual capacity.

If you have any questions, please do not hesitate to contact our office. Thank you for your time and attention to this matter.

Very truly yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

A handwritten signature in black ink that reads "Jay A. Mullinax". The signature is written in a cursive, flowing style.

Jay A. Mullinax, Esquire

/Enclosures

JAM:kem

Cc: Mr. J. Ashley Twombly, Esquire

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J. Ashley Twombley
Karl D. Twenge
Jennifer L. Campbell

Member of SC & GA
Bar Council

June 2, 2014

Via Electronic Mail

The Honorable Marvin H. Dukes, III
Beaufort County Master In Equity and
Special Circuit Court Judge
P.O. Drawer 1128
Beaufort SC 29901-1128

**Re: In RE: Estate of Valerie D'Agostino
Nicholls & Crampton, P.A. v. Estate of Valerie D'Agostino
Civil Action No.: 2013-CP-07-01491**

Dear Judge Dukes:

I again hate to continue to argue this case by letter campaign but feel I need to respond to the letter from Mr. Mullinax of May 30, 2014.

- Plaintiff's May 30, 2014 letter attaches a document that I have never seen before, and certainly was never entered into the record during our hearing. In addition, the document does not appear to have been ever filed with any Court, and looks like a draft document. I do not know where the document came from, who filled it out, or anything else about the document. Therefore, Defendant objects to this document being considered by the Court.
- Someone has typed the following comment into the document "South Carolina administration being terminated." Valerie D'Agostino's estate administration in South Carolina was never terminated.
- Plaintiff's May 30, 2014 letter states that "the newest issue brought on by the Defendant is that Nicholls & Crampton, P.A. assisted Mr. Richard D'Agostino as an individual and not as the Personal Representative of the Estate of Valerie D'Agostino." That is not true. Plaintiff brought this issue on years ago when Plaintiff filed a claim against the Estate of Richard D'Agostino stating "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Plaintiff.

- Mr. Mullinax argues repeatedly in his letter that Mr. Richard D'Agostino hired Mr. Nicholls as Personal Representative for the Estate of Valerie and not as a beneficiary in his personal capacity. The contract at issue does not say that. Moreover, this is at odds with his clients' prior claim which stated "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Plaintiff. It is also at odds with Plaintiff's sworn deposition testimony:

Q: I understand, but this motion to seek sanctions and to try to have sanctions imposed against Mr. Huther, that was done on behalf of Richard D'Agostino individually, correct?

A: Yes, I think it was. It appears to be, yeah.

- During his deposition, Mr. Nicholls admitted that he sent an email to his co-counsel wherein he stated he "did not file a claim in the wife's estate as we were never advised to do so by her estate and **our claim has always been against him personally.**" In response to my questions about the email, the following exchange took place:

Q: Isn't it true, though, that you stated that you didn't file a claim against the wife's estate because you were never advised to do so and your client has always been against Mr. D'Agostino personally?

MR. MULLINAX: Object to the form.

A: That is what it says, yes.

Q: And that was true when you wrote it, right?

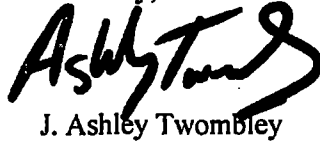
A: Yeah.

Depo, p. 42-43.

- The Court is not forced to choose between the interpretations of advocating counsel regarding the contract at issue, as Plaintiff testified under oath that "it's not clear" whether Mr. D'Agostino is personally liable under the contract or if the Estate of Valerie D'Agostino is liable. **Plaintiff's Counsel cannot change Plaintiff's sworn testimony.**
- South Carolina law is well settled that "any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the ambiguous language." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009).

With kindest personal regards, I remain,

Cordially,

A handwritten signature in black ink, appearing to read "Ashley Twombly", with a stylized flourish at the end.

J. Ashley Twombly

cc: Mr. Ronald W. Huther
Jay A. Mullinax, Esquire

TWENGE TWOMBLEY LAW FIRM, LLC
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J. Ashley Twombley*
Karl D. Twenge
Jennifer L. Campbell+

*Licensed in SC + GA
+Of Counsel

June 27, 2014

Via Electronic Mail

The Honorable Marvin H. Dukes, III
Beaufort County Master In Equity and
Special Circuit Court Judge
P.O. Drawer 1128
Beaufort SC 29901-1128

**Re: In RE: Estate of Valerie D'Agostino
Nicholls & Crampton, P.A. v. Estate of Valerie D'Agostino
Civil Action No.: 2013-CP-07-01491**

Dear Judge Dukes:

The above referenced matter was before you on May 19, 2014, for a final hearing. At the conclusion of the hearing, you asked counsel to remind you about the case and the need for a final order. This letter is the reminder.

To refresh your memory, this case involves a contract for legal services, and the primary issue for the Court to decide is whether Richard D'Agostino entered into the contract personally, or whether he entered into the contract as personal representative for the estate of Valerie D'Agostino.

Defendant takes the position that the contract is, at best, ambiguous on this point. This is supported by Plaintiff's own sworn testimony:

Question

But my question to you is the [contract] does not specify whether or not Mr. D'Agostino is individually responsible for the fees or if the estate is responsible for the fees, isn't that right?

