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SC Court of Appeals

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

Appellate Case No. 2019-001632

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,.....Appellant-Respondent

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,

Of whom Mary Deas Wortley and Alice B. Belger are ..... Respondent-Appellants

And

Lemuel Whitaker Boykin, III, and May Cantey Boykin are..... Respondents.

FINAL BRIEF OF APPELLANT-RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

This action arises from a dispute over the management of a testamentary trust worth roughly $20 million to $30 million. The administration of the trust is beset with an inherent conflict of interest that was not remedied below. The trust has four lifetime income beneficiaries, the children of the testator, and provides that any children of those four beneficiaries (testator's grandchildren) will receive all trust assets when the last of the four income beneficiaries dies. Two of the income beneficiaries are the Respondent-Appellants and have children. They are also both trustees. The other two income beneficiaries do not have children and will not have any, due to their age. Neither of them is a trustee. The trust had one additional trustee, Appellant-Respondent, who was independent and not a beneficiary.

The impasse that led to this litigation concerned the speed at which the trust should diversify assets – 90% of which is currently held in real estate – by liquidating a portion of those real estate assets to meet its obligations and provide support to the income beneficiaries. Respondent-Appellants, whose children stand to inherit assets not liquidated, opposed virtually all efforts to liquidate and diversify trust assets, or even to create a plan for liquidation. Appellant-Respondent supported such efforts. The court below resolved the impasse by removing Appellant-Respondent as a trustee and appointing a trustee who was the hired consultant of Respondent-Appellants. The court did not effect a lasting peace, however, as it might have done by either dividing the trust or replacing all the trustees. The issues presented are as follows:

1. Did the trial judge err by failing to adopt the most equitable resolution of splitting the trust in two – one for Respondent-Appellants and their children and one for the two income beneficiaries without children – which would have eliminated the conflict of interest inherent in

Respondent-Appellants' position, or in the alternative eliminated the conflict of interest by removing Respondent-Appellants and appointing independent trustees?

2. Did the trial judge err by failing to determine the net asset value of the trust in order to have some measure by which to determine the amount of a reasonable distribution to the lifetime income beneficiaries?

3. Did the trial judge err in making findings of fact against Appellant-Respondent that are not supported by the weight of the evidence?

STATEMENT OF THE CASE

Appellant-Respondent Rigdon H. Boykin ("Rigdon") submits this Amended Brief to comply with this Court's Order of May 22, 2020, granting Respondents-Appellants' motion to strike. The only explanation of the rationale of the Court's Order is a citation to Rule 210, SCACR, and the parenthetical notation, "providing the record on appeal shall not include any matter that was not presented to the lower court." For the reasons stated in Rigdon's Return in Opposition to Motion To Strike, the material at issue in the motion was presented to the lower court, and thus may be included in the record on appeal. More importantly, what was at issue in the motion to strike are all public court filings, which may be referred to in a party's brief aside from the question of whether they should or should not be in the record on appeal. Rigdon respectfully submits that it was error for this Court to order portions of this brief to be stricken, when the matters at issue are public court records and this Court has not had the opportunity to read the briefs and record in full in order to evaluate their significance to the issues in this appeal. Accordingly, and with respect, Rigdon submits this Amended Brief under objection and with full reservation of rights.

This case arose from an impasse among the three original trustees of the Lemuel Whitaker Boykin, II Residuary Trust (the "Trust"). Rigdon was one of the original trustees. The other two original trustees were Respondent-Appellants Mary Deas Wortley ("Wortley") and Alice B. Belger ("Belger"). Respondents Lemuel Whitaker Boykin, III ("Whit") and May Cantey Boykin ("May") are lifetime income beneficiaries of the Trust, along with Wortley and Belger.

Wortley is the daughter of Lemuel Whitaker Boykin, II, from his first marriage. Belger, Whit, and May are the children of Mr. Boykin's second marriage.

The Trust provides that upon the death of the last survivor of Mr. Boykin's four children, their respective children will inherit the assets remaining in the Trust at that time. Whit and May

do not have children. Wortley and Belger do; hence their respective children are remainder beneficiaries of the Trust. Rigdon was the only one of the three original trustees who had no personal financial stake in the operation or financial results of the Trust or the manner or timing of distributions from it.

