

*NO. PR17-0144*

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| <i>ESTATE OF</i>           | § | <i>IN THE COUNTY COURT</i>    |
| <i>ELIZABETH J. BURKS,</i> | § | <i>AT LAW</i>                 |
| <i>DECEASED</i>            | § | <i>ROCKWALL COUNTY, TEXAS</i> |

***JOINT MOTION TO MODIFY ORDER APPOINTING RECEIVER OR  
TERMINATE RECEIVERSHIP, AND RESPONSE TO RECEIVER  
JUSTIN HOLLAND’S MOTION FOR CLARIFICATION  
OF ORDER APPOINTING RECEIVER***

NOW COME GENE BURKS, II, Individually as a Beneficiary of the Estate of Elizabeth J. Burks, Deceased (“Decedent”) and as Independent Executor of the Decedent’s Estate (the “Estate”), and LISA WILLIS and CHRISTOPHER BURKS , in their individual capacities as three of the four Beneficiaries of the Estate (the three Movants herein being collectively referred to below as the “Beneficiaries”) , and file this their Joint Motion to Modify this Court’s Order dated December 29, 2021 appointing Justin Holland as Receiver (the “Receiver”) or, in the alternative, to terminate the receivership, and their Response to Mr. Holland’s Motion for Clarification of Order Appointing Receiver, and as grounds therefor would respectfully show the Court as follows:

I.

On December 29, 2021, this Court entered an Order appointing Justin Holland as Receiver, with the primary responsibility of listing the following three properties owned by the Estate for cash sale: (i) House and lot located at 204 Howard Street, Royse City, Texas; (ii) the commercial lot at Goliad and East Fork consisting of 4.6021 acres, in Rockwall,

Texas; and (iii) the lot on North Goliad consisting of 1.00 acres in Rockwall, Texas (referred to herein individually as the “Property” and collectively as the “Properties”). In addition to this primary responsibility, the Receiver was given the responsibility of receiving note and rental income payable to the Estate, maintaining the real property, and paying the expenses of the Estate, after December 31, 2021.

## II.

The agreement of the undersigned parties to transfer the responsibility for selling the Properties from the Independent Executor, GENE BURKS, II, to a Receiver is included as part of the Mediated Settlement Agreement entered into by and between the undersigned parties on November 30, 2021, following a mediation conducted that day by David Smith as Mediator. The mediation was attended by GENE BURKS, II, LISA WILLIS and their attorney, Larry Green, Jr., and by ANGELA MCBRIDE and her attorney, Paul Leake.

## III.

GENE BURKS, II, and LISA WILLIS had concerns about how the receivership would be conducted, without regard to whom the Court would appoint as Receiver. Their concerns included the process for seeking court approval for the sale of the Properties. In particular, GENE BURKS, II, and LISA WILLIS were concerned that a Receiver, perhaps in a rush to discharge his or her duties and earn a commission, would bring unreasonably low offers to the Court for approval. Unreasonably low offers to purchase any of the Properties would necessitate the filing of written responses in opposition to the proposed sale, additional attorney fees for the Estate, and appearances by the parties and their

counsel at hearings before this Court. GENE BURKS, II, and LISA WILLIS were also concerned about how the Properties, not just the residential rental property, would be maintained if the responsibility for maintenance shifted from a fiduciary who is a beneficiary of the Estate (GENE BURKS, II) to a Receiver, who would not have the same vested interest in property maintenance that a beneficiary has.

#### IV.

GENE BURKS, II, and LISA WILLIS agreed to enter into the Mediated Settlement Agreement because they were assured that the Receiver would communicate directly with them and the other Beneficiaries about offers received to purchase any of the Properties before filing a report of sale with the Court, and further that the Receiver would convey all offers to Mr. Burks, as Independent Executor, and that Mr. Burks could communicate directly with the Receiver regarding Mr. Burks' approval or disapproval of any offer.

#### V.

By communicating with the Beneficiaries about an offer the Receiver received, the Beneficiaries would have the opportunity to convey to the Receiver their opinion if they considered an offer to be below fair market value. Beneficiary opposition to an offer, in particular unanimous opposition, should logically preempt the Receiver from seeking the Court's approval of a low offer, thus avoiding the time and expense the Beneficiaries and the Estate would incur to formally oppose a proposed sale. One of the fundamental incentives for litigants to enter into a settlement agreement is to avoid the cost of further litigation. Understanding that the Receiver would communicate with the

Beneficiaries before contract terms were agreed upon and presented to the Court, with the expectation that the Receiver would abandon unreasonably low offers after communicating with the Beneficiaries, was an important factor in the decision of GENE BURKS, II, and LISA WILLIS to enter the Mediated Settlement Agreement. A receivership operating in that manner would avoid unnecessary cost to the Estate, and would avoid the time required to attend hearings before this Court to oppose a proposed sale. If the receivership meant having to commit time in his schedule to attend hearings before this Court to oppose unreasonably low offers, GENE BURKS, II, would have elected to retain authority over the sale of the Properties himself, as Independent Executor, rather than agreeing to a receivership.