MR. MULLINAX: Object to the form.

Answer

Yeah, I don't think it is clear, yes.

In addition to Plaintiff's sworn testimony, Plaintiff filed a claim against Mr. D'Agostino's estate stating "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Plaintiff.

South Carolina law is well settled that "any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the ambiguous language." Plantation A.D., LLC, v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009) (emphasis added). Plaintiff drafted this contract.

If the Court agrees with Plaintiff's own testimony that the contract "is not clear," the Court is then required to construe the contract "liberally and most strongly in favor of the party who did not write or prepare the contract." Ward v. West Oil Co., Inc., 665 S.E.2d 618 (S.C. Ct. App. 2008).

Defendant would respectfully submit that the only logical construction, much less a liberal construction, of the contract is that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Plaintiff, and therefore, the Estate of Valerie D'Agostino is not liable under the contract.

With kindest personal regards, I remain,

Cordially,



J. Ashley Twombly

cc: Mr. Ronald W. Huther
Jay A. Mullinax, Esquire



June 27, 2014

VIA ELECTRONIC MAIL AT (mdukes@bcgov.net)

The Honorable Marvin H. Dukes, III
Master-in-Equity for Beaufort County
Beaufort County Courthouse
102 Ribaut Road, Room 212
Beaufort, SC 29901

Rè: Nicholls & Crampton, P.A. vs. Estate of Valerie D'Agostino
Case No.: 2013-CP-07-01491

Dear Judge Dukes:

This correspondence is a follow up to Mr. Twombly's correspondence dated June 27, 2014. Mr. Twombly suggests in his correspondence that "the primary issue for the Court to decide is whether Richard D'Agostino entered into the contract personally, or whether he entered into the contract as personal representative for the Estate of Valerie D'Agostino." We disagree that this is the primary issue for the Court to decide. We believe that the primary issue for the Court to decide is whether the Estate of Valerie D'Agostino is liable for services performed on its behalf, regardless of any additional personal liability by Richard D'Agostino.

If Richard D'Agostino entered into the contract personally, as suggested by the Defendant, it does not prevent a claim against the subject estate. This issue is fully explained with statutory references in our May 22, 2014 correspondence to the Court (enclosed). As explained in that correspondence, South Carolina Probate Code § 62-308(c) expressly provides that a contract claim **"may be asserted against the estate by a proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor"**. It is expressly clear from the Code that a personal representative and an estate can be liable for the same claim.

In addition, according to N.C. Gen. Stat. § 28A-13-1 and SCPC § 62-3-701, the powers of a personal representative relate back in time to give acts by the person appointed [as Personal Representative / Fiduciary] which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Both N.C. Gen. Stat. § 28A-13-1 and SCPC § 62-3-701 are cited and discussed in detail in our May 22, 2014 correspondence to you, which we have enclosed for your convenience.

Richard D'Agostino signed the contract (engagement letter) on June 8, 2010 (enclosed), hiring Plaintiff Nicholls & Crampton, P.A., a North Carolina law firm, inter alia, to assist him with the administration of the estate and to have himself, Richard D'Agostino, appointed as

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Fiduciary in North Carolina. The Defendant argues that the contract between the Plaintiff and Richard D' Agostino is ambiguous. However, it is clear from the first paragraph of the contract (engagement letter) that the Plaintiff was hired by Richard D'Agostino to "provide legal services on your [Richard D'Agostino] behalf in connection with the administration of your deceased wife's estate in Wake County, NC".

The Plaintiff assisted Richard D'Agostino in being appointed as Fiduciary for the Estate of Valerie D'Agostino in North Carolina. At the time the contract was signed on June 8, 2010, Richard D'Agostino was not serving as Fiduciary of the Estate in North Carolina.

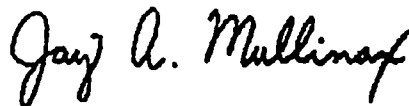
Approximately one month after Richard D'Agostino signed the contract with Plaintiff on June 8, 2010, through the efforts of the Plaintiff, the North Carolina Court removed Ronald Huther (Defendant) who was inappropriately appointed as Fiduciary, and appointed Richard D' Agostino as Fiduciary in North Carolina on July 10, 2010.

As outlined in our May 22, 2014 correspondence to the Court, both the South Carolina and North Carolina codes retroactively sanction [fiduciary] acts by an individual who is later appointed as Personal Representative / Fiduciary. Richard D' Agostino's act of hiring the Plaintiff, Nicholls & Crampton, P.A. to assist with the administration of the Estate and to be appointed as Fiduciary of the Estate is retroactively sanctioned by these provisions. This is consistent with the principle that when an individual agrees to be personally liable on a contract and is later appointed as the Personal Representative / Fiduciary, a contract claim "may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor." SCPC § 62-3-808(c).

If you have any questions, please do not hesitate to contact our office. Thank you for your time and attention to this matter.

Very truly yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

A handwritten signature in black ink that reads "Jay A. Mullinax". The signature is written in a cursive, flowing style.