On August 23, 2017, acting as the sole disinterested and non-beneficiary trustee, and following a protracted period of paralysis resulting from the Trustees' disagreement over whether and how to liquidate trust real estate in order to diversify the trust and provide cash for distribution to the income beneficiaries of the Trust, Rigdon filed this action in the Probate Court for Kershaw County. The original Petition asked the Court to resolve the trustees' impasse by determining various questions arising from the administration of the Trust and by instructing the trustees in the discharge of their fiduciary duties. (R. pp. 83-130) Rigdon amended his Petition on May 7, 2018, adding claims for modification of the Trust and for removal of Wortley and Belger as co-trustees. (R. pp. 298-345)

Respondents Whit and May filed an Answer admitting the material allegations of Rigdon's Petition and asserting cross-claims against Wortley and Belger for negligence and breach of fiduciary duty, wherein they requested that Wortley and Belger be removed as trustees. (R. pp. 151-64)

In their original and amended Answers to Rigdon's Petition, Wortley and Belger denied the material allegations of the Amended Petition, asserted various affirmative defenses, and alleged a counterclaim for removal of Rigdon as trustee. (R. pp. 216-27; *see* R. pp. 686-700, 810-23)

The initial Probate Court action was removed to Circuit Court on September 1, 2017. (R. p. 1) On January 8, 2018, the Circuit Court entered an order granting Rigdon's motion to designate

the matter as complex. In so doing, the Court assigned the case to Acting Circuit Court Judge Jean H. Toal. (R. pp. 2-3) Following a hearing on January 24, 2018, Judge Toal entered an Order denying Respondents Wortley's and Belger's Motions to Strike portions of Rigdon's Petition and granting Rigdon's Motion for Attorney's Fees. In her Order, Judge Toal specifically 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. [T]he Court shall defer making a ruling as to the reasonableness of any fees incurred … so that the Court may consider any allegations that the fees incurred to date have been improper. However, nothing in the record indicates that Petitioner has done anything to benefit himself, or that the efforts resulting in attorney's and consultant's fees have been for any purpose other than to benefit the Trust.

(R. p. 5 (bullets omitted); *see also* R. pp. 165-78)

The trial of the case commenced on July 9, 2018, and testimony was completed on September 28, 2018.[1] Following the trial, Judge Toal allowed Rigdon to take and submit the deposition of William Harrison, an expert on the valuation and prudent management of the Trust assets, and allowed Wortley and Belger to submit additional affidavits and reports from their expert John Helms.

Judge Toal entered a Final Judgment on May 24, 2019. (R. pp. 9-71) In essence, the Final Judgment adopted the trust management plan put forth by Wortley and Belger's expert witnesses, John Helms and Cheryl Holland, and ordered the removal of Rigdon as trustee. While making a number of findings adverse to Rigdon's position in the litigation, Judge Toal nonetheless found that Rigdon had brought the action in good faith and that the trust management plan proposed by

[1] The trial spanned a total of four days: July 9, July 10, September 27, and September 28, 2018.

Wortley and Belger would not have been developed had they not been pressured to act by Rigdon's action in bringing the litigation. (R. pp. 64-65; *see also* R. p. 80)

Rigdon filed a timely Motion To Alter or Amend *pro se* on June 3, 2019. (R. pp. 839-44) Subsequently, the undersigned filed a Notice of Appearance as additional counsel for Rigdon and refiled the Motion To Alter or Amend over their signatures on June 13, 2019. (R. pp. 845-949) Rigdon filed a supplemental memorandum in support of the Motion To Alter or Amend, urging the trial court to reconsider splitting the trust as the most equitable and effective long-term solution to the parties' disagreements. (R. pp. 887-93)

The trial judge denied Rigdon's motion on August 28, 2019, concluding that Rigdon could not file the motion *pro se* and that the later re-filing of it by counsel was untimely, but also addressing and rejecting Rigdon's arguments on the merits. (R. pp. 72-82) In its Order, the Court also rejected Wortley and Belger's motion to set aside the attorneys' fee award in Rigdon's favor. In so doing, the Court expressly found that, although the Court had ruled against Rigdon on the merits, Rigdon had pursued the action in good faith and that the action benefited the Trust by causing the Trustees to develop a comprehensive long-term plan for the management of the Trust's assets. (R. p. 80)

Rigdon filed his Notice of Appeal on September 25, 2019. (R. pp. 5776-79) Wortley and Belger filed a Notice of Cross Appeal on September 30, 2019. (R. pp. 5780-83)

STATEMENT OF THE FACTS

Background

Lemuel Whitaker Boykin, II ("Decedent"), was a resident and citizen of Kershaw County, South Carolina, at the time of his death on December 19, 1989. Decedent's Last Will and Testament (the "Will") provided for the creation of two separate trusts: the Lemuel Whitaker

Boykin, II Marital Deduction Trust and the Lemuel Whitaker Boykin, II Residuary Trust. (R. pp. 2449-73)

Pursuant to an Order entered by the Probate Court in 1991, the Marital Deduction Trust was split into two trusts, Marital Deduction Trust A and Marital Deduction Trust B (hereinafter collectively the "Marital Deduction Trust"). The Residuary Trust was likewise split into two trusts, Residuary Trust A and Residuary Trust B (hereinafter collectively the "Residuary Trust" or the "Trust"). (R. pp. 4917-26)

Decedent was survived by his four children and his spouse, Alice Shoolbred Boykin ("Alice Boykin"), who was also a resident and citizen of Kershaw County, South Carolina. Alice Boykin died on August 8, 2016. Upon the death of Alice Boykin, the remaining assets of the Marital Deduction Trust were transferred as a matter of law into the Residuary Trust pursuant to Item VII of Decedent's Will.