#### VI.

The Beneficiaries did not oppose the appointment of Mr. Holland as Receiver based on their understanding that he would communicate with the Beneficiaries and that he was appointed Receiver to serve the joint interests of the four Beneficiaries in selling the Properties for their fair market value or higher.

#### VII.

Unfortunately, the actual operation of the receivership since the Court's appointment of Mr. Holland has not gone the way the Beneficiaries reasonably expected it would. Although he had permission to communicate directly with GENE BURKS, II, and LISA WILLIS, Mr. Holland did not communicate with GENE BURKS, II, and LISA WILLIS or their attorney about the terms of two earnest money contracts before he entered into the contracts. Not long after his appointment, Mr. Holland retained Mr. Horton as

counsel and indicated that he (Mr. Holland) would no longer communicate with the Beneficiaries. Two of the Properties were sold very quickly. Mr. Holland was appointed Receiver by Order of this Court dated December 29, 2021. He qualified as Receiver by filing a Receiver's Bond and Oath on December 30, 2021. Shortly thereafter, Mr. Holland entered into two contracts. The contract for the sale of the 4.0621 acre tract on Goliad (referred to as the "East Fork Contract") and the contract on the residence located at 204 Howard Street in Royse City (referred to as the "Howard Street Property") were each entered into by the Receiver on or before January 14, 2022, just two weeks after the Receiver qualified. The effective date of the title commitment issued on the East Fork Contract was January 5, 2022, only four (4) business days after the Receiver qualified to serve. Mr. Holland was contacted by one of the Beneficiaries about purchasing the residential property, but he declined to consider the Beneficiary's offer in favor of entering a contract with a company that is believed to be owned and/or operated by a business associate of Mr. Holland.

#### VIII.

Neither contract would have been approved by the Beneficiaries, had they been presented to the Beneficiaries before they were executed by the Receiver, for multiple reasons. Mr. Holland entered into the contracts without: (i) obtaining professional appraisals of the fair market value of either Property; (ii) putting a "for sale" sign on any of the Properties<sup>1</sup>; (iii) listing the Properties on a Multiple Listing Service; or (iv) allowing adequate time to market the Properties so as to receive more than one offer on

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<sup>1</sup> In fact, the only sign placed on any of the Properties by Mr. Holland was a political sign, not a "for sale" sign, and permission to place the sign on the Property was not requested of the Beneficiaries or their attorneys.

each Property. Instead, he entered into contracts only two weeks after qualifying to serve as Receiver. It can reasonably be inferred that the Receiver had agreed upon the terms of the East Fork Contract before January 5, 2022, which suggests that he had reached an understanding with the purchaser on the sale price on or before December 30, 2021, the date he formally qualified as Receiver. Further, the purchaser on the East Fork Contract is believed to be an entity whose principal owner is a person who is a current or past business associate of Mr. Holland. If true, a sale to a business associate, absent an appraisal to support the sale price, would cast doubt on whether the proposed sale was an arms length transaction, and whether the Receiver had a conflict of interest. Furthermore, before the receivership was established, the East Fork land had been listed by agent Rod Holland for approximately \$1.2 million more than the sale price in the Receiver's proposed contract on the same property.

## IX.

After filing with this Court an Application for the Sale of the two Properties (Goliad at East Fork and 204 Howard) the Receiver has since withdrawn the two contracts. The Beneficiaries agree that an appraisal of the Properties is necessary to establish the fair market value of the Properties for the benefit of the Receiver and the Beneficiaries. GENE BURKS, II, and LISA WILLIS recommended an experienced licensed Texas appraiser, Randall E. "Randy" Tarpley to appraise the Properties, but the Receiver declined to retain Mr. Tarpley. When Mr. Tarpley was contacted by Mr. Holland, Mr. Tarpley did not know Mr. Holland was referring to the Properties in the Burks Estate. He had agreed to appraise the Properties prior being contacted by Mr. Holland.

Nevertheless, in his capacity as Independent Executor of the Estate, GENE BURKS, II has retained Mr. Tarpley to appraise the Properties, with the support of the other three Beneficiaries. The Executor's contract with Mr. Tarpley provides for an estimated delivery of the appraisal reports on or before July 29, 2022. The Beneficiaries have confidence that Mr. Tarpley will produce appraisals the Beneficiaries will have confidence in as establishing the true and current fair market value of the Properties.

X.

Upon the Receiver declining to retain Mr. Tarpley, undersigned counsel notified Mr. Horton, as counsel for Mr. Holland, that the Executor will not pay any professional fees charged by an appraiser who is not retained by the Executor. The Beneficiaries object to the Receiver retaining his own appraiser for the following reasons: (i) an appraiser retained by the Receiver will be assumed by the Beneficiaries to be guided by the Receiver's interest in selling the Properties as quickly as possible, which may result in an inaccurately low appraisal of the Properties; (ii) the Estate should not be obligated to pay for two appraisals, one retained by the Executor with the consent of the other two Beneficiaries, and the other retained by the Receiver; (iii) the terms of the Order Appointing Receiver entered by this Court do not authorize payment of professional fees to an appraiser from payments received by the Receiver on the promissory note payable to the Estate by Triton I 30 Rockwall, LLC (the Triton Note); and (iv) the manner in which Mr. Holland conducted the receivership casts doubt on the credibility of any appraiser he would select. Further, the discretion to retain and pay for a professional appraiser are exclusively reserved to the Independent Executor of the Estate, GENE

BURKS, II. That authority is not granted to the Receiver in its Order appointing Mr. Holland.