Jay A. Mullinax, Esquire

/Enclosures

JAM:kem

Cc: Mr. J. Ashley Twombly, Esquire (w/ enclosures)



August 22, 2014

VIA ELECTRONIC MAIL AT (mdukes@bcgov.net)

The Honorable Marvin H. Dukes, III
Master-in-Equity for Beaufort County
Beaufort County Courthouse
102 Ribaut Road, Room 212
Beaufort, SC 29901

Re: Nicholls & Crampton, P.A. vs. Estate of Valerie D'Agostino
Case No.: 2013-CP-07-01491

Dear Judge Dukes:

I am writing in response to Mr. Twombly's proposed Final Merits Hearing Order (Order) for the above referenced case. I have expressed my concern regarding some of the issues included in the Order to Mr. Twombly, and I believe it is important that I bring the unresolved issues to the Court's attention for consideration.

In the Court's email correspondence directing the Respondent's counsel (Ashley Twombly) to prepare a draft Order, the Court stated that "Ashley's arguments about the undisputed (and admitted) lack of contract clarity prevail (at least at this level)." It is clear from the Court's July 8th correspondence and the Respondent's arguments that the Court decided the outcome of this case based on ambiguity in the contract. The Petitioner fully accepts the Court's decision (at this level) and respects the reason (ambiguity in the contract) for its decision. However, we believe that the Respondent's proposed Order delves into territory beyond the Court's rationale for its decision, and even alleges facts not supported in the record, and/or provides misleading information.

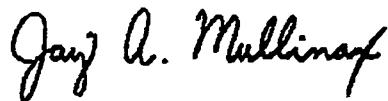
We have attempted to leave the majority of the Respondent's proposed order untouched, while removing information that is unrelated to the Court's decision based on ambiguity. We also provided minimal additions to revise misleading sections. Additionally, we propose the removal of alleged facts that we contend are not supported in the record.

*Chart your course.
Build your legacy.
There's still time.*

We thank you for your patience and your consideration of our response. Please feel free to contact us with any questions.

Very truly yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

A handwritten signature in black ink that reads "Jay A. Mullinax". The signature is written in a cursive, flowing style.

Jay A. Mullinax, Esquire

JAM:kem

Cc: Mr. J. Ashley Twombly, Esquire

TWENGE TWOMBLEY LAW FIRM, LLC
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J. Ashley Twombley*
Karl D. Twenge
Jennifer I. Campbell*

*Licensed in SC & GA
*Of Counsel

August 25, 2014

Via Electronic Mail

The Honorable Marvin H. Dukes, III
Beaufort County Master In Equity and
Special Circuit Court Judge
P.O. Drawer 1128
Beaufort SC 29901-1128
mdukes@bcgov.net

**Re: In RE: Estate of Valerie D'Agostino
Nicholls & Crampton, P.A. v. Estate of Valerie D'Agostino
Civil Action No.: 2013-CP-07-01491**

Dear Judge Dukes:

This letter is in response to Jay Mullinax's letter dated August 22, 2014, in which Mr. Mullinax provides edits and comments to the proposed Order that you requested I prepare. I will briefly address each edit/comment in the order in which they appear in the proposed Order.

1. Page 4 additional language (starting three lines down): The July 12, 2012, Order quoted by Mr. Mullinax was not placed into evidence during the trial. It is not part of the record in this case. Moreover, the language is simply not relevant to any issue determined by the Court. This language should not be added to the Order.
2. Page 4 additional language (in the first full paragraph): The statement that the Petitioner did not pursue the claim made against the Estate of Richard D'Agostino is entirely incorrect. Petitioner filed a claim, and the Estate of Richard D'Agostino disallowed the claim. After the claim was disallowed, Petitioner filed a Petition for Allowance of Claim, which was dismissed with prejudice by the Probate Court. The Probate Court signed an Order dismissing Petitioner's Claim against the Estate of Richard D'Agostino on March 6, 2013. Because Petitioner did pursue the claim, this language should not be added to the Order.
3. Pages 4-5 Edits and Comment: Petitioner states in a comment that it did not ever argue that Richard D'Agostino as Personal Representative retained Petitioner. However, this position is contradicted by the actual

Claim filed against the Estate of Valerie D'Agostino in which Petitioner stated that the basis of its claim is "Legal services provided to Richard D'Agostino **as Personal Representative of the Estate of Valerie D'Agostino.**" (emphasis added). The proposed edits and changes on pages 4 and 5 should not be included in the Order.