The lifetime beneficiaries of the Residuary Trust are as follows:

a. Mary Deas Wortley ("Mary Deas" or "Wortley"), Decedent's eldest daughter from his prior marriage. Wortley is a resident and citizen of the State of Ohio and has three (3) children and six (6) grandchildren, none of whom live in South Carolina. Wortley is seventy-six (76) years of age.

b. Alice B. Belger ("Alice" or "Belger"), Decedent's and Alice Boykin's daughter. Belger is a citizen and resident of Kershaw County, South Carolina, and has one (1) daughter with her husband, Wayne Belger. Alice Belger is fifty-eight (58) years of age. She is presently renting the "Millway Plantation" home (formerly her parent's home) from the Residuary Trust.

c. Lemuel Whitaker Boykin, III ("Whit"), Decedent's and Alice Boykin's only son. Whit is a citizen and resident of Kershaw County, South Carolina, and has no spouse and no children. Whit is fifty-seven (57) years of age. He is presently living in a house owned by the Trust which has mold and water leakage problems.

d. May Cantey Boykin ("May") is Decedent's and Alice Boykin's youngest daughter. May is a citizen and resident of the State of New York and is married but has no children. May is fifty-six (56) years of age.

Decedent's Will provides that these four beneficiaries shall receive from the Residuary Trust, in reasonably equal shares, all of the Trust's net income for their "medical care, comfortable maintenance, welfare and education." (R. p. 2455) Further, the Will provides that these beneficiaries may receive such sums from the principal of the Residuary Trust that shall be necessary for their "medical care, education, support and maintenance, and reasonable comfort." (R. p. 2456)

The Residuary Trust is a "one-generation" trust, meaning that upon the death of the last to survive of the four above-named beneficiaries, the Residuary Trust will terminate and its assets will be distributed to the issue of those four beneficiaries. (R. p. 4935) There is, therefore, a substantial difference between the expectations and beneficial interests of the beneficiaries of the Residuary Trust, in character as well as amount. On one hand, Wortley and Belger have children who stand to inherit all of the remaining assets of the Residuary Trust upon the death of the Residuary Trust's four named beneficiaries. On the other hand, Whit and May do not have children (and are extremely unlikely to have children given their ages), and therefore their interests in the Residuary Trust are limited to distributions made to them during their lifetimes.

In Item VIII of his Will, Decedent appointed his wife, Wortley, and Rigdon as trustees of the Residuary Trust. When Alice Boykin died on August 8, 2016, her daughter, Belger, succeeded her as trustee of the Residuary Trust. (R. pp. 4217-18)

Rigdon is a cousin of Decedent and grew up very closely involved with Decedent and his family, including living with Decedent and his family for periods of time. (R. pp. 1329-31) Rigdon received an undergraduate degree from the University of South Carolina and a law degree from the University of South Carolina School of Law. (R. pp. 1330, 1332) After graduation from law school, Rigdon moved to New York where he worked for a several large law firms in New

York City for thirty-three (33) years, gaining considerable business and legal experience representing companies in the forest products industry and energy sector. (R. pp. 1330-32) In addition, Rigdon has served for more than twenty-five (25) years as the co-trustee of a multi-million dollar, out-of-state trust organized under New Jersey law. (R. pp. 1336-37) When Decedent executed his Last Will and Testament, he was cognizant of Rigdon's specialized skills and experience, and relied upon those skills when he named him as a trustee of the Residuary Trust. (R. pp. 1342-43, 1255:14-22) Upon retirement, Rigdon returned to the Boykin area of South Carolina, where he now lives with his wife.

Relevant Provisions of Decedent's Will

Fundamentally, the present controversy involves the management, preservation, and disposition of estate assets which are held in the Residuary Trust. In particular, the issues before the trial court concerned how the Residuary Trust has been managed in the past, and how it will be managed in the future in light of preserving and diversifying the assets of the Trust and the need to maximize growth, minimize risk, and make the assets income-producing.

