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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Jean Hoefer Toal, Acting Circuit Court Judge

Case No. 2017-CP-28-00831

IN THE MATTER OF:
LEMUEL WHITAKER BOYKIN, II, deceased

May Cantey Boykin .....Appellant

v.

Mary Deas Wortley, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, Co-Trustee of the Lemuel Whitaker Boykin Marital Deduction Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; Alice B. Belger, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; Lemuel Whitaker Boykin, III; and May Cantey Boykin .....Respondents

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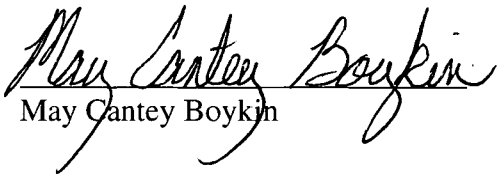
NOTICE OF APPEAL

Pursuant to Rule 203, SCACR, Appellant May Cantey Boykin, representing herself pro se, appeals the Final Order and Judgment, entered May 24, 2019, and the Order Denying Motions to Alter or Amend Final Order and Judgment, entered August 28, 2019. Appellant received electronic notice of the entry of the Order Denying Motions to Alter or Amend Final Order and Judgment on August 28, 2019. Copies of said orders are attached hereto.

Respectfully submitted,



May Cantey Boykin

Dated: September 27, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
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The Hon. Jean Hoefer Toal, Acting Circuit Court Judge

Appellate Case No. _____
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IN THE MATTER OF:
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May Cantey Boykin .....Appellant

v.

Mary Deas Wortley, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, Co-Trustee of the Lemuel Whitaker Boykin Marital Deduction Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; Alice B. Belger, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; Lemuel Whitaker Boykin, III; and May Cantey Boykin .....Respondents

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PROOF OF SERVICE

I hereby certify that a copy of Appellant's Notice of Appeal has been served upon the Respondents' counsel pursuant to Rule 262(b), SCACR, by placing a copy of the same in the United States mail, postage prepaid, addressed as follows:

James Y. Becker
Robert L. Reibold
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Wallace Lightsey
Wade S. Kolb III
Wyche, PA
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Greenville, SC 29601

This 27th day of September, 2019.

May Cantey Boykin

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW

IN THE MATTER OF:
LEMUEL WHITAKER BOYKIN, II, deceased

Rigdon H. Boykin, as sole disinterested Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B;

Petitioner,

v.

Mary Deas Wortley, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, Co-Trustee of the Lemuel Whitaker Boykin Marital Deduction Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; et al.;

Respondents.

Case No. 2017-CP-28-00831

ORDER DENYING MOTIONS TO ALTER OR AMEND FINAL ORDER AND JUDGMENT

Before this Court are three post-trial motions: Petitioner's Motion to Alter or Amend dated June 3, 2019; Respondents' Amended Motion to Alter or Amend dated June 3, 2019; Petitioner's Re-Filing of his Motion to Alter or Amend dated June 13, 2019. The Court has reviewed the memoranda in support and opposition of these motions that were filed by Petitioner, Respondents, and Cross-Claimants. In addition, the Court has reviewed the Petitioner's Supplemental Memorandum regarding Post Trial Motions and the Respondent's Reply to the same. For the reasons stated below, the Court denies each of these motions.

FACTUAL AND PROCEDURAL BACKGROUND

This case arose out of a dispute among the co-trustees of the Lemuel Whitaker Boykin, II Residuary Trusts A and B (the "Residuary Trust" or the "Trust"), a family trust created by the will

("Will") of Lemuel Whitaker Boykin, II (the "Testator") concerning the governance of the Trust and its assets. Trustee Rigdon H. Boykin ("Petitioner") alleged that his Co-trustees, Mary Deas Wortley and Alice Boykin Belger (collectively, "Respondents") have failed to prudently manage the Residuary Trust in numerous respects.

Petitioner complained, among other things, that the Trustees must re-allocate the Trust's assets and do so as quickly as possible by selling 85% of the Trust's real property holdings within two to four years, including certain properties that the Testator specified in the Will should be preserved, if at all possible. Petitioner also requested that the Court remove Respondents as Trustees of the Trust, as they were not fit or competent to serve in that capacity. Respondents Lemuel Whitaker Boykin, III and May Cantey Boykin ("Cross-Claimants"), who two of Testator's four children and are income beneficiaries of the Residuary Trust, originally joined in Petitioner's request that Respondents be removed as Trustees.

Respondents, who are the remaining children of Testator, argued that, as Trustees, they were bound to follow the clear and unambiguous terms of the Will by preserving those properties identified as legacy property by the Testator. Respondents also asked the Court to remove Petitioner removed as a Trustee.

This case was tried in two phases, with the first phase taking place on July 9 and 10, 2018 and the second phase taking place on September 27 and 28, 2018. Following trial, this Court left the record open to allow the parties to submit additional evidence, including deposition testimony of a rebuttal expert for Petitioner.

On May 24, 2019, this court issued its Final Order and Judgment (the, "Final Order"), in which the Court granted final judgement in favor of the Respondents and ordered that Petitioner be removed as a Trustee of the Residuary Trust.

Following this order, both Petitioner and Respondents filed Motions to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on June 3, 2019. Petitioner filed his Rule 59(e) motion *pro se*. On June 13, 2019, Wallace K. Lightsey and Wade S. Kolb III filed a notice of appearance on behalf of Petitioner. That same day, Petitioner re-filed his Motion to Alter or Amend, this time signed by his new counsel.

CONCLUSIONS OF LAW

A. Petitioner's Motions to Alter or Amend

The Court finds that Petitioner's original Motion to Alter or Amend filed on June 3, 2019 was not properly filed with the Court as it was filed by Petitioner *pro se*. Petitioner, while an attorney, is not licensed to practice in South Carolina. South Carolina law is clear that "[n]o person may either practice law or solicit the legal cause of another person or entity in this State unless he is enrolled as a member of the South Carolina Bar pursuant to applicable court rules, or otherwise authorized to perform prescribed legal activities by action of the Supreme Court of South Carolina." S.C. Code Ann. 40-5-310. As a trustee, Petitioner is acting in a representative capacity bringing this action on behalf of the beneficiaries of the Trust. An unpublished opinion from our Court of Appeals considered this exact issue and found that a non-attorney trustee cannot represent a trust in South Carolina court. *See Real Estate Unlimited, LLC v. Rainbow Living Trust*, Unpublished Opinion No. 2004-UP-019, (S.C. Ct. App. filed Jan. 15, 2004). Further, neither Petitioner, nor his counsel, filed a motion to withdraw or remove the counsel that represented him at trial. Accordingly, at the time he filed his first Motion to Alter or Amend, Petitioner was still represented by that same counsel. To the extent Petitioner wanted to move before this Court, he should have done so through his trial counsel. Accordingly, the Court finds that Petitioner's Motion to Alter or Amend was improperly filed and dismisses the same.

In an apparent attempt to correct this error, Petitioner subsequently obtained additional counsel, who appeared in this case and then re-filed the same motion. This second motion was signed by Petitioner's new counsel, who were licensed to practice in South Carolina. However, Rule 59(e) requires that motions to alter or amend be served no later than 10 days after the written notice of the entry of the order. Accordingly, Petitioner's re-filed motion was not timely and is therefore also dismissed.

In addition to the fact that his motions are not properly before this court, either by virtue of Petitioner's first *pro se* filing or his second untimely filing, Petitioner has not raised any valid grounds for altering or amending the Court's Final Order. Petitioner outlines five arguments in his two motions. Each of these arguments is addressed in turn below.

Petitioner first argues that the Final Order fails to account for the fact that the Residuary Trust had virtually "no net fiduciary income for the years 2017 and 2018 and is unlikely to have any net fiduciary income going forward without substantial and immediate diversification." While it is certainly true that the Trust has had little to no net fiduciary income for the last two years, this has been in large part due to the nature of the Trust's current assets, which is primarily timber land. However, during the last two years, the Trustees have sold numerous stands of timber that have generated significant income for the Trust. While this income is not net fiduciary income, that does not mean that the Trust has not had cash to operate or make distributions to its beneficiaries. In addition, the diversification sought by Petitioner is addressed in Respondents' investment plan, although not to the same extreme advocated by Petitioner. Ultimately, the Court stands by its decision to endorse the investment plan advanced by Respondents, which the Court feels adequately balances the interests of the various beneficiaries and the Testator's preferences set forth in his Will.

Petitioner next argues that the Court erred in failing to rule on "a critical issue in the case – the net asset value of the Residuary Trust." The Court was not required to make a finding of fact concerning the overall value of the Trust's assets in order to resolve the legal issues before it. The issues before the Court included: an action for declaratory relief, an action to modify the terms of the Trust, multiple actions to remove one or more of the Trustees, requests for miscellaneous relief sought at the conclusion of the final hearing (such as the request to spit the trust), and requests for the award of attorney's fees. None of these issues require a finding of fact concerning the value of the Trust's assets. Further, contrary to Petitioner's insistence that this is a critical issue for both the Trustees and the Court, under the unambiguous terms of the Trust, the Trustees are not required to determine the value of the Trust's assets in order to make a distribution to the income beneficiaries. Item VIII of the Will simply requires the "net income" from the Residuary Trust be distributed "in convenient installments at least annually" to the income beneficiaries. Further, as noted by Respondents, the value of these assets will continuously change as markets for Timber and real property fluctuate up and down, making this figure even less useful. Ultimately, the Court finds the issue of the net asset value is not critical to any of the issues before the Court or to the administration of the Trust generally.

In his third argument, Petitioner argues that the Final Order does not distinguish between Residuary Trust property which are subject to the Testator's stated desire for retention and those that are not identified to be retained. The Final Order states that: Testator's desires are expressed in the terms of the Will; the parties all agree these desires are precatory, rather than mandatory; and the Testator's preferences expressed in the Will are entitled to respect. The Final Order also states:

> While this preference is entitled to respect, the Testator's stated desire to retain property cannot overrule the common sense of the

> Trustees he put in charge of his legacy. As times change, the Trustees must use their best judgment to prudently manage the Trust and maximize the Trust's benefits to all beneficiaries.

Final Order at 49. The Final Order is clear on the appropriate deference that should be given to the Testator's desires for retaining property outlined in the Will.

In his fourth argument, Petitioner argues that the Trial Court erred in appointing Cheryl Holland as the substitute co-trustee to replace Petitioner. Petitioner argues that the third trustee who serves with Respondents should "adequately represent the interests of [Cross-Claimants] Whit and May Boykin." To begin, Cheryl Holland is extremely qualified to serve as a Trustee of the Residuary Trust. Ms. Holland is a certified financial planner and is the founder and president of Abacus Planning Group. She is an expert in the fields of financial planning and investments and fiduciary standards for investing. Ms. Holland is also a certified family business planner, and testified that she advises families that have shared assets, such as a closely held business, real estate, timber, or commercial real estate, regarding disposition of those assets. Ms. Holland also testified that during her professional practice, she has provided investment and planning advice to approximately 150 trusts, and that the values of those trusts have ranged from $150,000.00 to $22 million. Notably, Ms. Holland testified that she has experience advising clients with assets similar to those of the Trust. Further, based upon her testimony at the final hearing, the Court is confident that Ms. Holland will manage the trust and advise her co-trustees in an objective manner, using her best professional judgment. Finally, Petitioner's argument that the third trustee should represent the interest of Cross-Claimant ignores the fact that every Trustee owes fiduciary duties to all the Trust's beneficiary. Accordingly, the Trustees, including Ms. Holland and Respondents, must manage the Trust in such a way that is mindful of both the income and residual beneficiaries' interests.

In his final argument, Petitioner argues that the Court misconstrued the parties arguments

concerning the "underproductive property rule." Petitioner's argument in support of this position does not make sense. In the Final Order, the Court cites the Testator's waiving of the unproductive property rule as evidence of "a preference for the interest of the remainder beneficiaries over those of the income beneficiaries." In Petitioner's own words,

> The unproductive property rule was to the effect that if an unproductive asset was at some point made productive (such as by the sale of the asset) the trust beneficiaries were to be made whole by the trustees' [sic] paying them "delayed income," that is, income which would have been received by them during the period when the asset was unproductive. When the [Testator] in this case said he waived the delayed income requirement, he was providing that the four beneficiaries (Respondents Wortley, Belger, Whit Boykin, and May Boykin) were not to be made whole.

Pet. Mot. to Alter or Amend at 4. By Petitioner's own description of this rule, the waiver of the unproductive property rule supports the point being made in the Final Order, which was that the Will contains many terms that benefit the remainder beneficiaries at the expense of the income beneficiaries. The Court does not see how the waiver of this rule "is indicative of [Testator's] belief that real estate must be sold." To the contrary, the Testator expressly stated a preference for the retention of property in numerous places throughout the terms of his Will. As noted previously, the Trustees should mindful of Testator's stated desires as they manage the Trust's assets and fulfil their duties as trustees.

In conclusion, Petitioner's two Motions to Alter or Amend are not properly before the Court. Petitioner's first motion was improperly filed by Petitioner, who is not licensed to practice in this state and therefore cannot proceed in this case *pro se*. Petitioner's second motion is untimely. Finally, none of the arguments raised by Petitioner have merit, and as a result, the Court would have denied these motions if either were properly before the Court.

B. Respondents' Motion to Alter or Amend:

Respondents have also filed a Motion to Alter or Amend related to the Court's Final Order.

For the reasons outlined below, this motion is denied.

This motion raises two grounds for reconsideration. The first ground relates to the Court's failure to address the Respondents' outstanding Motion to Compel Petitioner and Cross-Claimants to Consent to an IRC §2032A Tax Election, which was filed with this Court on November 28, 2018. This motion will be addressed in a separate order to be entered by this Court. Accordingly, the issues raised in Respondents' motion to compel are moot.

The second ground of Respondents' Motion to Alter or Amend focuses on the Court's award of attorney's fees to counsel for Petitioner and Cross-Claimants. Specifically, Respondents argue that (1) there is no legal basis on which to award fees and expenses to Cross-Claimants, (2) the award of attorney's fees to Petitioner should be stricken or substantially reduced, and (3) the award to Petitioner's trust and estate expert, James Hardin III, should be eliminated or further reduced.

Under Section 62-7-1004 of the Trust Code, the Court has the authority to award costs and expenses, including reasonable attorney's fees "as justice and equity may require . . . to any party, to be paid by another party of from the trust that it the subject of the controversy." Under this provision, the awards of attorney's fees made in the Final Order are all authorized by the South Carolina Trust Code.

With regard to the attorney's fees awarded to Cross-Claimants, the Court is also concerned with the practical effect of not awarding attorney's fees to Cross Claimants. Specifically, from their testimony at trial, the Court is aware that Cross-Claimants lack independent means to pay hundreds of thousands of dollars towards legal fees related to this litigation. As a practical matter, if the Court did not award fees in this case, it would seem likely that the Cross-Claimants would petition the Trustees to make a distribution to help pay for this outstanding debt.