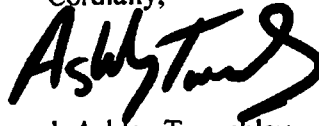
4. Page 8 Edits: Petitioner seeks to delete language stating that its Claim against the Estate of Richard D'Agostino (in which Petitioner stated that Richard D'Agostino personally, and not in a representative capacity, contracted with Petitioner) is at odds with the factual position taken in this case (in which the basis of its claim is "Legal services provided to Richard D'Agostino **as Personal Representative of the Estate of Valerie D'Agostino.**"). See also number 3 above. The text of the two Claims themselves provides evidence of the inconsistent positions. The proposed deletions and edits should not be made.
5. Page 9-10 (first two paragraphs of Arguments of the Petitioner): These two paragraphs address arguments made by Petitioner at the hearing in support of its position. The Court reviewed these arguments raised to the Court and decided not to adopt the arguments raised by Petitioner. Therefore, these paragraphs are properly included in the Order and should not be deleted.
6. Page 10 (first full paragraph): Petitioner is asking the Estate of Valerie D'Agostino to pay its legal fees, citing the relation back statutes. Under the relation back statutes, one of the elements that Petitioner must prove is that is that its actions actually benefited Respondent. While the relation back statutes do not apply because Richard D'Agostino had already been appointed as Personal Representative at the time he signed the contract, there is also nothing in the record to establish that the Petitioner's work was intended to or actually benefited the Estate of Valerie D'Agostino. If Petitioner wanted to submit evidence at trial on this point, it could have done so. However, as Mr. Mullinax stated in his email to me dated July 29, 2014, "we find nothing in the record to support the alleged finding of fact that the actions of the Petitioner lacked benefit to the estate." Because the Petitioner had the burden of proof on this point and failed to present any evidence to carry its burden, this paragraph is properly included in the Order and should not be deleted.
7. Page 10-11 (paragraph beginning with "Second"): This paragraph addresses an argument made by Petitioner at the hearing. The Court reviewed this argument raised to the Court and then decided not to adopt the arguments raised by Petitioner. Therefore, these paragraphs are properly included in the Order and should not be deleted.
8. Finding of Fact 8: See number 6 above.
9. Finding of Fact 14: See number 8 above.

10. Conclusion of Law 8: Richard D'Agostino had been appointed as a Personal Representative prior to signing Petitioner's Contract. Therefore, this Conclusion of Law is correct as written and no additional language should be added.

We are re-attaching a clean copy of our proposed Order for your consideration. Thank you for your attention to this matter. If you have any additional questions, please do not hesitate to contact me.

With kindest personal regards, I remain,

Cordially,

A handwritten signature in black ink, appearing to read "Ashley Twombly", written in a cursive style.

J. Ashley Twombly

cc: Mr. Ronald W. Huther
Jay A. Mullinax, Esquire

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT
	)	
COUNTY OF BEAUFORT	)	CASE NO: 2013-CP-07-01491
IN RE:	)	
ESTATE OF VALERIE D'AGOSTINO	)	
NICHOLLS & CRAMPTON, P.A.,	)	
	)	
Petitioner,	)	
	)	
v.	)	FINAL MERITS HEARING ORDER
	)	
ESTATE OF VALERIE D'AGOSTINO,	)	
	)	
Respondent.	)	
	)	
	)	
	)	
	)	

This matter is before me for a hearing on Petitioner's Motion for Summary Judgment and a Final Merits Hearing. The hearing was held on May 19, 2014, and present for the hearing were Jay A. Mullinax, Esq., for Petitioner and J. Ashley Twombly, Esq., for Respondent. Regarding the Final Merits Hearing, the parties previously stipulated that this matter would be tried before the undersigned in a summary fashion, that the court would consider deposition transcripts as opposed to live witness testimony, and that the undersigned would issue a final order with findings of fact and conclusions of law.

After hearing and considering arguments from both counsel at the hearing and reviewing all of the information provided by the parties, including but not limited to the depositions of Frederick Timothy Nicholls and Ronald Huther and the exhibits thereto, the contract between Petitioner and Richard D'Agostino, and the post-hearing letters submitted by counsel, I now make the following findings of fact and conclusions of law and issue this final Order.

Procedural Background

Petitioner filed a claim against the Estate of Valerie D'Agostino in Beaufort County Probate Court, seeking payment of attorney fees for legal services provided to Richard D'Agostino. In its Statement of Creditor's Claim, dated September 26, 2012, Petitioner stated that the basis of the claim was for "Legal Services provided to Richard D'Agostino as Personal Representative of the Estate of Valerie D'Agostino," and therefore, the Estate of Valerie D'Agostino was responsible for the unpaid fees. Petitioner also sought interest and attorney's fees.

Respondent timely filed a Notice of Disallowance of Petitioner's Claim, alleging that Richard D'Agostino contracted with Petitioner personally and not in his representative capacity, that the amount of the claim was unreasonable in light of the service provided, and that Respondent was not responsible for paying any attorney fees Petitioner incurred pursuing this claim. Petitioner then filed a Summons and Petition for Allowance of Claim, and Respondent filed an Answer, once again denying the claim. This case was removed from the Beaufort County Probate Court to the Beaufort County Circuit Court and was referred to me via an order dated March 18, 2014.

The deciding question in this case is whether Richard D'Agostino contracted with Petitioner personally or in his capacity as Personal Representative of the Estate of Valerie D'Agostino. For the reasons contained herein, I find and conclude (1) that the contract entered into between Petitioner and Richard D'Agostino is ambiguous as to the resolution of the deciding question, (2) that construing the contract against the drafter leads to the conclusion that Richard D'Agostino contracted with Petitioner personally, (3) that the evidence submitted to the Court leads to the conclusion that the parties intended for the contract to be between Petitioner and Richard D 'Agostino personally and (4) that the Estate of Valerie D'Agostino has no

liability or responsibility to pay Petitioner's claim.

Factual Background

Valerie D'Agostino died on October 17, 2009. On January 8, 2010, Richard D'Agostino was appointed as Personal Representative of the estate by the Beaufort County Probate Court.