Much of the parties' dispute arises from the application of Item X of the Will. That section provides in relevant part:

> ITEM X: It is my desire, but I do not direct, that certain tracts or parcels of real property located in the State of South Carolina and presently owned by me or by corporations the stock of which is owned in whole or in part by me, namely Millway Plantation (consisting of approximately 884 acres), the "Laney Tract" (consisting of 101 acres), Broadview Plantation (consisting of approximately 324 ½ acres), the "Swamp Tract" (acquired from my mother and consisting of approximately 416 acres), the "Cantey Tract" (consisting of approximately 140 acres) and the "Gillis Tract" (consisting of approximately 112 acres), shall to the fullest extent possible be preserved for the benefit of or transferred to my children or their issue. However, if any or all of these parcels must be sold, they should be sold in the following order:
>
> (1) Swamp Tract
> (2) Broadview Plantation, Cantey Tract, Gillis Tract

(3) Millway Plantation and Laney Tract

> Any sale or mortgage of these parcels (exclusive of timber rights) must be by unanimous consent of the Trustees after consultation with and approval of a majority of the four (4) named beneficiaries of this trust unless any be not sui juris in which event approval is waived.

(R. pp. 2457-58) The properties listed in Item X of Decedent's Will are hereinafter referred to as the "Item X Properties."

In Item XIV of his Will, Decedent imposed upon his fiduciaries a standard of prudent investment consistent with long-standing South Carolina law. In that provision, Decedent granted his personal representatives and trustees various powers, including the power "to invest and reinvest the property of the estate or trust in such manner as men of prudence exercise in the management of their own affairs." (R. p. 2462)

Another provision of Decedent's Will that caused consternation and difficulty in the administration of the Residuary Trust is the requirement under Item XIV that any decisions "with respect to any real property" be made by a unanimous vote of the trustees. (R. pp. 2461-62 (emphasis added); R. p. 5046; R. pp. 5005-06; R. p. 4278; *see also* R. pp. 2002:05–14, 2011:12–20 (K. Thomas testifying that the unanimous voting provision has contributed to the present impasse)). This provision of the Will creates a logical impossibility in the event of any disagreement among the trustees on whether to sell or retain a tract of property. In that situation, it is impossible to comply with the Will no matter what is done. This logical dilemma arises because Item XIV of the Will requires unanimity among the trustees either to sell or to retain real property:

> Item XIV: My Personal Representatives and Trustees, respectively, are authorized in their absolute discretion with respect to any real property, by unanimous vote …:
>
> A. To sell, transfer and convey the whole or part of the property …

…

B. To retain any of the original property constituting the estate or trust ….

(R. pp. 2461-62)

If the trustees cannot agree on whether to sell or retain certain property, retaining it violates the requirement of unanimity just as much as does selling it. No matter what they do, the trustees who constitute the majority will be in violation of the Will as they will be either retaining or disposing of real property without unanimous agreement.

Administration of the Residuary Trust

Promptly after the death of Alice Boykin, Rigdon raised the issues of diversification and lack of liquidity with Wortley and Belger, and he continued to emphasize his concerns about the ability of the Residuary Trust to meet its financial obligations unless the trustees effected dramatic changes to the makeup of the Trust's asset portfolio. The root cause of these concerns was that the Trust was worth a great deal but was cash poor and predominantly invested in illiquid real estate. Thus, real estate needed to be marketed and sold quickly, or the Trust would soon be in a cash crisis.

Early in the administration of the Residuary Trust, in an effort to solve what he viewed as a serious problem regarding the Trust's ability to meet its financial obligations including expenses, distributions, and principal accretion, Rigdon proposed that he, as non-beneficiary trustee, would "vote in favor of the trust selling Mary Deas the Millpond and however much land she wanted around it, including some or all of downtown Boykin. And I would let Little Alice buy Millway[2] and as much land as she wanted to buy around Millway." (R. p. 1346:05–10) Rigdon further

[2] "Millway Plantation," which is one of the Item X Properties, is the former marital home of Decedent and Alice Boykin, and is the current home of Belger and her husband.

suggested that the Trust could finance their purchases of these properties with loans of up to $1.5 million each, but explained that the properties would have to be sold to them at fair market value, and since this was a self-dealing transaction, the deal would have to be approved by the other beneficiaries. (*Id.*; *see also* R. pp. 5255-56, ¶¶ 6-8)