Further, the Court has repeatedly noted its belief that while Petitioner's action ultimately failed under the prevailing law and applicable terms of the Will, this action was nevertheless brought in good faith out of Petitioner's desire to appropriately manage the Trust's assets. The Court further notes that the action resulted in the Trustees developing comprehensive, long-term plans for the management of the Trust's assets. These plans are certainly beneficial to the Trust and its beneficiaries. The Court stands by its prior decision to award attorney's fees and to reduce those fees pursuant to the *Glasscock* factors as laid out in the Final Order.

Ultimately, this action is a sad and complicated dispute between family members about how the Testator's legacy should be managed. The costs of this dispute ballooned rapidly, resulting in an enormous amount spending on legal fees and expenses that have resulted in little financial benefit to any of the Trust's beneficiaries. As the Court stated at the final hearing, it hopes the resolution of this action will help heal the divisions that has developed within this family and allow these siblings to move forward in their relationships. The Court urges this family to put this dispute behind them and reconcile their differences so that the Testator's legacy is not squandered on fighting amongst his children.

Finally, in his Supplemental Memorandum regarding Post-Trial Motions, Petitioner expresses a concern that the Final Order "merely sets the stage for future litigation." The Court hopes that all of the parties have learned from this action about the costs of litigation. This action has certainly taken a hefty toll on both the assets of the Trust and the relationships in the Boykin family. Most of the disputes concerning the appropriate approach to managing the Trust and the Trustees' authority for doing so have been squarely resolved by the current litigation. The Court has a hard time envisioning how additional litigation would be beneficial to the Trust or its beneficiaries. Accordingly, the Court would caution anyone considering filing additional litigation

to think long and hard before filing another action as the Court will be reluctant to permit the cost of any future litigation to be paid out of the Trust's assets.

CONCLUSION

Based on the foregoing, the Court:

1. Dismisses Petitioner's Motion to Alter or Amend as improperly filed;
2. Dismisses Petitioner's Re-Filed Motion to Alter or Amend as untimely; and
3. Denies Respondent's Motion to Alter or Amend.

AND IT IS SO ORDERED.

The Honorable Jean H. Toal
Presiding Judge

August ___, 2019

Kershaw Common Pleas

Case Caption: Rigdon Boykin Co-Trustee , plaintiff, et al VS Mary Deas Wortley , defendant, et al

Case Number: 2017CP2800831

Type: Order/Amend

IT IS SO ORDERED.

s/ Jean H. Toal #2758

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF KERSHAW

IN THE MATTER OF: LEMUEL WHITAKER BOYKIN, II, deceased **Rigdon H. Boykin**, as sole disinterested Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B; Petitioner, v. **Mary Deas Wortley**, individually, as Co-Trustee of the Lemuel Whitaker Boykin, II Residuary Trusts A and B, Co-Trustee of the Lemuel Whitaker Boykin Marital Deduction Trusts A and B, and as Co-Personal Representative of the Estate of Alice S. Boykin; et al.; Respondents.	Case No. 2017-CP-28-00831 **FINAL ORDER AND JUDGMENT**

This case was referred to me by Order of Circuit Judge L. Casey Manning signed on December 29, 2017 and filed on January 8, 2018. A Consent Scheduling Order was signed by me on May 2, 2018 and filed on the same day.

This case arises out of a dispute among the co-trustees of the Lemuel Whitaker Boykin, II Residuary Trusts A and B (the "Residuary Trust" or the "Trust"), a family trust created by the will ("Will") of Lemuel Whitaker Boykin, II (the "Testator") concerning the governance of the Trust and its assets. Trustee Rigdon H. Boykin ("Petitioner") alleges that his Co-trustees, Mary Deas Wortley and Alice Boykin Belger (collectively, "Respondents") have failed to prudently manage the Residuary Trust in numerous respects. Specifically, Petitioner complains that the Trustees must re-allocate the Trust's assets and do so as quickly as possible by selling 85% of the Trust's

real property holdings within two to four years, including certain properties that the Testator specified in the Will should be preserved, if at all possible; that Respondents have improperly refused to do so; that Respondents failed to approve an option agreement for the sale of the very properties most treasured by the Testator; that Respondents failed to hold in person trustee meetings for a three month period during the summer of 2017; and that Respondents are not fit or competent to serve as trustees.

Petitioner requests that the Court order that he is entitled to exercise preeminent authority over his Co-Trustees, and that the Court modify the terms of the Residuary Trust to require the Co-Trustees to follow the South Carolina Prudent Investor Act (the "SCPIA"), which Petitioner claims requires speedy sale of the majority of the real property held by the Trust. Petitioner also requests that the Court remove Respondents as Trustees. Respondents Lemuel Whitaker Boykin, III and May Cantey Boykin ("Cross-Claimants"), who two of Testator's four children and are income beneficiaries of the Residuary Trust, originally joined in Petitioner's request that Respondents be removed as Trustees.

Respondents, who are the remaining children of Testator, argue that, as Trustees, they should follow the clear and unambiguous terms of the Will by preserving those properties identified as legacy property by the Testator and diversifying Trust assets in a less hasty, more prudent manner. Respondents have resisted Petitioner's attempts to reallocate the bulk of the Trust's assets from real estate to securities

The Court is primarily called upon to determine who should manage the Trust in order to fulfill its purpose as set forth by the Testator. South Carolina law has long considered the right of a testator to dispose of property as he or she sees fit to be a sacred right. *Cagle v. Schaefer*, 115 S.C. 35, 35, 104 S.E. 321, 324 (1920). Provided a testator's disposition of property is allowed by

law, it is the duty of the court to respect and safeguard the testator's intent. *See id.* The Court concludes that the purposes of the Trust and the intent of the Testator are best served if Respondents continue to serve as Trustees. As explained below, the Court grants final judgment in favor of Respondents, and further orders that Petitioner be removed as a Trustee of the Residuary Trust.

PROCEDURAL HISTORY

Petitioner initially filed an action in the Probate Court for Kershaw County on August 23, 2017. Petitioner sought recovery of attorney's fees, trustee's fees, and a declaration that he should be entitled to exercise preeminent authority. The Honorable Debra Branham, Judge of the Probate Court for Kershaw County, removed the matter to Circuit Court on September 1, 2017. The Chief Administrative Judge for the Fifth Judicial Circuit designated the case as complex and assigned it to the undersigned on December 29, 2017.

The parties first appeared before this Court on January 24, 2018, for a hearing on Petitioner's Motion for Attorney's Fees and Appointment of Trust Counsel, and Respondents Wortley's and Belger's Motion to Strike. After reviewing the parties' briefs and hearing oral argument from counsel, on February 16, 2018, the Court entered an Order denying Respondents Wortley's and Belger's Motion to Strike and granting Petitioner's Motion for Attorney's Fees[1] and Appointment of Trust Counsel. Subsequently, Tina M. Cundari, Esquire, was appointed as independent Trust Counsel to act as neutral counsel to the Trusts created under the estate plan of

[1] In its February 16, 2018 Order, the Court held: "The attorney's and consultant's fees incurred by Petitioner have been occasioned by his attempt to manage and operate the Trust, and therefore those are valid fees chargeable to the Trust. While the Court finds that the fees of Petitioner's counsel should be paid by the Trust, the Court makes no determination at this time regarding the amount or reasonableness of such fees."

Mr. L.W. Boykin, II. Ms. Cundari was eventually succeeded by Benjamin R. Gooding, Esquire, who took over as the court-appointed trust counsel when Ms. Cundari became unable to continue to serve as trust counsel due to her appointment as an Assistant U.S. Attorney for the District of South Carolina.

On May 7, 2018, almost eight months after Petitioner initially filed suit, Petitioner amended his pleadings to assert claims for modification of the trust and removal of Respondents as Trustees. Cross-Claimants initially asserted claims for removal and breach of fiduciary duty against Respondents, including claims for actual and punitive damages.

On June 6, 2018, in anticipation of the trial of this matter, the Court requested that the parties submit additional materials for the Court's consideration, and specifically requested the following:

(1) A list of all trust assets, along with the value of the assets from the most recent appraisal;
(2) A proposed trust management plan from each side showing the plan going forward for the trust; and
(3) A spreadsheet/schedule with the projected income and expenses under the proposed trust management plan.

The parties have submitted the foregoing materials, and the Court has reviewed them in detail.

Prior to trial, the Court personally visited certain tracts of property owned by the Trust, including the Boykin Millpond, the pond dam, and the Trust-owned buildings in the town of Boykin, South Carolina.

Trial occurred in phases. The first phase took place on July 9 and 10, 2018. The second phase took place on September 27 and 28, 2018. At trial, the Court heard testimony from Petitioner, Cross-Claimants, Respondents, as well as numerous other witnesses, including: James C. Hardin, III, a probate attorney engaged by Petitioner and then by his litigation counsel; John Helms, a real estate appraiser and registered forester commissioned by Respondents to create a

proposed investment and management plan for the Trust (the "Wortley-Belger Investment Plan"); Cheryl Holland, a Certified Financial Planner and investment advisor who provided expert testimony concerning the Respondents' proposed investment plan and Petitioner's proposed investment plan; George S. Bailey, an attorney who acted as counsel for the Trust from Mr. Boykin's death to August 2016; Karen H. Thomas, Mr. Bailey's law partner, who is now serving as counsel to Respondents, in their capacity as co-personal representatives of the Estate of Alice S. Boykin, for estate and income tax purposes only; Wayne Belger, who testified concerning the management of the Boykin Millpond dam and the pond; and Mary Deas Boykin Heimbach, a remainder beneficiary who testified on behalf of all remainder beneficiaries, the four grandchildren of Testator. In addition to the testimony proffered at trial, the Court reviewed the depositions of Jane Peacock, the Trust's accountant; Jimmy LaFrage, who was retained by the Trust to perform valuations on the Trust's timber holdings; Ansel Bunch, a broker for the Trust's investment accounts; and Dave Thomas, a representative of an entity that sought to purchase the Boykin Millpond. The Court also reviewed the depositions of Petitioner and Respondents. Finally, after the conclusion of trial, the Court allowed Petitioner to take and submit the deposition of William Harrison, and for Respondents to submit additional affidavits and reports from Helms.

Numerous exhibits were admitted. These exhibits included the minutes and transcripts of many Trustee meetings, the investment plans from both Petitioner and Respondents, real estate appraisals, and photographs of portions of the real property owned by the Trust.

At the end of phase one of the trial, Cross-Claimants dropped their claims at law and for monetary damages (other than attorney's fees) and elected to proceed on a single claim under the South Carolina Trust Code for removal of Respondents as Trustees.

At the end of phase two of the trial, the Court requested that all represented parties specifically enumerate the relief they sought from the Court. At that time, Petitioner asked the Court to: (i) remove all Trustees; (ii) appoint non-family members to manage the Trust; (iii) modify the Trust to eliminate the unanimous voting requirement for certain decisions relating to the disposition of real property held by the Trust; and (iv) split the Trust into two trusts, one to continue to hold the family legacy property discussed in the Will (and would provide income, if any, to Respondents during their lifetimes), and the other to take control property which could then be sold and invested in the stock market (and would provide income to Cross-Claimants during their lifetimes).

Cross-Claimants asked the Court to: (i) remove all three Trustees; (ii) appoint competent non-family members to manage the Trust; and (iii) award Cross-Claimants certain attorney's fees.

Respondents asked the Court to deny all relief sought by Petitioner and Cross-Claimants and to remove Petitioner as a Trustee.

The Court held the record open to allow Petitioner to depose a rebuttal expert, Mr. William Harrison. That deposition was completed on November 30, 2018, and submitted to the Court on December 10, 2018. Respondents submitted a supplemental affidavit and supporting materials from Mr. Helms on November 28, 2018, and Mr. Helms' response to Mr. Harrison's deposition testimony on January 10, 2019.

FINDINGS OF FACT

The Testator, Lemuel Whitaker Boykin, II, died on December 19, 1989. At the date of his death, the Testator owned several thousand acres of real property in Kershaw and Sumter Counties. These properties included large tracts which were primarily used for timber farming, other tracts which were leased for hunting and fishing, and certain core properties the Testator considered to

be family legacy properties, which included the Boykin Millpond, Millway Plantation, and other tracts. Mr. Boykin was actively involved with his property as a timber farmer. Throughout his life, Mr. Boykin frequently told many family members of his strong affection for his real property and his desire that it be preserved in his family.

Mr. Boykin executed his Will on June 2, 1989. The Will created two trusts: (1) a marital trust to provide income and support for his wife, Alice Shoolbred Boykin ("Mrs. Boykin"), during her lifetime (the "Marital Trust"); and (2) the Residuary Trust (the "Residuary Trust" or the "Trust"). In his Will, Mr. Boykin directed his trustees to place in the Residuary Trust the maximum amount of property that could pass to his heirs free of estate tax, and the remainder of his assets in the Marital Trust. At Mrs. Boykin's death, the assets of the Marital Trust would transfer to the Residuary Trust.

The Trust is designed to provide reasonable support and maintenance to Mr. Boykin's four children during their lifetimes, who are thus income beneficiaries, and "shall terminate upon the death of the last to survive," and then be divided "into separate shares so as to provide one share for each deceased child . . . who shall leave issue then living." (Will, Item VIII (3), p. 8.) Respondent Mary Deas Wortley has three children who are remainder beneficiaries under the Will, including Mary Deas ("Deasy") Boykin Heimbach, Theodore T. Wagner, and B. Boykin Wagner. Respondent Alice Belger, has one child, Allie Boykin Belger, who is also a remainder beneficiary under the Will. Neither Cross-Claimant has children. All of the remainder beneficiaries intervened in this action.