In addition to the Beaufort County estate opened by Richard D'Agostino, an estate for Valerie D'Agostino was subsequently opened in Wake County North Carolina by Ronald Huther, Valerie D'Agostino's son. According to Mr. Huther, relying upon the advice of a North Carolina attorney and the North Carolina attorney's interpretation of a waiver that had been previously executed by Richard D'Agostino, Mr. Huther requested that he be appointed as the Fiduciary for the North Carolina estate stating that he was the person "entitled to apply for letters or am applying after all persons having prior right have renounced." On or about March 5, 2010, the Wake County North Carolina Court appointed Huther as Personal Representative of the North Carolina estate.

On June 10, 2010, Richard D'Agostino signed a contract retaining Petitioner. The scope of representation, as provided in the contract, states "[y]ou have requested that we provide legal services on your behalf in connection with the administration of your deceased wife's estate in Wake County, NC (the "Matter")." The re line of the contract states "Estate of Valerie V. D'Agostino." Richard D'Agostino's signature block states "Rich D'Agostino." (Contract dated June 8, 2010). The contract does not specify whether Richard D'Agostino signed individually or in his capacity as personal representative, but the words "personal representative" do not appear in the contract. The retainer called for under the contract was paid by Richard D'Agostion's personally.

On or about July 2, 2010, Petitioner filed Motions for Sanctions on behalf of Richard D'Agostino against Mr. Huther and Mr. Huther's North Carolina counsel alleging that

misrepresentations were made to the North Carolina Court in Mr. Huther's application to be appointed as personal representative. Subsequently, Mr. Huther voluntarily resigned as personal representative of the North Carolina estate and retained new counsel. The Wake County, North Carolina estate was ultimately closed, and the Estate of Valerie D'Agostino was probated in Beaufort County.

Initially, Petitioner contended that Richard D'Agostino entered into the contract personally and not in his capacity as personal representative of the Estate of Valerie D'Agostino. Specifically, Petitioner filed a claim against the Estate of Richard D'Agostino, and the claim was denied by his estate. Petitioner then filed a Petition for Allowance against the Estate of Richard D'Agostino. In the Petition for Allowance, Petitioner made the following statement: "Richard J. D'Agostino personally, and not in a representative capacity, contracted on June 8, 2010 with Petitioner for the performance of legal services in North Carolina in connection with the administration of the Estate of Valerie D'Agostino." (Nicholls Dep. Def. Exh. 20). Mr. Nicholls also stated in an email dated January 30, 2012, that Petitioner had not filed a claim against the Estate of Valerie D'Agostino because "our claim has always been against him personally." (Nicholls Dep.p. 41, line 10-p.43, line 1; Nicholls Dep. Def. Exh. 19). Petitioner's claim against the Estate of Richard D'Agostino was ultimately dismissed with prejudice by the Beaufort County Probate Court pursuant to an order dated March 6, 2013. That order was never appealed or otherwise challenged.

Petitioner now argues that Richard D'Agostino retained Petitioner in his capacity "as Personal Representative of the Estate of Valerie D'Agostino," (Statement of Creditor's Claim, dated September 26, 2012) and therefore, the Estate of Valerie D'Agstino is responsible for the remaining balance owed under the contract. Petitioner also claims interest due under the contract, as well as attorney's fees.

Analysis

The threshold question before the Court is whether Richard D'Agostino a) contracted with Petitioner in his individual capacity, b) contracted in his capacity as Personal Representative of the Estate of Valerie D'Agostino, or c) whether the contract is ambiguous on this point. A contract is ambiguous when it may fairly and reasonably be understood in more ways than one. Jordan v. Security Group, Inc., 311 S.C. 227, 428 S.E.2d 705 (1993). The question of whether or not a contract is susceptible of more than one interpretation is a question of law for the court. Liberty Mut. Ins. Co. v. Westport Ins. Corp., 664 F. Supp. 2d 587 (D.S.C. 2009).

After reviewing and considering all of the evidence, I find that the contract at issue is ambiguous on this issue for the following reasons:

1. The language used in the contract is simply not clear as to whether Richard D'Agostino hired Petitioner in his individual capacity as a beneficiary of the estate or in his capacity as Personal Representative of the Estate of Valerie D'Agostino. While the re line of the contract states "Estate of Valerie V. D'Agostino," the scope of representation is "in connection with the administration of your deceased wife's estate." Richard D'Agostino was a beneficiary of Valerie's estate as well as the personal representative. Therefore, he had multiple interests in the estate. The contract does not specify or otherwise address which interests Petitioner was retained to pursue.
2. Petitioner initially argued during the hearing that Richard D'Agostino did not enter into the contract as personal representative of Valerie D'Agostino's estate because he had not been appointed as personal representative of her estate at the time to contract was entered into. However, Respondent correctly pointed out that Richard D'Agostino

was appointed by the Beaufort County Probate Court as Personal Representative for the Estate of Valerie D'Agostino on January 8, 2010, almost six months before he signed Petitioner's contract. There is no reason why Richard D'Agostino could not have entered into the contract as personal representative of Valerie D'Agostino's estate had he chosen to do so. Moreover, there is no reason why Petitioner could not have drafted the contract to specify that the Estate of Valerie D'Agostino was responsible for the fees. Again, the words "personal representative" do not appear anywhere in the contract.