Wortley agreed to Rigdon's proposal, and Belger was initially interested as well. (R. pp. 1234:03–15, 1348-58; R. p. 3010; R. p. 5014; R. p. 5256 ¶ 8) During this time, and until approximately November 2016, the trustees and Karen Thomas, who at that point was serving as independent trust counsel, got along well and trust business generally was proceeding without significant issues. Rigdon believed there was "an agreement to liquidate over time a bunch of property" and thus the Residuary Trust would be able to meet its financial demands, including the payment of estate taxes, reasonable distributions to lifetime beneficiaries, and growth in the Trust corpus. (R. p. 1348:18–19)

Thus, in the fall of 2016, Rigdon, with the consent of his co-trustees, began speaking to owners of neighboring properties (some of whom were distant family members) to see if they might be interested in purchasing abutting properties owned by the Residuary Trust. Problems amongst the trustees began to arise because of Belger's misunderstanding of the meaning of "fair market value" as it related to land that she desired to purchase from the Residuary Trust. (R. pp. 1346:06–21, 1353:01-1355:10; *see also* R. pp. 5036-60) Belger supported the sale of such properties early on, in the fall and winter of 2016, when she was under the misimpression that she would be able to purchase them at prices substantially below market. It was only when Belger realized that this would not be allowed that she objected to the sale of this land to her and the sale of land to Wortley. (R. pp. 1365-67; R. pp. 5256-58 ¶¶ 10-15)

What is more, in early 2017, Belger withdrew her consent to market those properties for sale to any third-parties, including family members. (*See* R. pp. 4017-18 (authorizing sale); R. pp. 4024-26 (summarizing March 2, 2017, meeting and stating, "Alice is withdrawing her consent to sell at this time."))

In response to their opposition to sell, Rigdon repeatedly requested from Wortley and Belger a written formulation for how the Residuary Trust might meet its present and future financial obligations given the Residuary Trust's lack of liquidity. For example, Rigdon sent an email to Wortley and Belger, stating: "[W]e need to have a long range plan to diversify trust assets and create trust liquidity to pay trust expenses such as Hawthorne construction costs, property taxes, estate taxes and make distributions to income beneficiaries." (R. p. 3264) Similarly, Rigdon wrote the following to Karen Thomas:

> The Trust will be worth between 20 and 26 million dollars. Let us assume the lowest estimate, $20,000,000. It should generate a minimum of $600,000 for the benefit of the income beneficiaries. The Trust will also have expenses – taxes, management fees, legal fees, and other expenses. Based on my experience with other trusts, I estimate these expenses will be $200,000 at a minimum. Consequently, the Trust will need to generate a minimum yearly income of $800,000 per year and should also have enough left over to provide growth for the remainder men.

(R. pp. 4030-31; *see also* R. pp. 3282-84 (May 11, 2017, Email between Rigdon and K. Thomas))

Notwithstanding these repeated entreaties, Wortley and Belger did not propose a plan or even an approach to diversifying the assets of the Trust until the eve of trial.

Another issue with which the trustees were forced to wrestle during this time was that the Residuary Trust would have very little or no net income available for beneficiary distributions. As Wortley testified, "the net income is not necessarily the proceeds from the sale of timber. All of that has to be from the IRS point of view attributed to principal." (R. p. 1260:08–11; R. pp. 3034-35, 3038-39)

On March 20, 2017, Rigdon again put his concerns in writing. (R. p. 4063) Petitioner's Exhibit 154 is an email from Rigdon to Wortley and Belger, where he writes:

> Alice and Mary Deas,
>
> > Now that we have most of the appraisals and Karen is going to give us preliminary views of the taxable estate and size of the trust, it is time for us to begin making a plan for achieving diversification in the trust assets and the income necessary for paying taxes, trust expenses and distributions to the income beneficiaries. It would tremendously assist me in considering alternatives if you would let me know on Thursday if and to what extent you want to purchase Millway, the pond and/or Downtown Boykin. No decision will be considered by me as a decision not to proceed and I will withdraw my offer to try to accommodate such a transaction so that we can make progress on being responsible fiduciaries.

(R. pp. 5015-16)

Wortley Trial Exhibit 47, an April 13, 2017 email from David Siddons, Esquire (who at the time was serving as counsel to Belger) summarizes the trustees' meeting of March 23, 2017, and outlines various issues and concerns at that time. It is apparent from Mr. Siddons' email, which is dated four (4) months prior to the institution of this action, that the trustees viewed court intervention as necessary to resolve their differences. (R. pp. 5015-16 ("Mary Deas does not want to sell Sumter Mountain until after the judge makes her ruling" and "Alice and Mary Deas want to hold property until the judge rules and perhaps hold under timber management program.")) All of the meetings of the trustees of the Residuary Trust from May 2017 forward were recorded by the parties, and written transcriptions of those meetings were put in evidence as Petitioner's Exhibits 120 through 127, and 161. The trustee meeting transcripts contain compelling evidence of an impasse amongst the trustees prior to the institution of this action by Rigdon. (*See* R. pp. 3397-99, 4077-4138)