The Testator directed that the Trustees shall distribute the annual net income of the Trust to the income beneficiaries "in such shares and proportions as the Trustees in their sole discretion shall determine providing to each a reasonably equal division . . . as the need arises primarily for the

medical care, comfortable maintenance, welfare and education of my said beneficiaries," and that the Trustees may consider "any other income or resources of my said beneficiaries known to the Trustees." (Will Items VIII.1-2, pp. 7-8.) A similar section of the Will provides the Trustees with discretion to make distributions from the principal of the Trust on essentially the same basis. (*Id.*)

The Trust is also designed to preserve and protect certain family legacy property. While the Will permits the sale or lease of any Trust property, if all Trustees agree, it specifically states that "[i]t is my desire, but I do not direct, that certain tracts or parcels of real property" consisting of Millway Plantation, the Laney Tract, Broadview Plantation, the Swamp Tract, the Cantey Tract, and the Gillis Tract (collectively, the "Legacy Tracts," also sometimes referred to as the "Treasured Tracts") "shall to the fullest extent possible be preserved for the benefit of or transferred to my children or their issue." (Will Item X, pp. 9-10.) The Testator further provided that these Legacy Tracts could only be sold or mortgaged "by unanimous consent of the Trustees after consultation with and approval of a majority of the four (4) named beneficiaries of this trust," and that if any of the Legacy Tracts were to be sold, they must be sold in the following order: (1) Swamp Tract; (2) Broadview plantation, Cantey Tract, Gillis Tract; and (3) Millway Plantation and Laney Tract. (*Id.*)

The Will contains several other provisions which also reflect the Testator's intent that the family legacy property be preserved to the extent possible. The Will specifically does not require diversification or maximum productivity of Trust assets. The Will vests in the Trustees the authority "[t]o retain any of the original property constituting the estate or trust, regardless of the character of such property or whether it is such as then would be authorized by law for investment . . . or whether it leaves a disproportionately large part of the estate or trust invested in one type of property." (Will Item XIV.B, p. 14.) The Will allows the Trustees discretion "to keep

all or any portion of the estate or trust in cash and uninvested for such period or periods of time, as [they] may deem advisable, without liability for any loss in income by reason thereof." (*Id.* at Item XIV.C, pp. 14-15.) The Will also waives the under productive property rule of the Uniform Principal and Income Act. (*Id.*)

In the Will, the Testator appointed three trustees for the Residuary Trust: (1) the Petitioner, his cousin, (2) his eldest daughter, Respondent Wortley, and (3) his wife, Mrs. Boykin. (Will Item XII(b), p. 12.) Mr. Boykin gave his wife complete discretion to name her successor trustee, and to the other Trustees, he gave the authority to select one additional *family* member to serve "should any one of the other two Trustees fail to qualify or cease to serve for any reason." *Id.* (emphasis added).

Hurricane Hugo struck South Carolina on September 10, 1989, and damaged certain of the timber tracts owned by the Testator.

Mr. Boykin died about three months later on December 19, 1989, and was survived by Mrs. Boykin and the four children: Respondents and Cross-Claimants. Petitioner, Respondent Wortley, and Mrs. Boykin began their tenure as Trustees of the Residuary Trust, and Respondent Wortley and Mrs. Boykin began their tenure as Trustees of the Marital Trust.

George S. Bailey, an attorney who served as trust counsel for both the Residuary and Marital Trusts from Mr. Boykin's death in 1989 until Mrs. Boykin's death in 2016, advised the Trustees to split each of the Residuary Trust and Marital Trust into two trusts (A and B) to take full advantage of Mr. and Mrs. Boykin's respective generation skipping tax exemptions. The Trustees agreed and obtained orders from the Probate Court allowing this split.

Mr. Boykin's personal representatives, Mrs. Boykin and Respondent Wortley, had the discretion to transfer assets into the various Trusts created under the Will, as modified by the court

order. Heeding Mr. Boykin's desire to preserve Millway Plantation for his grandchildren and to protect the transfer of this property from generation skipping taxes, the Co-personal representatives transferred part of Millway to Residuary Trust A, and the other part to Marital Trust A. The remaining assets were transferred to Marital Trust B. At Mrs. Boykin's death, the assets in Marital Trust A would transfer to Residuary Trust A, along with assets from Marital Trust B to the extent of Mrs. Boykin's generation skipping tax exemption. The remainder of the assets in Marital Trust B would transfer to Residuary Trust B.

During Mrs. Boykin's lifetime the estate and generation skipping laws continued to change. In 2012, the unified estate and gift tax credit and generation skipping tax exemption had increased to $5,120,000. But that law was expiring on December 31st, and in January 2013, the unified credit and generation skipping tax exemption would drop to $1,000,000. Congress had not enacted any new tax laws by early December of 2012 to address this significant decrease in the unified credit. This unified credit is able to be used during one's lifetime against gift taxes or at death against estate taxes. Mr. Bailey contacted Mrs. Boykin to relay this issue and discuss making a gift of up to $5,120,000 (to use the 2012 laws) in case the unified credit did drop to $1,000,000 in 2013. Since Mrs. Boykin did not have sufficient assets in her name to make this large of a gift, Mr. Bailey proposed a transfer of assets from Marital Trust B to Mrs. Boykin, which she would then transfer to Residuary Trust A. With the consent of Mrs. Boykin and Respondent Wortley, Mr. Bailey thus petitioned the Probate Court and explained the changing tax laws and the need for assets to be placed in Mrs. Boykin's name in order to make a large gift to Residuary Trust A. The court approved a modification of Marital Trust B to allow a distribution of assets to Mrs. Boykin as long as there was unanimous consent of the transfer by the four children named as beneficiaries of the Residuary Trust.

Mr. Bailey prepared a list of the properties to be approved for distribution from Marital Trust B and contributed by Mrs. Boykin into Residuary Trust A. These included the Boykin Family Legacy Tracts and others, the combined values of which were approximately $4,200,000 (those same assets at Mrs. Boykin's death appraised at approximately $5,500,000). Petitioner contacted Mr. Bailey and told him that he represented May Cantey Boykin, and that he would not allow her to consent to the proposed transaction for anything more than a 20% ownership interest in the tracts being transferred. For this reason, Marital Trust B ended up owning 80% of certain tracts and Residuary Trust A ended up owning 20%. This divided ownership continues to provide complications for leasing, farming, contracts, etc.

The withdrawal and transfer of a 20% ownership interest in the identified tracts saved the estate of Mrs. Boykin approximately $206,000 in estate taxes, and should save a like amount of future generation skipping taxes, given the current tax rate and land values. However, had 100% ownership of the identified tracts been withdrawn and transferred, the estate tax savings to Mrs. Boykin's estate would have been approximately $520,000, and the future generation skipping taxes approximately $520,000, given the current tax rate and land values.

Because Residuary Trust A held only a portion of Millway Plantation (which served as Mrs. Boykin's personal residence) and Residuary Trust B was empty prior to Mrs. Boykin's death in August 2016, the trustees of the Residuary Trust did not conduct significant business between 1989 and 2016.

After Mr. Boykin's death on December 19, 1989, Mrs. Boykin took charge of the real property formerly owned by her husband and continued the family business. Multiple witnesses testified regarding her business acumen. Among other things, she engaged in the timber business by growing and selling timber from the real property, leased hunting and fishing rights, leased

commercial properties, and improved on her husband's prior vision for the town of Boykin. Mrs. Boykin was instrumental in creating a restaurant known as the Millpond Steakhouse, a café, and other stores in the small town of Boykin. Mrs. Boykin founded the annual Boykin Christmas parade. Petitioner and all Respondents in this case have memories of visiting and enjoying the town of Boykin and the surrounding properties, including the millpond itself. At trial, both attorney George Bailey and Mary Deas Heimbach, Mrs. Boykin's granddaughter and a remainder beneficiary under the Will, testified that Mrs. Boykin essentially built downtown Boykin after Mr. Boykin's death. Both witnesses testified that Mrs. Boykin sought to preserve the Trust's real property assets in accordance with Mr. Boykin's desires as set forth in his Will.

Mr. Bailey also prepared several estate planning documents for Mrs. Boykin. He prepared an Irrevocable Life Insurance Trust ("ILIT") for the purpose of providing funds at her death to pay estate taxes (either through a loan or purchase of property) on her estate, including the assets in Marital Trust B (the "Estate"). Petitioner and Respondent Wortley were named as trustees of the ILIT. Mr. Bailey also prepared a Will and a Revocable Trust to address the distribution of Mrs. Boykin's own assets, the payment of estate taxes, and the allocation of her remaining generation skipping tax exemption. Her Will named Respondents Wortley and Belger as the Co-Personal Representatives of her Estate. Respondents Wortley and Belger were also named as Trustees of Mrs. Boykin's Revocable Trust. This document discussed the payment of estate taxes and the potential purchase of property of the Marital Trust with the insurance proceeds in the ILIT.

After Mrs. Boykin's death on August 8, 2016, the remaining assets of the Marital Trusts were transferred into the Residuary Trusts, and Respondent Belger succeeded Mrs. Boykin as one of the Co-Trustees of the Residuary Trust. Petitioner did not object to the appointment of Alice Belger as a Co-Trustee of the Residuary Trust at that time, and, although he claimed to have

concerns about Respondent Belger's fitness to serve, he testified that he "decided early on . . . to try and live with" Respondent Belger and "make it work." (Boykin Dep. 152:10-11.)

By August 2016, Mr. Bailey was nearing retirement and asked his law partner, Karen Thomas, to handle the administration of Mrs. Boykin's estate and to succeed him as counsel for the Trustees of the Residuary Trust. Ms. Thomas met with the Trustees for the first time on the day Mrs. Boykin died and was retained to represent all three Trustees shortly thereafter. At this first meeting, Petitioner stated that he was unwilling to follow Mr. Boykin's precatory language, and that he felt the Trustees should sell approximately 85% of the Trust's real property assets and invest the sales proceeds in the stock market. Mr. Bailey also testified that Petitioner had previously stated that he intended to sell all of the Trust's real property, once Mrs. Boykin died. Respondents maintained that they were required to follow Mr. Boykin's directions as set forth in the Will, as Mrs. Boykin did during her lifetime, and wished to adopt a more thoughtful and careful approach to selling real property. All Trustees, including Respondents, voted to and did in fact sell or place on the market certain of the Trust's real property assets, not any Legacy Tracts, since their first meeting in August 2016.

Ms. Thomas also prepared a legal opinion that she submitted to Petitioner informing him of Mrs. Boykin's intentions in creating the ILIT. The ILIT funds became a point of contention between Petitioner and Ms. Thomas, as Petitioner did not believe the funds could be used for any purpose other than to provide income for Mrs. Boykin's children. Petitioner consistently refused to consent to the ILIT loaning funds to the Residuary Trust when the estate taxes on Mrs. Boykin's estate came due in 2017.

The Trustees met with Ms. Thomas and conducted regular trustee meetings from the date of Mrs. Boykin's death until May 2017, sometimes meeting twice in one month. Ms. Thomas and

Petitioner testified that there was a three to four month period between May and October 2017 where the Trustees did not meet in person to conduct trustee meetings. This gap in face to face Trustee meetings resulted from issues involving Ms. Thomas' schedule and inability to be present for Trustee meetings during this particular period. It also resulted from the summer vacation schedules of the Trustees.

Finally, relations among the Trustees had deteriorated by May of 2017. As Petitioner had told Mr. Bailey prior to Mrs. Boykin's death, Petitioner desired that the Trust should sell virtually all of the Trust's real property and invest the proceeds in the stock market, where he believed the Trust could earn a better return on investment and be in a better position to pay Trust expenses and make income distributions. Petitioner became increasingly frustrated and angry that his Co-Trustees believed that the Legacy Tracts should be preserved in accordance with the desires of the Testator as expressed in the terms of the Will.

By this time, Petitioner had also begun threatening his Co-Trustees with litigation, which resulted in each Trustee retaining separate litigation counsel. Coordinating the schedules of the various litigation counsel was also a factor in the inability to initially schedule face to face Trustee meetings from May to October 2017.

Despite these factors, the Trustees conducted over 24 face-to-face meetings between Mrs. Boykin's death and October of 2017. Even in the brief period where face-to-face meetings were interrupted, the Trustees continued to conduct trust business by phone and email.

The Trustees resumed holding in-person trustee meetings again in October 2017, and have met on a regular basis since that time. Since the appointment of trust counsel, Tina M. Cundari, Esq. and her successor, Benjamin R. Gooding, Esq. have chaired these trustee meetings.

The estate taxes due on Mrs. Boykin's Estate were a central issue in the initial Trustee meetings. The initial estate tax payment would have been due in May 2017, nine months after Mrs. Boykin's death. Respondents were primarily concerned with getting the necessary appraisals for the estate tax return, and commissioned Jimmy LaFrage, a registered forester, to prepare date-of-death valuations on all Trust tracts. Mr. LaFrage would then give this information to John Helms at Milliken Forestry, who would perform the comprehensive date-of-death appraisals on the Estate's land and timber holdings. These tasks were necessary for the Trustees to complete the estate tax return and ascertain the true value of the Estate. However, during this time Petitioner requested that Mr. LaFrage work on other projects that Petitioner commissioned in order to get property values for potential purchasers. These requests from Petitioner caused a significant delay in completing date-of-death appraisals for estate tax purposes. The Trustees did not get date-of-death appraisals which were necessary to understanding of the value of the Estate and the Trust until November 7, 2017, one day before Respondents and Ms. Thomas filed the estate tax return.

Petitioner also commissioned other appraisers to value certain Trust property, including Millway Plantation, that he contended Respondents should purchase in order to preserve ownership within the family. Petitioner required the appraisers to employ a unique valuation method that caused the properties to have inaccurate, but higher, values. The existence of real estate appraisals with higher values placed the Estate in jeopardy of having to pay higher estate taxes, and thereby reducing the assets held by the Trust. Ms. Thomas advised Petitioner of her concerns that his attempts to value the land for immediate sale were counterproductive, but Petitioner continued his efforts.

Due to the numerous tax issues before the Trustees, Ms. Thomas and Mr. Bailey discussed two elections that the Estate could seek under the Internal Revenue Code that could provide

significant savings and other benefits to the Estate: a § 6166 election and a § 2032A election. These elections apply specifically to estates, like the estate here, which have been involved in the business of growing timber.

The Section 6166 election allows a personal representative to defer payment of estate taxes if the interest in a closely held business exceeds 35 percent of the decedent's adjusted gross estate.

The Section 6166 election allows the Estate to pay the estate taxes due over a 15 year time period at comparatively low interest rates. Payments on the deferred taxes are due annually, with payment of interest only for the first five years and then accrued interest and one-tenth of the deferred taxes for each of the next ten years. There is no prepayment penalty under Section 6166, and the Estate could pay the taxes in full at any time. This election provided the Estate with greater flexibility and was unquestionably beneficial to both the Estate and the Trust.

Ms. Thomas advised Petitioner of these benefits, but Petitioner opposed Ms. Thomas' recommendation. When the Estate tax return was due in 2016, Respondents still did not have the date-of-death valuations that were necessary for the estate tax filing due to Petitioner's distracting demands on Mr. LaFrage. Respondents also did not have sufficient cash to pay the Estate taxes in full due to Petitioner's unwillingness to approve the loan of the ILIT funds to the Estate. Ms. Thomas therefore prepared a memorandum outlining the estate tax issues and noting that seeking a Section 6166 election was still a viable option. Respondents, after consulting separately with their independent counsel, agreed to send in a partial estate tax payment and to make the Section 6166 election to defer payment of the remaining taxes due. Petitioner was angered by Ms. Thomas' decision to advise Respondents to seek the Section 6166 election. He threatened to report Ms. Thomas' involvement in seeking the Section 6166 election to the IRS as fraud, an action which could have disastrous consequences for someone in Ms. Thomas' profession. It was at this time

that Petitioner announced that Ms. Thomas was not his trust counsel. Ms. Thomas continued to serve as counsel to Respondents.