3. The contract does not mention that Valerie D'Agostino's estate will be responsible for the fees incurred and not does mention that Richard D'Agostino would be liable if her estate did not pay.
4. Frederick Timothy Nicholls, Petitioner's 30(b)(6) deponent, testified that the contract was "not clear" as to whether Mr. D'Agostino was individually responsible for Petitioner's fees or if the Estate of Valerie D'Agostino was responsible for Petitioner's fees. When Nicholls was asked "my question to you is the [contract] does not specify whether or not Richard D'Agostino is individually responsible for the fees or if the estate is responsible for the fees, isn't that right," Petitioner responded "[y]eah, I don't think it is clear, yes." (Nicholls Dep.p.21, lines 14-21).
5. Based upon all of the above, at best the contract can be fairly and reasonably understood either way, and is therefore ambiguous.

South Carolina law is clear that "any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the ambiguous language." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009). Petitioner's representative testified that he

drafted the contract. (Nicholls Dep.p.8, lines 11-15). Therefore, the contract must be construed “liberally and most strongly in favor of the party who did not write or prepare the contract.” Myrtle Beach Lumber Co. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). A reasonable construction of the contract, much less a liberal one, is that Richard D’Agostino was individually responsible for fees incurred pursuant to the contract.

Such a finding is supported by other testimony offered by Petitioner’s representative as well as the documentation submitted to the Court for consideration. For example, when asked about the motions for sanctions that were filed by Petitioner on behalf of Richard D’Agostino, Petitioner conceded they were filed on behalf of Richard D’Agostino individually:

Q: I understand, but this motion to seek sanctions and to try to have sanctions imposed . . . that was done on behalf of Richard D’Agostino individually, correct?

A: Yes, I think it was. It appears to be, yeah

(Nicholls Dep.p. 20, lines 12-17.) In addition, there were numerous documents filed on behalf of “Richard D’Agostino” by Petitioner without any reference to proceeding as personal representative of an estate. In addition, Petitioner concedes in his deposition that at least some of the work performed by Petitioner was analyzing whether or not Richard D’Agostino would individually receive more money if Valerie D’Agostino’s estate was probated in North or South Carolina. (Nicholls Dep.p.12, lines 15-25 –p.14, line 03; p. 19 line 21 –p.20 line 4 and p. 25 line 6 –p.26, line 7).

During his deposition, Petitioner’s representative acknowledged that he sent an email to his co-counsel wherein he stated he “did not file a claim in [Valerie D’Agostino’s] estate as we were never advised to do so by her estate and **our claim has always been against [Richard D’Agostino] personally.**” In response to questions about the email, the following exchange took place:

Q: Isn't it true, though, that you stated that you didn't file a claim against the wife's estate because you were never advised to do so and your client has always been against Mr. D'Agostino personally?

MR. MULLINAX: Object to the form.

A: That is what it says, yes.

Q: And that was true when you wrote it, right?

A: Yeah.

(Nicholls Dep.p. 42-43).

In addition, prior to filing a claim against the Estate of Valerie D'Agostino, Petitioner filed a claim the Estate of Richard D'Agostino after he passed away. In that claim, Petitioner took the position that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Petitioner. (Nicholls Dep. Def. Exh. 20) (underline added). The factual position previously taken by Petitioner is directly at odds with the factual position Petitioner attempts to take in this case. The Court finds that Petitioner is barred by estoppel, waiver and the doctrine against inconsistent positions from taking such a contrary position here. 28 Am. Jur. 2d Estoppel and Waiver § 65 ("Generally, a party will not be permitted to maintain inconsistent positions or to take a positions in regards to a matter that is directly contrary to, or inconsistent with, one previously assumed by him or her, at least whenever he or she had, or was chargeable with, full knowledge of the facts.").

Finally, Richard D'Agostino paid the initial retainer fee required under the contract with his personal funds using a check from his personal banking account. (Nicholls Dep. Def. Exh. 2). The Estate of Valerie D'Agostino never paid for any of the work performed under the contract, and there is no evidence that payment was ever sought from her estate in the normal course by Petitioner until this claim was filed.

Here, the testimony of Petitioner's own 30(b)(6) deponent and review of the contract

itself establishes (1) that Petitioner drafted the contract, (2) that the contract is admittedly not clear and is ambiguous as to whether Richard D'Agostino signed in his personal or representative capacity, and (3) the evidence presented to the Court suggests that it was the intent of both Petitioner and Richard D'Agostino that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Petitioner.

Arguments of Petitioner

Petitioner advances several arguments in support of the claim. First, Petitioner cites "relation back" statutes of the South Carolina Probate Code (S.C. Code Ann. § 62-3-701) and the North Carolina Probate Code (N.C. Code § 28A-13-1) in support of its claim. These "relation back" statutes provide that the powers of a personal representative relate back to give acts by the person appointed as personal representative which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter. Petitioner argues the "relation back" statutes apply in this matter because Richard D'Agostino had not been appointed as Personal Representative in the North Carolina Estate at the time he entered into the contract, and when he later was appointed as Personal Representative of that Estate, his appointment related back to acts taken by him prior to his appointment.