The gist of the impasse was that Rigdon felt all along that a large percentage of the Trust's land should be sold and diversified into other assets, whereas Wortley and Belger wanted as much

of the land as possible to be retained, and not just the Item X Properties but also so-called "Family Legacy"[3] properties and other timberland properties. The trial record and transcripts of trustee meetings reveal that Rigdon made numerous efforts to explain to his co-trustees why, in his view, their proposed course would not allow the Residuary Trust to operate in a prudent fashion, because the vast majority of the Trust assets (as much as 90%) were in the form of unproductive or underproductive land that would not generate enough income to cover the expenses and liabilities of the Trust and have any money left over for reasonable distributions to the lifetime beneficiaries. As he put it:

> The biggest issue was the pieces of property and assets held by the trust generated a very minimal amount of income, and that income was so low that if we did the kinds of maintenance that should be done on the downtown Boykin area, the commercial buildings, everything else, there would be virtually no money left for distributions to anyone. And the way I looked at it, the trust would go down in value every year if we made any minimum distributions.
>
> …
>
> The will says you should distribute net income, at least, yearly, and it was clear to me that there would be virtually no net income to distribute. So we had discussions about that at the very first – I think it was at the very first meeting. It could have been at the second meeting.
>
> … and because of that, I told them I was willing to utilize what is known as the power to adjust [between principal and income].

(R. pp. 2159:21-2160:23) To make matters worse, the Item X Properties are the most unproductive properties, and they include buildings and structures that are in substantial disrepair and would require significant expenditure to maintain. (*See* R. pp. 1629:6-1631:24, 1638-40; R. pp. 2174-75)

[3] "Family Legacy Properties" is a phrase used by Wortley's, Belger's, and the Intervenors' real estate appraisal consultant, John R. Helms, to refer to Item X Properties and in addition those properties which "adjoin or complement" them.

This was a fundamental economic problem that could be solved only by selling land and investing the proceeds in more liquid assets like stocks and bonds. The trustee meetings and Court record are replete with evidence that Rigdon performed a number of financial analyses and produced various models to assist in demonstrating to his co-trustees that there was not enough money to retain all of the properties Wortley and Belger desired to keep. (*See, e.g.,* R. pp. 2159-62, 2968-3307, 3280-81, 3297-98, 3394-95, 3397-99, 4077-4138, 5254-60, 5304-10, 5357-63) For example, at a meeting of the trustees with independent trust counsel, Tina Cundari, Esquire, on May 17, 2018, Rigdon made reference to the "Plan Comparison" which is marked as Petitioner's Exhibit 5, and demonstrated that, under Wortley's and Belger's plan, the corpus of the Residuary Trust would be substantially depleted over time. (R. pp. 4122-24, 4131-37)

In the face of Wortley's and Belger's opposition to selling land, Rigdon repeatedly asked them to present a plan to show how they could retain the land they wanted, meet the financial obligations of the Trust, and have cash for reasonable distributions to the income beneficiaries. Despite the repeated requests from Rigdon, Wortley and Belger did not produce a plan for the financial management of the Residuary Trust until April of 2018, eight months after Rigdon filed this lawsuit and *two months before the start of trial*. In their pleadings and testimony at trial, all parties agreed in principle that the assets of the Residuary Trust needed to be more diversified than the current portfolio, of which approximately 90% is real estate in three counties in South Carolina. (*See, e.g.*, R. p. 3311) In other words, all the eggs were in one basket, a basket highly at risk of loss from a natural disaster like a hurricane, pests like the pine beetle, or a downturn in the timber market. While Wortley and Belger gave lip service to the need for diversification, only two pieces of property representing about 1% of the value of the Trust had been sold as of the time of trial – and the situation remains essentially the same as of the time of the writing of this brief (*see* R. pp.

1298:21-1299:8, 1390:25-1391:13, 1460-61) – notwithstanding the undeniable situation of the Trust's not having sufficient cash to meet its obligations.