## XI.

In addition to foregoing objections to the manner in which the Receiver has undertaken to sell the Properties, the Beneficiaries also object to the lack of transparency in which the receivership has been conducted. In particular, the Beneficiaries note that they have received no payments from Mr. Holland of any sums received by him from the Triton Note or from the lease of the residence at 204 Howard Street. The Receiver first began receiving payments on the Triton Note for the installment due for the month of January and has received the monthly installment every month thereafter in the sum of \$16,380.71 per month, for a total of \$98,284.26 through June, 2022. After payment of attorney fees and expenses payable to the court-appointed Master, Tiffany Miller, and to the attorney for the Independent Executor, Larry Green, Jr.; payment of maintenance expenses and insurance premiums on the residence at 204 Howard Street; ad valorem taxes due on the Properties, if any are then due; and the Receiver's one percent (1%) monthly commission, the Order Appointing Receiver requires that the "Receiver shall pay the remaining balance of said payments equally among the four (4) beneficiaries" (Order, page 3). The 2021 ad valorem taxes due on the Properties were paid in 2021 by the Independent Executor and the 2022 ad valorem taxes have not been assessed. No accounting of his receipts and disbursements has been furnished by Mr. Holland to the Beneficiaries, but the attorney fees and expenses paid by the Receiver to Tiffany Miller and Larry Green, Jr., combined with the expenses authorized by the Order Appointing



Receiver should fall well short of consuming all of the funds received by the Receiver from January 1, 2022 to the present. No expenses or professional fees are authorized for payment by the Order Appointing Receiver other than those expenses described in the Order and in this paragraph above.

## XII.

The Beneficiaries are also concerned about the manner in which the Properties are being maintained by the Receiver. In that regard, GENE BURKS, II received an invoice from the City of Rockwall dated June 16, 2022 for a high grass abatement fee and a forced mowing fee concerning the 1.00 acre tract of land on North Goliad.

## XIII.

As a result of the manner in which the receivership has been conducted, the **Beneficiaries have, collectively, lost confidence in Mr. Holland's commitment to generating fair market value from the sale of the Properties.** They wish it were not necessary, but in order to have confidence that the Properties will be sold for full value, the Beneficiaries must respectfully request the Court to appoint a new Receiver or, in the alternative, terminate the receivership and restore full authority over, and custody of, the Properties and the Triton Note to the Independent Executor of the Estate, GENE BURKS, II, for the purpose of selling the Properties, distributing the remaining assets of the Estate equally among the Beneficiaries, and winding up the administration of the Estate.

WHEREFORE, PREMISES CONSIDERED, the Beneficiaries pray that the Court modify or terminate the Order Appointing Receiver dated December 29, 2021 in the following manner, to:

- (a) require the Receiver to utilize the appraisals of the Properties prepared by Randy Tarpley to the exclusion of any other appraisals;
- (b) require the Receiver to give due consideration to the fair market value of each Property as determined by Mr. Tarpley's appraisal report for the Property;
- (c) require the Receiver to disclose the details of all offers (including sale price, identity of the buyer and any potential conflicts of interest between the Receiver and buyer) with the Beneficiaries within a reasonable time before entering into a conditional contract to sell one of the Properties and before filing with this Court a report of sale;
- (d) permit the Beneficiaries to communicate directly with the Receiver after receiving notice of a proposed offer;
- (e) require the Receiver to furnish to the Beneficiaries a quarterly accounting of the Receiver's receipts and disbursements for the quarter, beginning with the period from January 1, 2022 through March 31, 2022 and continuing quarterly thereafter as long as the Receiver maintains his appointment, with the first quarterly accounting due twenty (20) days after entry of the Court's order modifying the Order Appointing Receiver; and
- (f) appoint a new Receiver to assume the duties of the receivership, as modified according to the foregoing Motion; or

In the alternative, to

- (g) terminate the receivership and restore full authority over, and custody of, the Properties and the Triton Note to the Independent Executor of the Estate, GENE BURKS, II, for the purpose of selling the Properties, winding up the administration of the Estate, and distributing the remaining assets of the Estate according to the terms of Decedent's Will and the Mediated Settlement Agreement; and

the Beneficiaries pray for general relief.

Respectfully submitted,

PEMBERTON, GREEN, NEWCOMB & WEIS

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EXECUTRIX OF THE ESTATE OF ELIZABETH J.  
BURKS, DECEASED, and LISA WILLIS, Co-  
Movants

The undersigned joins in the foregoing Motion and Response:

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CHRISTOPHER BURKS, Movant, *Pro Se*  
Date: July 13, 2022