Petitioner opposed the Section 6166 election to gain leverage in his attempts to force his Co-Trustees to sell the Trust's real property. If payment of the estate tax could not be deferred, the tax would have to be paid in short order, which likely would have necessitated the sale of real property belonging to the Trust.

Upon direct questioning from the Court, Petitioner reluctantly admitted that his opposition to the Section 6166 election and his threats to Ms. Thomas were inappropriate.

Section 2032A allows real property that is used for farming or timber purposes to be valued for estate tax purposes on the basis of its current use as a farm or timber business, rather than based on the property's hypothetical "highest and best use." Ms. Thomas testified that if the requirements of Section 2032A are established for the qualifying property, the Estate could save up to approximately $400,000 in both estate and generation skipping taxes, for a total of approximately $800,000 in tax savings. Ms. Thomas testified that although Section 2032A's requirements are difficult to meet, she and Mr. Bailey felt that the Estate was the "perfect estate" to try and seek the election. While the Section 2032A election does not restrict the sale of any of the qualifying property, it does apply a recapture tax to any property sold within a prescribed timeframe that would be approximately equal to the initial tax savings.

Although Ms. Thomas testified at trial that in her professional opinion, there was no downside to seeking the Section 2032A election, Petitioner refused to consent to or to even allow the Trust to investigate whether it could qualify for the Section 2032A tax election. Petitioner informed Ms. Thomas that he had discussed both elections with Cross-Claimants, and that they refused to consent as well. Again, by refusing to consent to the Section 2032A election, Petitioner

was obviously willing to forego potential estate and generation skipping tax savings to gain additional leverage in his attempts to force his Co-Trustees to immediately sell the Trust's real estate holdings.

Additionally, on or about May 3, 2017, Respondent Wortley initiated a wire of funds from a brokerage account in Marital Trust B to a checking account, which would allow Ms. Thomas to obtain a check to send to the Internal Revenue Service. On May 5, the day after he "fired" Ms. Thomas, Petitioner went to the bank that housed the accounts for Marital Trust B and informed the bank that the account titles were incorrect. This caused the bank to freeze the account from which the check to the Internal Revenue Service was drawn. Respondent Wortley and Jane Peacock, who serves as the Trust's accountant, were forced to spend significant time and effort to have the funds released from the account, so that the check to the Internal Revenue Service would not be refused for insufficient funds.

From this point on, Petitioner treated Respondents and Ms. Thomas with disrespect, and continually maintained that he was not going to follow the precatory terms of Mr. Boykin's Will, but instead planned to sell all of the Trust's real property holdings. Ms. Thomas testified that she had never seen a client treat her or his fellow Trustees with such disrespect in her approximately thirty years of practice. She also expressed her belief that removing Petitioner as Trustee was necessary to overcome the difficulties the Trustees have experienced in administering the Trust.

Petitioner took no steps to ascertain any of the remainder beneficiaries' wishes and desires with respect to the Trust. Deasy Heimbach testified that Petitioner had never contacted her or the other remainder beneficiaries regarding Trust administration even though the remainder beneficiaries frequently kept themselves abreast of decisions made by the Trustees. Ms. Heimbach testified that Petitioner only contacted the remainder beneficiaries to express his disappointment

that they filed affidavits with the Court setting forth their desires with respect to Trust administration. Notably, these affidavits all stated the remainder beneficiaries desire that the Trustees follow all the terms of their grandfather's Will. Ms. Heimbach also testified that the remainder beneficiaries desire to have Petitioner removed as Trustee.

At phase one of the trial, Respondents and Petitioner also proffered expert witnesses in support of their respective investment plans. Respondents proffered two experts: (1) John Helms, an expert in the field of real estate and timber appraisals and valuations; and (2) Cheryl Holland, an expert in the fields of financial planning and investments and fiduciary standards for investing.

John Helms is a registered forester in North Carolina and South Carolina who is a principal of Milliken Forestry Company. Mr. Helms is also a state-certified general real estate appraiser in seven southeastern states and has a real estate salesperson's license in the state of South Carolina. Notably, Mr. Helms has been a member of the Society of American Foresters since 1979 and was a chairman of the South Carolina division in 2000. At trial, Mr. Helms offered a conservative estimate that he has completed roughly 500 real estate appraisal assignments over the past fourteen years, and that roughly two-thirds of those appraisals have involved properties comprising more than 2,000 acres of land.

Mr. Helms also testified that in addition to conducting appraisals on properties, he conducts timber growth yield modeling for some of his clients. These models project timber volumes, values, and related variables to help advise clients in the management of their large timberland properties.

Mr. Helms developed a model to project the after-tax cashflows from an orderly sale of approximately 60% of the Trust's real property, excluding the Legacy Tracts, over 15 years. He considered the value of the land, timber harvesting timelines, and the conditions of the various

properties in estimating which properties might be sold, when, and for how much. Respondents and the remainder beneficiaries have endorsed Mr. Helms' plan, as it would permit diversification and allow the Trust to retain ownership of the key family legacy properties. Mr. Helms' bound plan contained a computation error within his Excel spreadsheet, but given the conservative ranges employed by the plan, the error is not material. After trial, Mr. Helms submitted an affidavit and a corrected model, which with minor and reasonable adjustments in the underlying assumptions for investment returns and timber growth, demonstrates that the plan is reasonable and properly balances the competing interests of the income and remainder beneficiaries, while adhering to the Testator's desire to maintain the Legacy Tracts for future generations. The Court finds Mr. Helms to be knowledgeable and credible.

Cheryl Holland is a certified financial planner and is the founder and president of Abacus Planning Group. Ms. Holland is also a certified family business planner, and testified that she advises families that have shared assets, such as a closely held business, real estate, timber, or commercial real estate, regarding disposition of those assets. Ms. Holland also testified that during her professional practice, she has provided investment and planning advice to approximately 150 trusts, and that the values of those trusts have ranged from $150,000.00 to $22 million. Notably, Ms. Holland testified that she has experience advising clients with assets similar to those of the Trust.

Ms. Holland reviewed both Mr. Helms plan and Petitioner's plan and concluded that the Helms plan is a "prudent, thorough, patient and rational[] strategy for achieving" the goals of "providing both income and growth of the Trust's assets over the near-term and long term." (Wortley Trial Ex. 3.) Ms. Holland also concluded that Petitioner's "more aggressive real estate

and timber liquidation plan provides a more challenging time horizon for successfully transitioning an illiquid and concentrated set of holdings." (*Id.*)

Petitioner submitted his own plan for management and investment of the Trust assets. The plan called for the sale of 85% of the Trust's real property, including the Legacy Tracts, within four years. It contained estimates for sales prices which were sometimes obtained from appraisals commissioned by Petitioner as a Trustee, sometimes simply statements of the Petitioner's own opinion as to value, and sometimes based upon Mr. Helms' figures. Petitioner's plan included proposed rates of return on money which would be realized from the sale of Trust property and then invested in the stock market, but did not contain or describe any particular investment allocation strategy or cash flow projections. Notably, Petitioner did not submit his plan to an expert for review, or otherwise engage any expert to assist him in creating the plan, but simply presented it to the Court himself.

Petitioner repeatedly refused to follow the advice of experienced specialists and professionals retained to assist the Trust.

In some cases, Petitioner's refused to cooperate with his fellow Trustees and Trust advisors to obtain leverage to force his Co-Trustees to bend to his will and sell Trust property, including family legacy tracts.

Petitioner's tenure as Trustee was also accompanied by actions motivated by anger and frustration at being outvoted. He frequently belittled and threatened his Co-Trustees and trust advisors.

Respondents had read the terms of the Will on multiple occasions, and also had personal knowledge of the Testator's wishes with regard to the Legacy Tracts. Respondents were also advised by Mr. Bailey and Ms. Thomas, experienced legal counsel that specialize in probate and

estate planning and tax law, that the Testator's will expressed a strong preference to retain the Legacy Tracts if at all possible. Mr. Bailey and Ms. Thomas testified that they had never seen a testator's desire to retain property expressed so strongly in a will as the Testator did in his Will. James C. Hardin, III, an attorney and fact witness called by Petitioner, agreed that any reasonable person reading the Will would appreciate that the Testator desired to retain the Legacy Tracts. The Court concludes that Respondents' decisions in resisting Petitioner's desires for rapid sale of Trust property, including the Legacy Tracts, were informed by and taken in reasonable reliance upon the provisions of the Testator's Will.

Cross-Claimants testified at trial, but both admitted they had no personal knowledge of the matters described in their pleadings. Nor had they ever spoken to Respondents about their intentions regarding income distributions and diversification of Trust property. Both Respondents testified that they desire to and are willing to diversify Trust assets, but that they wish to do so in a more cautious manner than does Petitioner, a manner which allows the Trust to retain the Legacy Tracts. Respondents employed Mr. Helms to create just such a plan, and submitted this plan to the Court. The Wortley-Belger Plan calls for selling 60% of the Trust's real property over a 15-year period and investing the proceeds in financial assets, such as stocks and bonds. This plan also advocates monetizing the significant conservation values of the Boykin Millpond and other environmentally valuable properties. Respondents have also voted to list approximately $4.2 million of Trust properties for sale. These facts do not support the Cross-Claimants contention that Respondents are unwilling to sell any Trust real property and diversify the Trust's investment assets.

The Trustees agreed to distribute $100,000 per year to income beneficiaries on a temporary basis. Petitioner and Cross-Claimants both argued that there should be a mandatory minimum

income distribution and that the minimum distribution should be higher, perhaps ranging from $150,000 to $180,000 per year. After review of the Trust Assets and the various management plans provided by the Parties, the Court concludes that it would not be prudent to establish a mandatory minimum distribution, particularly at the levels urged by Petitioner and Cross-Claimants. Setting a mandatory minimum distribution at these levels risks necessitating invading the principal in order to satisfy the distribution obligation. Invasion of the principal places the interests of the income beneficiaries over those of the remainder beneficiaries of the Trust. While the Will permits invasion of the principal of the Trust in the discretion of the Trustees, it does not require it. Pursuant to the clear and unambiguous terms of the Will, income beneficiaries are entitled only to net income. Additionally, Trustees need the freedom to adjust income distributions should unforeseen events affect the net income of the Trust.[2]

Prior to filing suit, Petitioner presented Respondents with a proposed confidential option agreement, in which an undisclosed potential purchaser would pay the trust a $300,000 fee for the right to exercise an option to purchase certain Trust property for the total sum of $3,960,148. Respondents were not parties to any of the negotiations between Petitioner and the undisclosed purchaser. Numerous parties testified that the Petitioner actively concealed the identity of the potential purchaser in discussions in Trustee meetings and other conversations. The properties which would be subject to sale if the option agreement were approved by the Trust included, under various alternative scenarios, the Boykin Millpond and Downtown Boykin. These properties represent the most treasured of the Legacy Tracts. Respondent Wortley was initially willing to

[2] For these reasons, the Court denies the outstanding motion to establish a minimum annual distribution to the income beneficiaries.

listen to the offer and proposed at least one modification. Respondent Belger, who felt that the offer was contrary to her father's directions as set forth in the Will, was less receptive.

Four versions of the option agreement were presented to Respondents during the period from November 2017 to March 2018, and all versions of the option agreements referred to the prospective purchaser only as the "Donor." One option agreement identified the prospective purchaser as "Boykin Millpond Conservation LLC." Despite Respondents' repeated requests for more information on the "Donor," Petitioner continuously withheld the Donor's true identity from Respondents, and maintained that such secrecy was necessary. (*See* Boykin Dep. 97:20-98:7.) Despite Petitioner's insistence on keeping the Donor's identity confidential however, and unbeknownst to Respondents, counsel for Cross-Claimants was engaged in several email communications between Petitioner and the Donor's counsel concerning the option agreement.

Eventually, the proposed purchaser was revealed to be the Haile Gold Mine, which desired the property for environmental offsets to be used in connection with a permit the mine was seeking for expanded operations.

Notably, the deposition testimony of Dave Thomas, Haile Gold Mine's senior executive, revealed that there was no reason at all for Petitioner to withhold Haile Gold Mine's identity from Respondents. Mr. Thomas testified that he was unaware that Petitioner was withholding Haile Gold Mine's identity from Respondents, and that Haile Gold Mine had no desire or need to conceal its identity from Respondents during negotiations. (Thomas Dep. 26:11-14; 42:8-21.) Mr. Thomas also testified that Haile Gold Mine "ha[s] never in the history of the company concealed or used a surrogate to do a transaction," and that Petitioner is the individual who requested that Haile Gold Mine set up a separate LLC to conceal the purchaser's identity from his Co-Trustees. (*Id.* at 40:24-41:7.)

The total purchase price offered under the last proposed option agreement was $3.32 million for approximately 618 acres including the Boykin Millpond, adjoining acreage to the north, and additional acreage west of Highway 261, and $1.32 million for approximately 12.5 acres including Downtown Boykin, Swift Creek Church, and several cottages. The option agreement allowed, at the purchaser's option, the purchase of the 618 acre Boykin Millpond assemblage without the 12.5 acre Downtown Boykin parcels. (Thomas Dep. Ex. 21.)

At a Trustees' meeting held on April 3, 2018, the Trustees interviewed Mr. Steve Nichols, a managing partner of Newkirk Environmental, a South Carolina environmental consulting company devoted exclusively to environmental surveying, planning, and permitting. Newkirk Environmental was retained by the owner of the Haile Gold Mine to develop the mitigation plan for its original mining permit for the mine in Kershaw, South Carolina, and had made preliminary surveys of the environmental values of the Boykin Millpond prior to the option agreement. Mr. Nichols advised the Trustees that Newkirk focuses on wetlands and threatened or endangered species, and had established eight mitigation banks in South Carolina and Georgia over the last 15 to 20 years. (Petitioner's Dep. Ex. 11, pp. 13-16.)

Mr. Nichols presented the Trustees with two additional options for monetizing the conservation values of the Boykin Millpond, a mitigation bank and a conservation easement, and compared them to the option agreement, which he characterized as a permittee-responsible plan. (*Id.*, pp. 17-60; Wortley Trial Ex. 11.) Mr. Nichols advised the Trustees that the mitigation bank alternative normally produces the highest returns, and estimated that the Trust could likely receive between approximately $2.7 million and $4.7 million in revenue over a ten year period, after making an approximately $200,000 investment to establish the mitigation bank. (*Id.*)

Ultimately, Respondents did not approve the proposed option agreement, primarily because it would have required the sale of most of Millway Plantation, one of the Legacy Tracts that was the last to be sold based on the order of priority in the Will. While the conservation values of the land would have been preserved under the option agreement, family members would no longer have had access to the Millway land and the Millpond.

The Residuary Trust has cash on hand to satisfy taxes and expenses and is not currently in a financial position where it must sell any of the Legacy Tracts to meet expenses.

The Court has heard testimony on repairs which would be necessary to repair the Millpond dam and the repairs which would be required by the South Carolina Department of Health and Environmental Control. The Court has also heard testimony on repairs which might be needed to certain buildings in Downtown Boykin, including the Millpond Steakhouse.