By mid-2017, matters had come to a head. Jane Peacock, a Certified Public Accountant for the Residuary Trust, testified that by the spring of 2017, the Residuary Trust was having trouble making payments of expenses from income. (R. pp. 2899-2900, 2906:04–08) She further described assisting Rigdon with preparing some illustrations or projections of an "as-is" scenario for the Residuary Trust, as contrasted with a "land sale" or diversification scenario. (R. p. 2911) According to Ms. Peacock, under the "as-is" model, which assumes no significant change in the makeup of the assets of the Trust, the principal balance of the Trust would decline significantly every year, and would eventually go into a deficit. (R. pp. 2911-16; *see also* R. p. 2926:18–20, 2968-3007)

On March 31, 2017, Ms. Peacock wrote to Wortley and told her that "we are going to be scraping the bottom again after paying all of the bills presented for approval. They will absorb the wired funds, as well as most of the farm rent just received (approx. $35k). It seems prudent to me to go ahead and get another $50,000 from the brokerage funds." (R. p. 4065) On that same day, Wortley informed Ms. Peacock of the fact that the trustees were going to have to go to court to resolve their differences, and that Wortley was relieved by that proposition. (*See* R. pp. 4066-67) George Bailey, a lawyer who served as counsel to Alice Boykin, also viewed court intervention as a positive step for the trustees of the Residuary Trust. (R. p. 4062)

Unfortunately, and over Rigdon's repeated and vocal opposition, beginning around this time Wortley and Belger refused to meet and adopted an approach of simply saying no to whatever he suggested. They repeatedly called off trustee meetings, such that not a single meeting was held for approximately five months from May through October of 2017. (R. pp. 1370-71, 5257-58 ¶

15) The trust was in paralysis, frozen by Wortley and Belger's refusal to give serious consideration to selling land in order to generate much needed cash, their refusal or inability to present an alternative plan for maintaining the ability of the trust to meet its obligations and make reasonable distributions to the lifetime beneficiaries, and their refusal even to meet.

Rigdon continued to press for a path forward. Karen Thomas, a lawyer in Columbia who previously served as counsel for all three trustees of the Trust, testified that, on numerous occasions, Rigdon proposed that the Residuary Trust be split into multiple trusts so as to resolve the impasse amongst the trustees. (R. pp. 2010:19-2011:07; *see also* R. pp. 3956-59, 4129-4130) According to Ms. Thomas, at the time those proposals were made, she viewed a division of the Trust as a reasonable solution to the parties' impasse and advised the trustees that they could petition the Probate Court for such relief. (R. pp. 2010:19-2011:20; *see also* R. pp. 5057-58, 4129-30) Wortley and Belger, however, opposed the idea solely because they did not want to have to shoulder all of the expense of the unproductive property they wanted to keep. (R. p. 4130:2–25) In other words, they wanted the Trust to retain this property for ultimate distribution to their children but require Whit and May to share in the cost of keeping it. As May testified at trial:

> [Wortley and Belger] don't agree to anything; they haven't invested anything; they sold one part of the land, but they haven't done anything. I mean, I'm paying taxes I don't even get any income for.

(R. p. 1511:15-18)

In May of 2017, Rigdon terminated his attorney-client relationship with Ms. Thomas as a result of disagreement regarding her role as an independent advisor to the trustees. After that time, Ms. Thomas was no longer serving as neutral counsel to the Residuary Trust but was instead acting as an advocate for Wortley and Belger, either in their capacity as Co-Personal Representatives of the Estate of Alice Boykin, or as trustees of the Residuary Trust (or both). Acting on the advice

of counsel, Rigdon sought guidance from James C. Hardin, III, Esquire, a certified specialist in estate planning and probate law, to advise him in the exercise of his duties as trustee. Mr. Hardin testified that he was contacted in July of 2017 by Rigdon, who informed him that while he was familiar with New York and New Jersey trust law, he was not as abreast of the law in South Carolina regarding trusts and trustees. Mr. Hardin stated that Rigdon was seeking his instruction and guidance on how to handle his duties as a trustee, and on how he should act moving forward.

Mr. Hardin counseled Rigdon that he had an affirmative duty to seek to prevent his trustees from engaging in any breach of trust, or to redress any breach of trust in which they may have already engaged. He further advised Rigdon that he believed the language of Decedent's Will to be mere precatory requests, rather than directions, despite the fact that some requests were "stated in fairly strong language." (R. p. 1399:05–10) According to Mr. Hardin, he discussed with Rigdon the duties and standards of prudent investment which have been in existence, either in common law or statutory codification, dating back to the early 1900s. Mr. Hardin, who has served as a trustee himself on more than fifteen (15) occasions, also testified concerning the various duties about which he advised Rigdon. These included the duty of undivided loyalty, duty of impartiality, duty of prudent investment, the duty to grow trust corpus, and the duty of a disinterested co-trustee to seek court guidance in cases of impasse. Rigdon and Hardin also discussed the duty to administer the Trust, and Hardin testified that he advised Rigdon to admonish Wortley and Belger about "the potentiality that they were breaching their duty [to administer the trust] by calling off meetings at the last minute and by delaying meetings" during the summer of 2017. (R. p. 1404:09–22; *see also* R. pp. 5268-69 ¶ 14)

By this time, in order to carry out his fiduciary duties, Rigdon had no choice but to file suit, which he did on August 23, 2017, seeking to have the Probate Court resolve the trustees' deadlock and enable the Trust to be managed in a financially sound and responsible manner.