This argument ignores the fact that Richard D'Agostino was appointed by the Beaufort County Probate Court as Personal Representative for the Estate of Valerie D'Agostino on January 8, 2010, almost six months before he signed Petitioner's contract. (Fiduciary Letters dated January 8, 2010). There is no reason why Richard D'Agostino could not have entered into the contract as issue in his capacity as Personal Representative of his wife's South Carolina estate, or why language could not have been inserted into the contract to hold Valerie D'Agostino's estate liable for fees incurred, which is the entity Petitioner now seeks to hold responsible under the contract. Accordingly, the "relation back" statutes do not help Petitioner.

In addition, it is far from clear that the actions of Richard D'Agostino and Petitioner were "beneficial" to the estate of Valerie D'Agostino. Petitioner appears to have been hired to stop the North Carolina probate proceeding and assist Richard D'Agostino in negotiating and drafting a settlement agreement that would fully resolve issues related to the same. While a settlement agreement was ultimately entered into, it was later rescinded by Richard D'Agostino (Petitioner's client) which resulted in two additional years of litigation. Therefore, Petitioner has not shown that his work was necessarily beneficial to the Valerie D'Agostino's estate.

Second, Petitioner also argues that as part of a Settlement Agreement and General Release (Settlement Agreement) resolving previous litigation that the Estate of Valerie D'Agostino agreed to pay Petitioner's claim. Petitioner was not a party to this Settlement Agreement. Nevertheless, this argument is not supported by the language of the Settlement Agreement. The Settlement Agreement provides that some moneys would be held in escrow pending final resolution of "any and all claims of Nicholls & Crampton, P.A. ("Nicholls") against the Estate of Richard D'Agostino." (Settlement Agreement ¶ 4) (underline added). The Settlement Agreement then states how the money will be distributed if Petitioner's claim against the Estate of Richard D'Agostino were upheld and how the money will be distributed if Petitioner's claim against the Estate of Richard D'Agostino were denied. (Settlement Agreement ¶ 4). Ultimately, Petitioner's claim against the Estate of Richard D'Agostino was dismissed, with prejudice. The Settlement Agreement Petitioner referenced does not appear to even contemplate a creditor's claim against the Estate of Valerie D'Agostino. According, I find that the Settlement Agreement does not require the Estate of Valerie D'Agostino to pay Petitioner's claim.

Third, Petitioner argues both Richard D'Agostino and the Estate of Valerie D'Agostino had dual liability under the contract. A review of the contract reveals that there is no language to

support the dual liability argument. Such an interpretation stretches the language of the contract, and construes the ambiguity liberally in favor of Petitioner and strongly against Respondent, which is at odds with South Carolina law. Moreover, the dual liability argument is not supported by the previous claim Petitioner filed with the Probate Court wherein Petitioner stated that "Richard J. D'Agostino personally, and not in a representative capacity, contracted" with Petitioner.

Accordingly, I find that Petitioner's arguments are without merit. Based on the evidence presented and after considering the arguments of the parties, I make the following:

FINDINGS OF FACT

1. I find that Richard D'Agostino was appointed by the Beaufort County Probate Court as the Personal Representative of the Estate of Valerie D'Agostino on January 8, 2010.
2. I find that on June 10, 2010, Richard D'Agostino signed a contract retaining Petitioner.
3. I find that Richard D'Agostino paid the initial retainer from his personal funds.
4. I find that Petitioner drafted the contract.
5. I find that F. Timothy Nicholls, Petitioner's 30(b)(6) deponent, testified that the contract is not clear as to whether Richard D'Agostino was individually responsible for Petitioner's fees.
6. I find that the contract drafted by Petitioner is ambiguous as to whether Richard D'Agostino hired Petitioner in his individual or representative capacity.
7. I find Richard D'Agostino was both a beneficiary and the Personal Representative of the Estate of Valerie D'Agostino and thus had multiple interests in the Estate of Valerie D'Agostino.
8. I find, based on Mr. Nicholls' deposition testimony, that the work performed by Petitioner included an analysis of whether Richard D'Agostino personally would receive

more money under South Carolina or North Carolina probate law and the filing of a motions on behalf of Richard D'Agostino personally. I also find that Petitioner has not shown that the work he performed was beneficial to the Estate of Valerie D'Agostino.

9. I find that prior to making a claim against Respondent, Petitioner took the position that its claim was against Richard D'Agostino personally in an email to co-counsel dated January 30, 2012.
10. I find that it was the parties' intent for Richard D'Agostino to enter the contract personally and not in a representative capacity.
11. I find that after Richard D'Agostino died, Petitioner made a claim against his Estate for attorneys' fees alleged owed.
12. I find that in making its claim against the Estate of Richard D'Agostino, Petitioner stated in its Petition for Allowance that Richard D'Agostino "personally and not in a representative capacity" contacted Petitioner to provide legal services in North Carolina.
13. I find that Richard D'Agostino individually contracted with Petitioner.
14. I find that the Settlement Agreement and General Release references Petitioner's claim against the Estate of Richard D'Agostino in no way requires the Estate of Valerie D'Agostino to pay Petitioner's claim.
15. I find that there is no evidence to support Petitioner's dual liability argument.
16. I find that Respondent properly disallowed Petitioner's claim.