Again, the Trust has cash on hand and sufficient projected future cash flows to address these needs such that it is not necessary to sell Trust property to address these expenses in the short term.

The Court heard testimony from both Respondents. Respondent Mary Deas Wortley is Testator's eldest daughter, and was specifically named by Testator in his Will to serve as a trustee of both the Marital Trust and the Residuary Trust. She has actively served in both of these roles since Testator's death in 1990. She is intimately familiar with the Trust property and cares deeply about the property. Respondent Wortley also demonstrated that she has listened to and relied on the advice of the well-qualified advisors who have been engaged to assist the Co-Trustees in managing the Trust. Most importantly, Respondent Wortley has maintained throughout this litigation that her primary concern as a Trustee is to administer the Trust in accordance with her

father's wishes while making sure that the Trust has sufficient funds to satisfy its obligations. The Court finds Respondent Wortley to be competent, intelligent, and fit to serve as a Trustee.

Like Respondent Wortley, Respondent Belger is intimately familiar with the Trust Property and the family business. Respondent Belger has assisted her husband, Wayne Belger, in farming the Trust's properties. Like Respondent Wortley, Respondent Belger has also consistently demonstrated that her primary objective as a Trustee is to follow the terms of the Will while ensuring that the Trust has the necessary liquidity to fulfill its obligations. The Court finds Respodnent Belger to be competent, intelligent, and fit to serve as a Trustee.

CONCLUSIONS OF LAW

I. Jurisdiction

The Court has jurisdiction of this matter pursuant to S.C. Code Ann. §§ 62-1-302(d)(5), § 62-7-201, and § 62-7-202.

II. Action for Declaratory Relief (Petitioner's Third Cause of Action)

Petitioner's third cause of action in the Amended Petition seeks a declaratory judgment that:

> (a) Petitioner is entitled to employ and compensate, from Residuary Trust Assets, attorneys and/or other agents and advisors who are necessary to assist him with the discharge of his fiduciary duties as Co-Trustee of the Residuary Trust, including past and future fees;
>
> (b) Petitioner is entitled to an award of Trustees fees in an amount to be determined by the Court for his services as sole disinterested Co-Trustee of the Residuary Trust;
>
> (c) Petitioner is entitled to exercise preeminent authority among the three Co-Trustees of the Residuary Trust (including the authority to appoint trust counsel) or otherwise be appointed as a "special fiduciary" under S.C. Code § 62-7-1001(b)(5); and
>
> (d) for otherwise unspecified instructions to Petitioner regarding his duties as Trustee.

(Am. Petit. at ¶ 59.)

After review of the applicable law and evidence, the Court concludes that there is no basis in law or fact to grant Petitioner's request that he be vested with preeminent authority over his Co-Trustees or to be appointed a special fiduciary with superior authority over his Co-Trustees.[3] There is no provision in the Will that permits a single Trustee to act or make a decision on behalf of the Trust by him or herself. Rather, the Will provides that the Trustees vote on how to conduct Trust business. Specifically, the Will authorizes the Trustees "in *their* absolute discretion with respect to any real property, by unanimous vote, or personal property, by majority vote" to exercise their duties and powers. (*Id.* at Item XIV, pp. 13-14 (emphasis added).) Each Trustee is given one equal vote.

Similarly, there is no basis in law for vesting Petitioner with special authority over his Co-Trustees. The words "preeminent authority" do not appear in the South Carolina Trust Code. The Trust Code does restrict interested trustees from acting in certain circumstances. For example, only a disinterested trustee may adjust principal and income.[4] However, because the factual scenarios implicated by these sections of the Trust Code are not present in this case, these specific statutory prohibitions are inapplicable and therefore do not support Petitioner's argument. Moreover, the fact

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[3] Petitioner's claims related to the award of Petitioner's fees and costs to Petitioner's counsel and consultants is addressed in Section VI of the Conclusions of Law, infra.

[4] Petitioner cited to three provisions of the Trust code that he argues demonstrate that disinterested trustees should be granted a heightened level of authority and discretion with respect to trusts, beyond the authority given to trustees who are also beneficiaries: (1) S.C. Code Ann. § 62-7-904(A); (2) § 62-7-904C; and (3) § 62-7-816A. (Am. Petit. at 17, n. 3.) To be sure, these sections do allow disinterested trustees to take certain actions that interested trustees cannot take. However, none of these statutes even tangentially touch on the types of disputes that are currently before the Trustees. Two of the statutes, for instance, simply provide that a trustee who is also a beneficiary of the trust cannot adjust between principal and income in making distributions to a trust beneficiary, and that an interested trustee cannot convert an income trust to a total return unitrust, reconvert a total return unitrust to an income trust, or change the percentage used to calculate the unitrust amount. S.C. Code Ann. §§ 904(A), 904C(A). Likewise, the remaining statute simply confers decanting authority to disinterested trustees. Id. § 816A.

that the Trust Code enumerates specific instances in which a trustee may not act indicates that, in other instances, there is no similar prohibition. *See Schlafly v. Saint Louis Brewery, LLC*, 909 F.3d 420, 425 (Fed. Cir. 2018) ("The statutory interpretive canon . . . provides that 'expressing one item of [an] associated group or series excludes another left unmentioned.'" (internal citation omitted)).

During his deposition, Petitioner testified that he did not "fully understand" the powers associated with "preeminent authority," and that he requested that the Court grant him such relief because his attorney, James C. Hardin, III, suggested he could seek such additional powers. (Pet. Dep. 202:14-18.) At trial, Mr. Hardin conceded that the phrase "preeminent authority" does not appear anywhere in the South Carolina Probate Code.

Additionally, Petitioner misunderstands the role of special fiduciary. A special fiduciary is not a co-trustee with powers superior to those of his or her co-trustees. Instead, a special fiduciary is akin to a receiver. Reporter's Comment to S.C. Code Ann. § 62-7-1001 (special fiduciary is "also sometimes referred to as a receiver."); *see also Fisher v. Huckabee*, 2016 WL 7495869 at *1 (S.C. App. 2016) (appointing a special fiduciary to accept all assets of an estate). Special fiduciaries are appointed where trustee positions are vacant, or some disability precludes action by an existing trustee, creating the need for a third party to manage the trust until the appointment of new trustees or removal of the disability. *E.g., Fundamental Church of Jesus-Christ of Latter Day Saints v. Lindberg*, 238 P.2d 1054, 1058 (Utah 2010) (appointing a special fiduciary to serve as a trustee until a new trustee can be appointed); *Keith v. Wallerich*, 687 S.E.2d 299 (N.C. App. 2009) (court entered order accepting trustee's resignation and appointing special fiduciary). Special fiduciaries can also be appointed to assist the court. *In re Daily*, 247 B.R. 369, 372 (Bankr. S.D.N.Y. 2000) (probate court appointed a special fiduciary to investigate insolvency of the estate); *In the Matter of the Estate of Plank*, 509 P.2d 812, 813 (Colo. App. 1973) (probate court

appointed special fiduciary to determine validity of claim against estate). No such circumstances exist in this case. The court is unaware of any law that supports giving a special powers superior to that of a regular trustee.

Finally, the Court specifically requested that each party set forth the relief requested at the conclusion of trial. Despite having spent extensive time briefing the issue in pre- and post-trial submissions, Petitioner did *not* request that he receive special powers and asked that all trustees, including himself, be removed. Given Petitioner's failure to request this remedy when explicitly given the opportunity to do so, the Court finds that Petitioner has abandoned his request to receive preeminent authority, either through declaration of the Court or by way of appointment as a special fiduciary. *See Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007) (noting that waiver is a voluntary and intentional abandonment or relinquishment of a known right); *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994) (waiver may be expressed or implied by a party's conduct).

III. Modification of the Trust (Petitioner's Fourth Cause of Action)

In his fourth cause of action, Petitioner seeks to modify the Trust pursuant to South Carolina Code § 62-7-412 in the following manner:

> (1) the precatory language in Item X of the Will is not binding and does not constitute a mandatory prohibition on the sale of Trust property; and
>
> (2) the Prudent Investor Rule controls and requires the sale of significant trust property to achieve diversification, income generation, and principal growth.

(Am. Pet. at ¶ 68.) As grounds for these modifications, Petitioner asserts that administrative provisions of a trust may be modified where continuing the trust on its existing terms would impair trust administration; that the Testator did not anticipate that the value of the trust property would

increase dramatically; and that the Testator did not anticipate his eldest son would not have a male child. (*Id.* at ¶¶ 63-66.)

South Carolina Code § 62-7-412, which governs modification of trusts, provides in pertinent part that:

> (a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
>
> (b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

S.C. Code Ann. § 62-7-412.

The right of a testator to dispose of his property as he or she sees fit is a sacred right. *Cagle v. Schaeffer*, 115 S.C. 35, 35, 104 S.E. 321, 323 (1920). A "cardinal rule of trusts and estates law is that the intent of the testator must prevail wherever possible." *Wilson v. Dallas*, 403 S.C. 411, 453, 743 S.E.2d 746, 770 (2013). "The right to make a will directing the ultimate disposition of one's property is one of the basic rights known to our civilization, and it encompasses the right to make it according to the testator's pleasure and in his absolute discretion . . . subject only to the restraints upon the power of disposition that the law has imposed." *Id.* at 445, 743 S.E.2d at 765. So sacred is this tenant of law that even when a court does engage in equitable deviation, it may modify the trust only by "directing that the trust property be applied or distributed, in whole or in part, in a manner *consistent with the settlor's . . . intent*." S.C. Code Ann. § 62-7-413(a)(3) (emphasis added). "Indeed, [t]he purpose of the 'equitable deviation' authorized by [the statute] is *not* to disregard the settlor's intent but to modify inopportune provisions to effectuate better the settlor's broader purposes." § 62-7-412, Reporter's Comment.

Given the law's deference to the Testator's disposition of his property, the Court concludes that circumstances do not warrant the requested modifications. The provisions of the Will discussing the Testator's desire to preserve family property are substantive, not administrative. All parties agree, and have at all times agreed, that the Testator's expressed desire to retain land is precatory, and not a binding prohibition on the sale of Trust property. Indeed, the Will expressly authorizes the sale of real property held by the Trust, including the Legacy Tracts, at any time with the unanimous consent of the Trustees. There is no actual dispute regarding whether the Testator's desire to retain Trust property is precatory. Similarly, the parties do not dispute that the Prudent Investor Rule is applicable. Accordingly, there is no necessity to modify the Trust with respect to these matters.

Where the parties do disagree is whether the application of the Prudent Investor Rule requires the sale of significant Trust property to achieve diversification, income generation, and principal growth. The Court concludes that the application of the Prudent Investor Rule does not require the sale of significant Trust property to achieve diversification for a number of reasons.

First, the Trust Code provides that "[t]he prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust." S.C. Code Ann. § 62-7-933(B)(2). The Prudent Investor Act is therefore statutorily subservient to contrary language in the Will. The Will states that the Trustees may "retain any of the original property constituting the estate or trust, regardless of the character of such property . . . or whether it leaves a disproportionately large part of the estate or trust invested in one type of property [.]" (Will Item XIV.B, p. 14.) Accordingly, the Will modifies the statutory duty to diversify imposed by the Prudent Investor Rule, particularly with respect to the original property constituting the Trust, including the Legacy Tracts.

Second, and in any event, the Prudent Investor Rule as embodied in the Prudent Investor Act, does not mandate diversification. The Prudent Investor Act certainly favors diversification, but it does not universally require diversification at any cost. For example, the Prudent Investor Act does not favor one type of investment asset over another. Instead, the Prudent Investor Act specifically states that "a trustee may invest in *any kind of property or type of investment* consistent with the standards of this act." *Id.* at § 62-7-933(C)(3)(5)(a) (emphasis added). It also qualifies the duty to diversify in the following manner: "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." S.C. Code Ann. § 62-7-933(D) (emphasis added). For instance, "[t]he wish to retain a family business" is a situation in "which the purposes of the trust sometimes override the conventional duty to diversify." S.C. Code Ann § 62-7-933(D), Reporter's Comment. The Prudent Investor Act specifically provides that among the circumstances "a trustee shall consider in investing and managing trust assets are . . . an asset's special relationship or special value to the purposes of the trust or to one or more of the beneficiaries." S.C. Code Ann. § 62-7-933(C)(3)(h) (emphasis added).

Applying these provisions of the Prudent Investor Act to the Trust at issue, special circumstances exist that permit the Trustees to reasonably believe that the purposes of the trust are better served without liquidating the majority of the Trust's land holdings. Specifically, the beneficiaries of the Trust, including Respondents and the remainder beneficiaries, have a special relationship to the land held by the Trust, and in particular to the Legacy Tracts. Essentially, the Trust manages a family business which was operated first by the Testator, and then by the Testator's wife, and now falls to the Trust.

Because the Prudent Investor Rule does not require the sale of significant Trust property to achieve diversification in this case, it would be error for the Court to modify the Trust to impose such a requirement without legal foundation and when such a requirement would be directly contrary to the intent of the Testator as expressed throughout the terms of the Will.

Finally, the reasons Petitioner sets forth for modifying the Trust are not convincing. First, Petitioner argues that Mr. Boykin "could not have anticipated that . . . Hurricane Hugo would decimate his timber holdings and substantially reduce the value of the assets held in trust." (Am. Pet. at ¶ 66.) This contention lacks merit. Natural disasters are not inherently unforeseeable. Moreover, Hurricane Hugo struck three months prior to the Testator's death. Not only could the Testator have foreseen that a natural disaster, such as a hurricane or fire, could damage the timber tracts he owned, the Testator had actual knowledge of Hurricane Hugo prior to his death and did not change his Will. Hurricane Hugo does not constitute an unanticipated circumstance justifying modification of the Will.

Likewise, the fact that Respondent Whit Boykin does not have male heirs to inherit the Legacy Tracts does not provide a compelling reason to modify the terms of the Trust. While the Will expresses a desire that certain property pass to the male children of Mr. Boykin, Testator could have anticipated that Respondent Boykin would not have a male child. Every adult knows that one cannot control the sex of one's children, or even whether it may be possible for one to have children. Furthermore, the Will does not contemplate that the Legacy Tracts should be preserved solely for the benefit of Respondent Boykin's male children. It states that the Legacy Tracts should be preserved for the benefit of Testator's "*children or their issue.*" (Will Item X, pp. 9-10.) The Testator is survived by his four children and his four grandchildren, two of whom are males; it is clear that there are multiple other beneficiaries for whom the Legacy Tracts may

be preserved. Thus, Petitioner has provided no compelling reason for this Court to disregard the Testator's intentions as set forth in the Will and modify the terms of the Trust on this basis.

For these reasons, the Court declines to use its equitable powers to modify the terms of the Trust.