CONCLUSIONS OF LAW

1. Under South Carolina law, a contract is ambiguous when it may fairly and reasonably be understood in more than one way. E.g., Jordan, 311 S.C. at 227, 428 S.E.2d at 705.
2. I conclude as a matter of law that the contract drafted by Petitioner is susceptible of more

than one interpretation regarding whether Richard D'Agostino hired Petitioner individually or in his representative capacity and who is responsible for Petitioner's fees.

3. South Carolina law is clear that ambiguities, doubts or uncertainties as to a contract's meanings are resolved against the drafting party and must be construed strongly in favor of the non-drafting party. E.g., Plantation A.D., LLC., 386 S.C. at 205. 687 S.E.2d at 718; Myrtle Beach Lumber Co., 276 S.C. at 8, 274 S.E.2d at 426.
4. I conclude that the contract signed by Richard D'Agostino must be construed against Petitioner and in favor of Respondent and that a reasonable construction of the contract is that the Estate of Valerie D'Agostino is not responsible for fees incurred under the contract.
5. I conclude that Petitioner performed work on behalf of Richard D'Agostino personally.
6. I conclude that Petitioner is estopped and/or barred from now taking the position that Richard D'Agostino contracted with it in his representative capacity because that position is directly at odds and inconsistent with Petitioner's position in the Estate of Richard D'Agostino and its email of January 30, 2012.
7. I conclude that Richard D'Agostino individually contracted with Petitioner.
8. I conclude that the "relation back" statutes of South Carolina and North Carolina do not help Petitioner because Richard D'Agostino was appointed as Personal Representative of the Estate of Valerie D'Agostino prior to signing Petitioner's contract and that Petitioner's arguments based on the "relation back" statutes are misplaced.
9. I conclude that Petitioner's dual liability argument is contrary to South Carolina case law that requires courts to construe ambiguous language in a contract liberally and most strongly in favor of the party who did not draft the contract. Myrtle Beach Lumber Co., 276 S.C. at 8, 274 S.E.2d at 426.
10. I conclude that since Richard D'Agostino individually contracted with Petitioner,

Respondent has no liability or responsibility to pay Petitioner's claim.

11. I conclude that Respondent properly disallowed Petitioner's claim.

Therefore, I find as a matter of fact and conclude as a matter of law that Petitioner's claim against Respondent is due to be denied and was properly denied and disallowed by Respondent.

Motion for Summary Judgment

Finally, on April 22, 2014, Petitioner filed a Motion for Summary Judgment, and that Motion for Summary Judgment was heard before Final Merits Hearing. The Court took the motion under advisement. Since the Final Merits Hearing has now been held, Petitioner's Motion for Summary Judgment is now moot. Even if it were not moot, I find that there were genuine issues of material fact that prevented summary judgment.

IT IS SO ORDERED!

MARVIN H. DUKES, III
Master In Equity and Special Judge for the
Fourteenth Judicial Circuit, Beaufort County

Beaufort, South Carolina

July __, 2014

THE STATE OF SOUTH CAROLINA
2014 OCT 17 PM 12:10 In the Court of Appeals

BEAUFORT COUNTY, S.C.
APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge and Master-In-Equity

Case No. 2013-CP-07-01491

Estate of Valerie D'Agostino,
ET AL,

Respondent,

v.

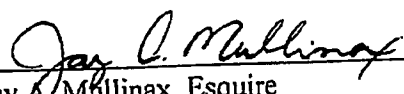
Nicholls & Crampton, P.A.,
ET AL,

Appellant.

NOTICE OF APPEAL

Nicholls & Crampton, P.A., ET AL appeals the Judgment of the Honorable Marvin H. Dukes, III, Master-In-Equity dated September 16, 2014. Appellant received written notice of entry of this Judgment on September 16, 2014, and was served a copy of the Judgment from the Respondent on September 19, 2014.

October 14, 2014


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Hilton Head Island, SC 29928
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Attorney for Appellant

Other Counsel of Record:
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Attorney for Respondent

2014 OCT 14 THE STATE OF SOUTH CAROLINA
In The Court of Appeals

BEAUFORT COUNTY, S.C.
APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED
AUG 21 2015
SC Court of Appeals

Marvin H. Dukes, III, Circuit Court Judge and Master-In-Equity

Case No. 2013-CP-07-01491

Estate of Valerie D'Agostino,
ET AL,

Respondent,

v.

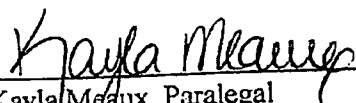
Nicholls & Crampton, P.A.,
ET AL,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Estate of Valerie D'Agostino, ET AL, by depositing a copy of it in the United States Mail, postage prepaid, on October 14, 2014, addressed to his attorney of record, Mr. J. Ashley Twombly, Esquire, Twenge + Twombly Law Firm, LLC, 311 Carteret Street, Beaufort, SC 29902, Attorney for Respondent.

October 14, 2014



Kayla Meaux, Paralegal
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge and Master-In-Equity

Appellate Case No. 2014-002249

Nicholls & Crampton, P.A., Appellant,

v.

Estate of Valerie D'Agostino, Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Jay A. Mullinax

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AUG 21 2015
SC Court of Appeals