IV. Removal of Trustees (Petitioner's Fifth Cause of Action and Respondents' First and Second Counterclaims)

Petitioner's Amended Petition seeks removal of both Respondents, Mary Deas Wortley and Alice Belger, as Trustees. Petitioner's stated grounds for removal of Respondents are: (1) lack of cooperation. (Am. Petit. at ¶ 71.); (2) failure to carry out their duties as Trustees in failing to devise a comprehensive budget, perform a financial analysis, conduct regular trustee meetings; and approve the gold mine option (*Id.* at ¶ 72.); and (3) unfitness to serve as Trustees. (*Id.* at ¶ 73.)

Likewise, Cross-Claimants seek to remove Respondents as Trustees. Cross-Claimants incorporate the arguments asserted by Petitioner. In addition, Cross-Claimants contend that Respondents have an inherit conflict of interest which disqualifies them from service as Trustees.

Finally, Respondents filed two counterclaims against Petitioner seeking his removal as a Trustee. (Second Am. Ans. & Counterclaims at ¶ ¶ 48-73). Respondents' stated ground for removal of Petitioner are: (1) lack of cooperation (*Id.* at ¶ 64) and (2) Petitioner's unwillingness to administer the Trust in a cost-efficient manner (*Id.* at ¶ 73).

Based upon both the Parties' submissions and the testimony and evidence presented at trial, it is apparent to this Court that the current cast of Trustees can no longer effectively administer the Trust. By all accounts, the Trustees have struggled to efficiently administer the Trust since the dispute that underlies this lawsuit first arose in the spring of 2017. This disagreement among the Trustees regarding the proper approach to managing the Trust's assets has greatly affected the

Trustees' ability to work with one another to efficiently conduct Trust business. Due to the strife among the Trustees, every item of Trust business, including simple administrative decisions, require discussion and debate. This has greatly stymied Trust business and significantly increased the time and effort required of the Trustees to administer the day-to-day operation of the Trust. The Court finds that it is necessary to remove one or more of the current Trustees in order to protect the Trust's assets and ensure administration of the Trust for the beneficiaries.

After careful consideration of the evidence presented at trial and for the reasons set forth below, Petitioner is hereby removed as a Trustee. Respondents will remain Trustees along with a third Trustee to be appointed by the Court consistent with instructions set forth in subsection F below.

Under the South Carolina Trust Code, removal is governed by § 62-7-706. This section provides that a court may remove a trustee if: (1) the trustee has committed a "serious breach of trust"; (2) lack of cooperation among the trustees "substantially impairs the administration of the estate"; (3) removal of the trustee will best serve the interest of the beneficiaries because of the trustee's "unfitness, unwillingness, or persistent failure" to administer the trust effectively; or (4) there has been a "substantial change in circumstances," and removal of the trustee best serves the interests of all of the beneficiaries, is not inconsistent with a material purpose of the trust, and there is a suitable co-trustee or successor trustee available. S.C. Code Ann. § 62-7-706(b). Each of these grounds and the Parties' arguments related to the same are addressed in turn below.

A. Serious Breach of Trust

Failure to administer the Trust is not a specific ground for removal. Based on the pleadings and arguments of Petitioner and his counsel in this case, the Court interprets this portion of

Petitioner's claim for removal as a claim to remove Respondents under subsection (a) of § 62-7-706 for committing serious breaches of trust.

Subsection (b)(1) of § 62-7-706 provides that "[t]he court may remove a trustee if . . . the trustee has committed a serious breach of trust." It is well established that the standard for removal is whether the trustee has engaged in conduct that is detrimental to the interest of the beneficiaries. Restatement (Third) of Trusts S.C. Code Ann. § 37 cmt. D (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts § 107 cmt. a (1959). However, a breach of trust must be "serious" to justify removal of the trustee. S.C. Code Ann. § 62-7-706, Reporter's Comment. A "serious breach of trust" may consist of a single act that causes significant harm or involves flagrant misconduct, or may consist of a series of smaller breaches which, when considered together, justify removal even though they may not be considered sufficient when considered alone. *Id.* Notably, "[a] trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance." S.C. Code Ann. § 62-7-1006.

Petitioner specifically alleges that Respondents should be removed due to their failure to: (a) devise a comprehensive budget; (b) perform a financial analysis; (c) conduct regular trustee meetings; and (d) approve the gold mine option. The Court concludes that none of these actions constitutes a serious breach of trust warranting removal.

The Trustees have a duty to competently manage the Trust, but that duty may or may not call for development of a budget or financial analysis. Following Mrs. Boykin's death, appraisals had to be performed before the value of the Trust property could be known and informed investment decisions could be made. These appraisals were not complete until the spring of 2017. By this point, Petitioner was already threatening Respondents with litigation. The delay in

developing a budget or financial plan is understandable under these circumstances and does not rise to the level of a serious breach of trust. This is particularly true where the evidence presented at trial demonstrated that Petitioner himself played a large part in causing the delay in the appraisals process. Finally and most importantly, Respondents have now had a financial analysis, budget and management plan developed such that any alleged failure has been cured.

Petitioner's next argument that Respondents failed to conduct regular trustee meetings is specious. More than twenty-four face-to-face meetings, at least one a month, were held between the date of Mrs. Boykin's death and the filing of this suit. There was a brief period between May and October of 2017 where meetings were not held and business was conducted by phone and email during this interval. The Court finds this likewise does not rise to the level of a serious breach of trust warranting the removal of Respondents.

The failure to approve the option agreement also does not constitute a serious breach of trust. There is no certainty that Haile Gold Mine would have exercised the option had the Trust actually granted it to Haile Gold Mine, making Petitioner's concerns speculative. Much of the financial benefit of the proposed agreement can also be achieved through the sale of conservation credits without sale of Trust property.

Furthermore, one of the reasons Respondents chose not to pursue the option agreement is that it would require the sale of the Legacy Tracts and, notably, the Boykin Millpond, a significant part of Millway Plantation, which is the Legacy Tract that is afforded the most protection in the Will. Preservation of the Legacy Tracts for as long as possible is one of the primary objectives of the Trust based on a plain reading of the terms of the Will. The Court concludes that in refusing the option agreement, Respondents reasonably relied upon the language of the Will which indicates that the property at issue is to be preserved, if at all possible. No trustee who similarly

acts in reliance upon language of a trust instrument can be liable to a beneficiary for a breach of trust, S.C. Code Ann. § 62-7-1006, and it is reasonable to conclude that, even if failure to approve the gold mine option could be considered a breach of trust, it would not be a breach of trust on which a beneficiary could sue, and is not a serious breach of trust warranting removal.

B. Lack of Cooperation

Subsection (b)(2) of § 62-7-706 provides that "[t]he court may remove a trustee if . . . lack of cooperation among cotrustees substantially impairs the administration of the trust." The lack of cooperation among trustees justifying removal need not involve a breach of trust. Reporter's Comment to S.C. Code Ann. § 62-7-706(b). The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. *Id.* The court may remove one, more, or all of the trustees. *Id.* Friction between trustees and beneficiaries does not ordinarily constitute lack of cooperation for purposes of removal. *Id.* The Court agrees with Petitioner that there has been a lack of cooperation among the Trustees of the Residuary Trust with respect to the issue of the sale of Trust property for purposes of diversification; however, the Court concludes that Petitioner, not Respondents, is guilty of a failure to cooperate.

The Will establishes that there are three Trustees, each with an equal vote. It sets majority rule as the basis of decision, except where certain issues regarding the sale of real property are involved. In those situations, the Will requires the Trustees unanimously agree to sell it. The decision-making process has worked exactly as designed by the Testator. The majority administers the Trust, not the minority.

There has been no evidence that any the Trustees have refused to participate in the decision-making process described above. Instead, evidence suggests that the Trustees meet regularly to discuss Trust issues and bring those issues to a vote. While the Court has been presented multiple

instances in which Respondents disagreed with Petitioner's proposed actions for the Trust, the objections to the proposed plans are based upon concerns shared by Respondents and were not made for the purpose of frustrating the administration of Trust business. Stated differently, the fact that Respondents disagree with certain proposals from Petitioner is not evidence that Respondents are guilty of failing to cooperate with the Petitioner. Accordingly, I find that that Respondents have not acted uncooperatively in such a manner that would require their removal.

In contrast, Petitioner has attempted to use his position as a Trustee to impose the will of the minority upon the majority. Petitioner has repeatedly refused to follow the advice of experienced trust counsel. He has belittled and threatened trust advisors, and refused to consent to the Section 6166 tax election, an action which Petitioner himself admitted was error. Similarly, Petitioner has refused to even investigate the potential tax savings of the Section 2032A election. Both of these tax elections were strongly recommended by the experienced trust counsel employed by the Trustees. Based on the Court's observations at trail, it would appear Petitioner's goal in refusing to consent to these tax elections has been to gain leverage over Respondents and force them into a position where they have no choice but to accede to his desire to sell a significant portion of the Trust's real property as soon as possible. This desire is at odds with the Testator's stated desire to preserve Trust property if at all possible, and at odds with six of the eight Trust beneficiaries.

Petitioner's tactics and actions constitute a lack of cooperation which has significantly impaired the administration of the Trust. The Court further finds that some of Petitioner's actions and positions were not taken out of genuine concern for the Trust and its beneficiaries, but rather in an attempt to intentionally frustrate Respondents' attempts to administer the Trust and manipulate the actions of his co-trustees. Because of Petitioner, the Trust has had difficulty

implementing financially beneficial tax elections and other decisions and determining proper distributions to income beneficiaries. Petitioner has further attempted to force his Co-Trustees to sell family property by whatever means necessary, including belittling and threatening experienced Trust advisors and concealing information regarding the identity of prospective purchasers. This behavior warrants his removal under subsection (b)(2) of § 62-7-706.

C. Unfitness, Unwillingness, or Persistent Failure to Administer Trust

Subsection (b)(3) of § 62-7-706 provides that "[t]he court may remove a trustee if . . . because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries." "Unfitness" may include not only mental incapacity but also lack of basic ability to administer the trust. Reporter's Comment, S.C. Code Ann. § 62-7-706. Before removing a trustee for unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. *Id.* "Unwillingness" includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. *Id.* A "persistent failure to administer the trust effectively" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts. *Id.* Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. *Id.*

Initially, after careful observation of each of the three Trustees's testimony at the trial of this case, the Court finds no evidence any of the current Trustees suffer from mental incapacity. Having determined that none of the Trustees lack mental capacity, the Court now turns to whether any of the Trustees lack the "basic ability to administer the trust" that renders them unfit to serve as Trustee.

In challenging Respondents' fitness to serve as Trustees, Petitioner has focused on the relative training, experience and education of the Respondents and whether their background was sufficient to handle the administration of a multi-million-dollar Trust. After careful consideration of the evidence presented at trial, the Court finds that Respondents' respective backgrounds are sufficient to qualify them for service as Trustees.

First, Respondents are intimately familiar with the Trust property. They have lived on, visited, or used the family property for their entire lives. They are familiar with the management of the Trust property by Mrs. Boykin, and Respondent Wortley assisted in the management and operation of Trust property as a trustee of the prior marital trust. Mrs. Boykin trained Respondents in the operation of the family business, including timber management, leases of hunting and fishing properties, and management and operation of commercial properties.

Moreover, Respondents have demonstrated that they are willing to listen to, and indeed rely on, the advice of well-respected professionals, such as Mr. Bailey and Ms. Thomas, Ms. Peacock, Mr. Helms, Ms. Holland, Mr. Bunch, as well as other individuals, in administering the Trust. No evidence was presented at trial indicating that Respondents have disregarded the advice of seasoned professionals in pursuit of their own agenda for the Trust. Respondents' training with respect to and familiarity with the Trust property, coupled with their willingness to retain the appropriate professionals to aid them in administering the Trust, more than qualifies them to serve as Trustees.

Additionally, the comments to § 62-7-706 instruct the Court that, before removing a trustee for unfitness, the Court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. Reporter's Comment, S.C. Code Ann. § 62-7-706. Petitioner is correct that Respondents do not possess extensive

experience with the stock market or in tax matters. These deficits in experience, however, are precisely the type of deficits which can be remedied by employing qualified trust advisors in legal, tax, and financial matters. As noted above, Respondents have done just that, employing the aforementioned professionals at various times, as well as individuals such as Ansel Bunch, who serves as an investment advisor for the Trust. Deficits in investment knowledge or experience do not warrant removal in this case.

For these reasons, the Court finds that Respondents are sufficiently qualified to serve as Trustees and should not be removed for being unfit to administer the Trust effectively.

Turning now to Respondents Claim that Petitioner should be removed for his unwillingness to administer the Trust effectively, the Court finds that S.C. Code Ann. § 62-7-706(b)(3) provides an additional ground for his removal. Based upon the conduct highlighted in the preceding subsection, namely the Petitioner's blatant disregard of the advice of the experienced counsel advising the Trust in estate tax matters, the Court concludes that Petitioner has demonstrated an unwillingness to act that warrants his removal. The evidence presented at trial established that Petitioner on numerous occasions took positions as to certain trust business that were not reasonably intended to further the Trust's purposes and were instead intended to manipulate his co-Trustees into acquiescing to his approach. The Court finds this conduct to demonstrate an unwillingness to effectively administer the Trust. This is an additional ground supporting Petitioners removal as Trustee.

D. Removal for Changed Circumstances

The Amended Petition states in a conclusory fashion that removal is warranted because there has been a substantial change of circumstances, removal serves the best interest of all of the beneficiaries, and is not inconsistent with a material purpose of the Trust. (Am. Petit. at ¶ 76.)

This allegation is almost a verbatim repetition of S.C. Code Ann. § 62-7-706(b)(4). The Amended Petition does not set forth any facts in support of this contention and Petitioner has not argued this provision. The Court thus concludes that Petitioner has abandoned this argument.

Out of an abundance of caution, the Court also holds that removal would not be appropriate under § 62-7-706(b)(4). There has been no substantial change in circumstances. If, as Petitioner alleges, the Trust property has appreciated in value since Mr. Boykin executed his Will, this is not a circumstance which ordinarily warrants removal of a trustee. Indeed, it is good for all of the beneficiaries that the trust property has increased in value, and all beneficiaries will undoubtedly hope for this trend to continue in the future. Similarly, the effects of Hurricane Hugo were known to the Testator *before* he died, and do not represent a change in circumstances of any kind.

Removal of Respondents is also not in the best interest of *all* beneficiaries and would be inconsistent with a material purpose of the Trust. Again, six of the eight beneficiaries wish for Respondents to remain as trustees and to follow their proposed investment plan and strategy. Even if the Court were to ignore the wishes of Respondents, who are Trustees and beneficiaries, four of the remaining six beneficiaries still wish for the same outcome. Removal would be against the wishes of the clear majority of beneficiaries in either circumstance. Moreover, it is undeniable that one purpose of the Trust was to retain the Legacy Tracts as family property for as long as possible. Because Respondents favor following the desires of the Testator in this regard, their removal would be inconsistent with this purpose of the Trust.

E. Removal for Impartiality

Cross-Claimants contend that Respondents have an inherit conflict of interest which disqualifies them from service as Trustees. They assert that while Respondents and Cross-Claimants are all income beneficiaries of the Trust, Respondents may act against their own self-

interest and those of Cross-Claimants in making Trust decisions because Respondents also have children who are remainder beneficiaries. Cross-Claimants contend Respondents may limit distributions to income beneficiaries in order to increase what will eventually pass to their children. According to Cross-Claimants, Respondents may or have violated the duty of impartiality to income beneficiaries.

The Restatement of Trusts describes the duty of impartiality as follows:

> *b. Meaning of impartiality.* The duty of impartiality is an extension of the duty of loyalty to beneficiaries but involves, in typical trust situations, unavoidably and thus permissibly conflicting duties to various beneficiaries with their competing economic interests.
>
> It would be overly simplistic, and therefore misleading, to equate impartiality with some concept of "equality" of treatment or concern—that is, to assume that the interests of all beneficiaries have the same priority and are entitled to the same weight in the trustee's balancing of those interests. Impartiality does mean that a trustee's treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries, even if the latter results from antagonism that sometimes arises in the course of administration. Nor is it permissible for a trustee to ignore the interests of some beneficiaries merely as a result of oversight or neglect, or because a particular beneficiary has more access to the trustee or is more aggressive, or simply because the trustee is unaware of the duty stated in this Section.
>
> It is not only appropriate but required by the duty of impartiality that a trustee's treatment of beneficiaries, and the balancing of their competing interests, reasonably reflect any preferences and priorities that are discernible from the terms (§ 4), purposes, and circumstances of the trust and from the nature and terms of the beneficial interests. Thus, unfortunately, it is often the case that the implications of the duty of impartiality are complicated by the difficulties of determining, and the vagueness of, some relevant aspects of the settlor's intentions and objectives—much of which is left to interpretation and inference.
>
> Therefore, in short, it is the trustee's duty, reasonably and without personal bias, to seek to ascertain and to give effect to the rights and

> priorities of the various beneficiaries or purposes as expressed or implied by the terms of the trust.

Restatement (Third) of Trusts § 79 cmt. b, Duty of Impartiality (2007).

Stated differently, there is no black and white line with respect to the duty of impartiality. Trustees must balance the competing needs and interests of *all* beneficiaries.

> [The] balancing of diverse interests usually involves not only the obviously competitive interests of successive-interest beneficiaries . . . but also, for example, the competing needs and objectives of multiple life beneficiaries or of multiple remainder beneficiaries. For example, different present-interest beneficiaries may have different needs, objectives, and tax positions, leading to differing preferences (e.g., to emphasize high yield, or capital appreciation, or tax-exempt income) in the trust's investment program. Similarly, different future-interest beneficiaries may have significantly different objectives and concerns (or attitudes) about, for example, the tradeoff between growth and security of capital, or about the types and tax characteristics of assets eventually to be distributed.

Id. at cmt. c. Modern trust law recognizes that a beneficiary is often designated as a trustee in a family trust. As the Restatement of Trusts provides:

> the fact that the trustee named by the settlor is one of the beneficiaries of the trust, or would otherwise have conflicting interests, is not a sufficient ground for removing the trustee or refusing to confirm the appointment. This is so even though the trustee has broad discretion in matters of distribution and investment.

Restatement (Third) of Trusts § 37, Removal of Trustee cmt. f (2007). The duties of impartiality and loyalty, in typical trust situations, involve "unavoidably and thus *permissibly conflicting duties to various beneficiaries with their competing economic interests.*" *Restatement (Third) of Trusts* § 79 cmt b., Duty of Impartiality (2007) (emphasis added).

Strict prohibitions against conflict of interest transactions do not apply to the extent they are authorized by the terms of the trust, either "expressly or by implication." *Restatement (Third) of Trusts* § 78 cmt. c(2) Duty of Loyalty (2007) (a trustee may be authorized by the terms of the

trust, expressly or by implication, to engage in transactions that would otherwise be prohibited by the rules of undivided loyalty). "[E]ven the vital fiduciary duty of loyalty is a *default rule* that may be modified by the terms of the trust." *Id.* (emphasis in original).

South Carolina law recognizes these principles. *E.g., First Union Nat. Bank of South Carolina v. Cisa*, 293 S.C. 456, 361 S.E.2d 615 (1987). *First Union* confirmed that it is the trust instrument or will which is ultimately controlling. In that case, the court stated that "[t]he question essentially is whether, when [the settlor] authorized the trustees in his residuary trust to take certain actions, he intended to include his wife [the defendant] as a person authorized to act in such matters as a trustee." *Id.* at 462, 361 S.E.2d at 619.

The Will in this case expressly allows Respondents to participate in all decisions, including those involving the sale of real property held by the Residuary Trust. Indeed, the Will specifically names Respondent Wortley as both a beneficiary and a trustee, and further provides that trustees may nominate an additional "family member" to serve as a Co-trustee. (Will at Items VIII(1), XII(b).) The Will clearly contemplates that beneficiaries will serve as trustees of the Residuary Trust.

Because beneficiaries will serve as trustees, they will necessarily take part in trust decisions. The Will places no limits on the ability of beneficiary trustees to act, and also affirmatively provides that beneficiary trustees will take part in trust decisions. For example:

- The Will specifies that decisions to sell real property must be unanimous and sales of personal property may be by majority vote. If the beneficiary trustees were not intended to vote on the disposition of property of the Residuary Trust, there would be no need for requirements of unanimity and majority. Only one trustee would be empowered to vote. The unanimity and majority requirements would be meaningless if Respondents were not permitted to vote in such transactions;
- The Will vests trustees with the power to determine how all receipts and disbursements of the trust, "including the executor's or trustee's compensation" shall be credited, charged, or apportioned "irrespective of statute or rule of law." (Will at Item XIV.G, p. 16.) Trustees are permitted to take part in decisions

regarding even their own compensation without regard to any limiting statute or rule of law; and

- The Will expressly permits the trustees to elect to borrow money from any of the trustees themselves, despite the fact that such a transaction would normally be a conflict of interest transaction. (Will at Item XIV.K, pp. 17-18.)

In this case, there is no evidence that Respondents have improperly balanced their loyalties. The plan and investment strategy, which includes proposed distributions to income beneficiaries, has the support of six out of the eight beneficiaries. The plan also properly reflects the preferences set forth in the Will. The Will reflects a strong preference for preservation of the trust property, and in particular the Legacy Tracts. In many ways, it expresses a preference for the interest of the remainder beneficiaries over those of the income beneficiaries. For example, the Will waives the unproductive property rule and instructs the Trustees to consider what other economic resources a particular beneficiary may possess in determining a reasonable distribution, provisions which disadvantage income beneficiaries. The Will also expresses a desire that the Legacy Tracts be preserved for the benefit of *all* beneficiaries—not solely the remainder beneficiaries.[5]

Finally, based upon the testimony and evidence presented at trial, the Court firmly believes that Respondents have affection for their siblings and have consistently acted in what they believe to be the Cross-Claimants' best interest. The Court has no doubt that Respondents would provide for the their brother and sister if they ever needed support from the Trust for their "medical care, comfortable maintenance or welfare" as provided by the terms of the Will.

Accordingly, the Court finds that Cross-Claimants' allegations that Respondents have acted impartially and, by extension, their claim for removal of Respondents as Trustees, are

[5] As to the income beneficiaries, the Will *requires* distributions of *only* the "net income" of the Trust "as the Trustees in their sole discretion shall determine . . . as the need arises primarily for the medical care, comfortable maintenance [and] welfare . . . taking into consideration . . . other income or resources" of the beneficiaries. (Will Item VIII(1), p. 7.)

without merit.

F. Conclusion and Replacement Trustee

For the foregoing reasons, Petitioner Rigdon Boykin is removed as a Trustee of the Residuary Trust effective immediately. Respondents Mary Deas Wortley and Alice Boykin Belger shall remain Trustees of the Trust.

In leaving Respondents in their position as Trustees, the Court would caution both of them that it is imperative that they implement the management and investment plan presented by their counsel and consultants to the Court at the trial of this matter. Respondents, as Trustees, have a duty to prudently manage the Trust's assets for the benefit of all beneficiaries. This duty requires that Respondents diversify the assets currently held by the Trust and reduce the Trust's concentrated holdings in real estate. Although not required to the extreme contained in Petitioner's plan, the Court finds that all the beneficiaries would be better served and protected by diversifying the Trust's portfolio of assets. The Court finds that the plan presented by Respondents at trial is a reasonable approach to achieving that diversification. Respondents' plan cannot simply be lip service meant to appease the Court. Respondents should closely adhere to the sales schedule contained in their plan. Failure to do so could be a breach of their duties as Trustees and present grounds for their removal from their position as Trustee in the future.

Based upon Respondents prior reluctance to sell Trust properties, the Court maintains some reservations about whether Respondents are capable of executing the plan presented at trial, as it requires sale of properties that their family has held dear for decades. As previously noted, the Will's preference to retain the real property held by the Trust is precatory. The instructions found in the Will are now more than 30 years' old. While this preference is entitled to respect, the Testator's stated desire to retain property cannot overrule the common sense of the Trustees he put

in charge of his legacy. As times change, the Trustees must use their best judgment to prudently manage the Trust and maximize the Trust's benefits to all beneficiaries.

Ultimately, the Court's decision to permit Respondents to remain as Trustees is based in large part upon their apparent willingness to listen to the advice of their counsel, consultants and other advisors. The advice contained in the plan presented at trial is a wise approach to the management of the Trust and the Court is confident Respondents will continue to heed the sage advice of their trusted counsel and advisors in implementing this plan.

In addition, the Court finds that it would be beneficial to Respondents for Petitioner's vacant Trustee position to be filled by a third party that can continue to provide a different perspective than that of Respondents. Accordingly, the Court hereby proposes to appoint Cheryl Holland to fill the vacant Trustee position. Ms. Holland is already familiar with the Trust's assets and management and has been wise counsel to the Trust. The Court believes Ms. Holland would provide valuable business and investment perspective to Respondents that will complement their familiarity with the family property.

Counsel for Respondents shall notify Ms. Holland of the Court's decision and ask that Ms. Holland to write the Court within 30 days regarding whether she is willing to accept a position as Trustee. If Ms. Holland rejects this position, each party shall submit a proposed replacement to fill the final vacant Trustee position and the Court shall choose a replacement from these proposals. Parties shall submit their proposed replacement in writing within 30 days of the date of Ms. Holland's letter rejecting the position. If the delay in filling this position interferes with administration of the Trust, any Trustee or beneficiary may petition the Court to appoint a special fiduciary until such time as a formal replacement for Petitioner can be instated.

V. Miscellaneous Claims for Relief Requested at Trial

The relief requested by Petitioner and Cross-Claimants at the conclusion of trial differed substantially from the relief set forth in these parties' pleadings. Petitioner asked the Court to: (i) remove all Trustees; (ii) appoint non-family members to manage the Trust; (iii) modify the Trust to eliminate the unanimous voting requirement for certain decisions relating to the disposition of real property held by the Trust; and (iv) split the Trust into two trusts, one of which would continue to hold the family legacy property discussed in the Will, and one of which would hold other property which could then be sold and invested in the stock market. Cross-Claimants asked the Court to: (i) remove all Trustees; (ii) appoint competent non-family members to manage the Trust; and (iii) modify the Trust to eliminate the unanimous voting requirement for certain decisions relating to the disposition of real property held by the Trust.[6]

These requests for relief were not requested in the pleadings. Neither Petitioner nor Cross-Claimants have sought to amend their pleadings to assert these requests for relief. Respondents and the remainder beneficiaries and interveners did not consent to trial of these matters. The Court concludes that these requests for relief are not properly before the Court, and denies the same.

Alternatively, the additional relief sought is not warranted for the following reasons:

A. Removal of All Trustees

The Court has already declined to remove Respondents Wortley and Belger as Trustees for reasons discussed above.

[6] What is striking about these requests for relief is that the relief requested by all parties, including Petitioner himself, apparently now includes Petitioner's removal and replacement as a Trustee. That all parties and beneficiaries desire Petitioner's removal and replacement is an additional and alternative ground for his removal as Trustee, and the Court so holds.

B. Appoint Non-Family Members as Trustees

This relief is not appropriate. While the Will does permit the Trustees have the discretion to appoint a trust company or bank trust department of sufficient size "to assist them in the administration of the trust" or "to serve as co-trustee with them should they determine the same to be necessary" (Will Item XII.b, pp. 12-13.), replacing all three Trustees with non-family members would contravene the Testator's intent that his family members control the Trust as expressed by the clear language of the Will. No party has sought a modification of this provision of the Will, or presented any evidence that this modification would be a necessary exercise of the Court's equitable deviation powers. For these reasons, the Court declines to modify the Will and to exclusively appoint non-family members as Trustees.

C. Unanimous Voting Requirement

Petitioner argues that the Trustees are at an impasse as a result of the unanimous voting requirement for certain real property decisions, and that this requirement has proven troublesome to the administration of the Trust. He therefore asks the Court to delete this requirement. Cross-Claimants echo these sentiments. All other parties oppose this suggested change to the Testator's Will.

Impasse connotes deadlock.[7] After careful consideration, the Court concludes that there is no actual deadlock in this matter. The unanimity requirement has most certainly frustrated the Petitioner's desire to sell most of the Trust's real property as quickly as possible, but that is not true deadlock. The unanimity requirement is a default rule. Real property of the Trust cannot be sold unless all Trustees agree. The fact that some Trustees did not agree with Petitioner does not mean that the Trustees are paralyzed and cannot make a decision. The Trust is not prevented from

[7] https://www.merriam-webster.com/dictionary/impasse

making a decision; rather, under the terms of the Will, the outcome of a less than unanimous vote is that the property under consideration for sale cannot be sold. This mechanism reflects the Testator's desire that Trust property be preserved.

Additionally, the facts do not indicate there is any current necessity for modification of the Trust to eliminate the unanimity requirement. Two of the three Trustees and all four remainder beneficiaries oppose Petitioner's plan for sale of the bulk of the Trust property. Were the Court to eliminate the unanimity requirement and replace it with a majority vote requirement, the sale sought by Petitioner would still be voted down. Modification accomplishes nothing in this instance.

Finally, the Court has removed Petitioner as a Trustee by this Order. As a result, disputes among the parties regarding his plan for selling Trust property are moot. Petitioner is no longer a trustee or a beneficiary and has no standing to pursue modification, and, given the absence of a third Trustee at this time, any argument that deadlock presently exists is speculative.

D. Splitting the trust

The Court understands that Petitioner and Cross-Claimants have proposed splitting the Trust in two, with certain properties managed by Petitioner or others as Trustee and the remaining properties managed by Respondents. Petitioner and Cross-Claimants believe this action would allow the sale of Trust property for reinvestment and also allow preservation of the Legacy Tracts.

While such a solution might have been achievable by way of settlement, the Court is not in a position to do as Petitioner and Cross-Claimants request. No evidence whatsoever was presented regarding what tracts should belong to which trust. Similarly, no evidence was presented on whether the new trusts would possess sufficient assets and income to meet expenses, including distributions to income beneficiaries.

The Court declines to work such a substantial change on the Trust without the evidence necessary to evaluate the request.

VI. Award of Attorney's Fees

Finally, all Parties (Petitioner, Respondents, and Cross-Claimants) have asked the Court to order that their attorney's fees and costs incurred in connection with this litigation be paid from the Residuary Trust.

"The decision to award attorney's fees is a matter within the sound discretion of the trial judge and the award will not be reversed on appeal absent an abuse of discretion." *Marquez v. Caudill*, 376 S.C. 229, 246, 656 S.E.2d 737, 745-46 (2008) (citing *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76 (2006)). In this case, the same is true for the parties' experts and consultants who have been intimately involved throughout this matter. The factors used to determine a reasonable attorney's fee are: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991). "While 'contingency of compensation' is an appropriate factor considered in awarding attorney's fees, the contingency to be considered is whether the party on whose behalf the services were rendered will be able to pay the attorney's fee if an award is not made." *Marquez*, 376 S.C. at 246, 656 S.E.2d. at 746. "Further, the factor 'beneficial results obtained' merely aids in determining whether an award is appropriate when considering whether the services of a lawyer facilitated a favorable result." Id.

The South Carolina Trust Code also addresses the issue of attorney's fees and authorizes a court to award attorney's fees to be paid by a trust. For example, S.C. Code Ann. § 62-7-709 ("Reimbursement of expenses") provides that "[a] trustee is entitled to be *reimbursed out of the*

trust property for (1) expenses that were properly incurred in the administration of the trust." S.C. Code Ann. § 62-7-709(a) (emphasis added). Furthermore, S.C. Code Ann. § 62-7-816 ("Specific powers of trustee") provides that a trustee may "pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and all other expenses incurred in the administration of the trust." S.C. Code Ann. § 62-7-816(15).

Section 62-7-1004 provides:

> In a judicial proceeding involving the administration of a trust, 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 trust that is the subject of the controversy.*

S.C. Code Ann. § 62-7-1004 (emphasis added).

The South Carolina appellate courts have likewise endorsed the entitlement of a trustee to employ attorneys and to pay their fees from the assets of the trust. In *Rembert v. Gressette*, 318 S.C. 519, 458 S.E.2d 552 (1995), the circuit court held for the trustees in connection with certain beneficiaries' actions against the Trustees for alleged breach of fiduciary duty and mismanagement. In affirming the judgment of the circuit court in favor of the Trustees, the Court of Appeals of South Carolina approved of the trustees' having engaged an attorney to assist the trustees. The Court of Appeals, citing the stature of the attorney for the Trustees as a certified specialist in estate planning and probate law in South Carolina, detailed the five years of representation the attorney had provided the trustees, and the successful results the attorney had obtained, thus preserving trust assets. The court upheld the trustees' payment of the fees of trust counsel from the assets of the trust as well as the amount of those fees.

Courts have routinely awarded trustees their reasonable attorneys' fees under their state's counterpart to S.C. Code Ann. § 62-7-1004. *Garwood v. Garwood*, 233 P.3d 977, 985 (Wyo.

2010) ("[A] trustee should not be personally responsible for litigation expenses associated with the proper exercise of its official duties."); *Klinkerfuss v. Cronin*, 289 S.W.3d 607 (Mo. Ct. App. 2009) (awarding payment under Missouri's version of § 1004, "[o]therwise . . . the trustee would have to personally bear the expense for performing his duty to the trust"); *see also O'Riley v. US Bank NA*, 412 S.W.3d 400 (Mo. Ct. App. 2013) ("[A]n award of attorney's fees under section 456.10-1004 was proper where the litigation was brought and defended in good faith and there were issues raised which could only have been settled via judicial determination."); *In re Gene Wild Revocable Trust*, 299 S.W.3d 767 (Mo. Ct. App. 2009) (same).

Payment of a trustee's attorneys' fees and expenses out of trust assets is appropriate where such expenses were incurred in good faith, and for the benefit or preservation of the trust. *Rapp v. Rapp*, 562 N.W.2d 359, 362 (Neb. 1997); *see also Shriners Hosps. for Crippled Children v. Robbins*, 450 So. 2d 798, 802 (Ala. 1984) ("When litigation expenses are necessary for the proper administration, preservation, and execution of the trust, the attorney's fees incurred by the trustees are chargeable against the estate."); *In re IMO Trust ex rel. Gore*, C.A. No. 1165-VCN, 2013 WL 771900 (Del. Ch. Feb. 27, 2013) (approving payment of substantial fees to trustee's litigation counsel and holding that "[a] trust should pay its trustee's attorneys' fees and expenses when the attorneys' services were necessary for the proper administration of the trust or where the services otherwise resulted in a benefit to the trust."); *Rouner v. Wise*, No. WD75305, 2013 WL 3880150 (Mo. Ct. App. July 30, 2013) (finding trial court did not abuse its discretion in awarding attorney's fees in favor of defendants where it determined that complex issues raised in plaintiffs' petition were not frivolous and required judicial determination and that defendants incurred litigation expenses while carrying out duty to defend the trust); *Anselmo v. Guasto*, 13 S.W.3d 650 (Mo. Ct. App. 1999) (upholding award of attorneys' fees to trustee's litigation counsel where services

performed by the attorneys were for the benefit of the trust); *Matter of Great Northern Iron Ore Properties*, 311 N.W.2d 488 (Minn. 1981) (same); *Nickas v. Capadalis*, 954 S.W.2d 735 (Tenn. App. 1997) ("In an action involving a trust, the award of attorney's fees from the trust corpus is permitted only when the services of such attorneys inure to the benefit of the entire estate as distinguished from services rendered to benefit one or more of the individuals interested in the trust.").

The Court finds that the South Carolina Trust Code and the Will of L.W. Boykin, II authorize lawyers and professional consultants to be hired by the Co-Trustees of the Residuary Trust, and to be compensated from trust principal or income or both. S.C. Code Ann. §§ 62-7-709 ("Reimbursement of expenses"), 62-7-816 ("Specific powers of trustee"), 62-7-1004 ("Attorney's fees and costs"). Specifically, Item XIV, Paragraph J of the Will provides that Co-Trustees are authorized to employ and compensate, out of the principal or income of the Residuary Trust, agents, accountants, brokers, attorneys, tax specialists, and their assistants, advisors deemed needful for the proper management, handling and administration of the Residuary Trust, provided such professional representatives are selected and retained with reasonable care. Additionally, Item XIV, Paragraph N of Decedent's Will grants the Co-Trustees "the authority to do all things and the right to exercise all powers reasonably necessary or incidental to the proper management" of the Residuary Trust.

The Court finds that the attorneys' and consultants' fees incurred by all the parties in this case have been occasioned by their attempt to manage and operate the Trust, and therefore those are valid fees chargeable to the Trust. Accordingly, the court must now apply the relevant Glasscock factors to determine the reasonableness of these fees being awarded from the assets of the Trust.

At the close of the trial of this case, the Court requested that counsel for the parties submit affidavits of attorneys' fees and costs. The Court has reviewed those affidavits, the supporting documentation provided therein, the law regarding awards of attorneys' and consultants' fees, and finds as follows:

A. Petitioner is entitled to $593,878.20 to be paid in attorneys' and consultants' fees and costs from the Trust.

Petitioner's team of legal counsel and experts consisted of Richard S. Rosen, Esquire, and Liam D. Duffy, Esquire, whom are both experienced, skilled attorneys, of high professional standing in the community and in good standing with the Bar of this State. In addition, Peitioner employed James C. Hardin, III, Esquire, William H. Harrison, Jr., and Richard C. Tiller as consultants to advise Petitioner as Trustees and testify at the trial of this matter. The fees charged in this matter were on an hourly basis and not based upon a contingency of compensation. Upon review of the affidavits submitted by Petitioner, the Court finds the hourly fees charged by Petitioner's counsel are of those customarily charged in the locality for similar legal services.

A review of the billing records submitted by Petitioner clearly indicates that they are properly detailed and that the time and labor spent by Petitioner's counsel is both reasonable for the effort required to litigate this case and was not duplicative. This was a case of complex nature, involving nuanced legal issues related to fiduciary management, prudent investment, appropriate beneficiary distributions, conflicts of interest, powers and duties of trustees, and other matters made even more challenging by the highly contentious nature of this litigation.

Unfortunately, the beneficial results obtained by counsel for Petitioner do not warrant the full award of fees being sought. Petitioner was unsuccessful in each of his causes of action. Instead, Petitioner is now being removed as Trustee. Additionally, the Court finds that the fees sought for Mr. Hardin are excessive in light of his contribution to the development of this action.

Mr. Hardin's testimony at trial was limited and much of his advice to Petitioner runs completely contrary to the Court's interpretation of the applicable law.

Based on the foregoing, the Court finds that the fees sought by Petitioner to be paid by the Trust are unreasonable in light of the Glasscock factors and the amount to be paid by the Trust must be reduced. Accordingly, the Court orders that the fees sought in connection with Mr. Rosen and Mr. Duffy's representation should be reduced by 20%, but that the costs associated with the same be paid in full. The Court further orders that the fees sought in connections with Mr. Hardin's representation should be reduced by 50%. The remaining consultant fees related to Mr. Harrison and Mr. Tiller's work for Petitioner shall be paid in full.

B. Respondents are entitled to $729,614.06 to be paid in attorneys' and consultants' fees and costs from the Trust.

Respondents team of legal counsel consisted of James Y. Becker, Esquire, Robert L. Reibold, Esquire, and Mary Cothonneau Eldridge, Esquire, all of whom are experienced, skilled attorneys, of high professional standing in the community and in good standing with the Bar of this State. Respondents also employed John R. Helms and Cheryl Holland as consultants to advise Respondents as Trustees and testify at the trial of this matter. In addition, Respondent Belger is seeking reimbursement of fees she paid to Nelson Mullins, LLP, Siddons Law Firm PC, and Bundy McDonald LLC for legal services they rendered to her in connection with her duties as a Trustee. The fees charged in this matter were on an hourly basis and not based upon a contingency of compensation. Upon review of the affidavits submitted by Respondents, the Court concludes that the hourly fees charged by Respondents counsel are of those customarily charged in the locality for similar legal services.

A review of the billing records submitted by Respondents clearly indicates that they are properly detailed and that the time and labor spent by counsel is both reasonable for the effort

required to litigate this case and was not duplicative. As previously noted, this was a case of complex nature, involving nuanced legal issues related to fiduciary management, prudent investment, appropriate beneficiary distributions, conflicts of interest, powers and duties of trustees, and other matters made even more challenging by the highly contentious nature of this litigation.

Counsel for Respondents obtained substantial beneficial results for their clients. Respondent's counsel was able to successfully defend each of the claims brought against their client and successfully pursue the removal of Petitioner as Trustee. Based on the foregoing, the Court finds that the fees sought by Respondents are reasonable in light of the Glasscock factors and orders that the fees sought by Respondents be paid in full from the assets of the Trust.

C. Cross-Claimants Whit Boykin and May Cantey Boykin are entitled to $106,343.53 to be paid in attorney's fees and costs from the Trust.

Cross-Claim Respondents Whit Boykin's and May Boykin's attorney, William S. Tetterton, Esquire, is an experienced, skilled attorney of high professional standing in the community and in good standing with the Bar of this State. The fees charged in this matter were on an hourly basis and not based upon a contingency of compensation. The hourly fees charged by Mr. Tetterton are of those customarily charged in the locality for similar legal services. A review of the billing records submitted by Respondents Whit Boykin and May Boykin clearly indicates that they are properly detailed.

However, the Court finds that the time and labor spent by their counsel was excessive in light of the limited role that counsel played in this action. Specifically, counsel for Cross-claimants largely adopted the positions taken by Petitioner. Further, counsel for Cross-claimants was unable to obtain any significant beneficial results on behalf of his clients.

Based on the foregoing, the Court finds that the fees sought by Cross-Claimants to be paid by the Trust are unreasonable in light of the Glasscock factors and the amount to be paid by the Trust must be reduced. Accordingly, the Court orders that the fees sought in connection with Mr. Tetterton's representation should be reduced by 50%, but that the costs associated with the same be paid in full.

CONCLUSION

Based on the foregoing, the Court:

1. Grants judgment against Petitioner on his third cause of action for a declaration that he should have pre-eminent authority over his Co-Trustees. The law does not authorize the requested relief;

2. Grants judgment against Petitioner on his fourth cause of action for modification of the Trust. There is no change of circumstances sufficient to warrant the modification of the Trust sought in Petitioner's pleadings;

3. Grants judgment against Petitioner on his Fifth Cause of Action for removal of Respondents Wortley and Belger as Trustees;

4. Grants judgment against Cross-Claimants on their claim for removal of Respondents Wortley and Belger as Trustees; and

5. Grants judgment for Respondents Wortley and Belger and the interveners on their request to remove Petitioner as a Trustee. Petitioner Rigdon Boykin is removed as a Trustee of the Residuary Trust effective immediately. The Court hereby proposes to appoint Cheryl Holland to fill the vacant Trustee position. Ms. Holland shall notify the Court in writing within 30 days if she accepts this position as Trustee. If Ms. Holland rejects this position, each party shall submit a proposed replacement to fill the final vacant Trustee position and the Court shall choose a

replacement from these proposals. Parties shall submit their proposed replacement in writing within 30 days of the date of Ms. Holland's letter rejecting the position. If the delay in filling this position interferes with administration of the Trust, any Trustee or beneficiary may petition the Court to appoint a special fiduciary until such time as a formal replacement for Petitioner can be instated.

6. Relieves court-appointed trust counsel, Benjamin R. Gooding, Esq., from his duties to the Trust under the Court's May 2, 2018 Order upon the appointment of a successor trustee to Petitioner. Mr. Gooding is instructed wrap up any outstanding work related to his court-appointed representation of the Trust. Additionally, Mr. Gooding may, at the request of the Trustees, continue to do work for the Trust outside of his court-appointed capacity.

6. Grants the Parties request for reimbursement of attorney's fees to the counsel and experts from the Residuary Trust as follows:

a. To Petitioner in the amount of $593,878.20;

b. To Respondents in the amount of $729,614.06; and

c. To Cross-Claimants in the amount of $106,343.53.

AND IT IS SO ORDERED.

The Honorable Jean H. Toal
Presiding Judge

May ___, 2019

Kershaw Common Pleas

Case Caption: Rigdon Boykin Co-Trustee , plaintiff, et al VS Mary Deas Wortley , defendant, et al

Case Number: 2017CP2800831

Type: Order/Civil Judgment

IT IS SO ORDERED.

s/ Jean H. Toal #2758