STANDARD OF REVIEW

This dispute involves the administration of a trust and therefore sounds in equity. *Floyd v. Floyd*, 365 S.C. 56, 93, 615 S.E.2d 466, 485 (Ct. App. 2005) ("Trusts have long and broadly been a field for the jurisdiction of equity."); *Wannamaker v. S.C. State Bank*, 176 S.C. 133, 133, 179 S.E. 896, 899 (1935) ("The enforcement and protection of trusts is a matter peculiarly within the jurisdiction of Courts of equity, and the jurisdiction of such Courts to declare and enforce trusts and supervise the administration thereof is undoubted.").

Accordingly, appellate review is de novo. *See Independent Nat'l Bank v. Buncombe Prof'l Park, LLC*, 402 S.C. 514, 520, 741 S.E.2d 572, 575 (Ct. App. 2013), *rev'd on other grounds*, 411 S.C. 605, 769 S.E.2d 663 (2015). De novo review has been recognized as "the broadest form of appellate review, as it 'permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings.'" JEAN H. TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 224 (3d ed. 2016) (citing *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011); and *Lewin v. Lewin*, 396 S.C. 349, 354, 721 S.E.2d 1, 3-4 (Ct. App. 2011)).

The foundation for de novo review in equitable matters is constitutional. The South Carolina constitution in fact mandates that in reviewing cases of equity, the appellate courts "shall review the findings of fact as well as the law." S.C. Const., art. V, § 5 (emphasis added). In analyzing this constitutional principle, the S.C. Supreme Court recognized early on that "it may now be regarded as settled that this court may reverse a finding of fact by the circuit court [in cases of equity] when the appellant satisfies this court that the preponderance of the evidence is against

the finding of the circuit court." *Finley v. Cartwright*, 55 S.C. 198, 33 S.E. 359, 360-61 (1899). "Thus, pursuant to the Supreme Court's ruling in *Finley*, in reviewing equity cases . . . South Carolina's appellate courts have consistently found facts in accordance with their own view of preponderance of the evidence." TOAL, *supra,* at 222 (citing numerous cases).

ARGUMENT

Summary of Argument

The trial court left important work unfinished. After an enormous investment of time and resources by the parties, the court chose not to address the inherent conflict of interest and administrative problems with this Trust. Instead, relying on a skewed and partial view of the facts, the court elected only to remove the one independent voice among the trustees and appoint a new trustee who was the hired expert of the two remaining trustees. That one independent voice, Rigdon, had been the only trustee with any significant business experience, the only trustee with prior experience managing a trust, the only trustee who was not a beneficiary, and the only trustee who did not have children who would inherit what was left of Trust assets after distributions to the lifetime beneficiaries.

Removing Rigdon was a "quick fix" to the impasse that forced this litigation, but it has done nothing to remedy the dire underlying condition of the Trust.

Peace cannot exist among the four income beneficiaries to the Trust so long as administration of the Trust is beset with a conflict of interest. Two of the beneficiaries who have a demonstrable interest in not diversifying or liquidating trust assets (in order to preserve as much of those assets as possible for their children) maintain seats at the administrative table. The other two beneficiaries, neither of whom has or will have children, have no seat at that table. The one independent voice at that table is now gone, replaced by Wortley and Belger's hired gun.

The court below might have remedied this situation by splitting the Trust in two, and creating one Trust for the benefit of Wortley and Belger, and another for the benefit of Whit and May (for the duration of their lifetimes). The court might also have started afresh with a blank slate of independent trustees. It chose neither option. Problematically too, the court failed even to establish the value of the Trust – despite a mountain of evidence and testimony concerning that value – and thereby failed to provide any frame of reference for an assessment of what appropriate distributions would be to the income beneficiaries, or the haste with which the Trust would need to act to diversify assets in order to achieve appropriate distributions.

Instead, the court bought into an erroneous and misleading picture of Rigdon's actions, fixated upon him as the underlying problem, and presumed wrongly that removing him would fix all ills.

This Court should complete the work that remains. That work holds the prospect of achieving a lasting peace among the parties and transforming an illiquid Trust benefitting only half the beneficiaries into a more liquid trust that would benefit all. Should that occur, the efforts to build the record below will not have been squandered.

I. The Trial Judge Should Have Split the Trust in Order To Remove Respondent-Appellants' Inherent Conflict of Interest, or in the Alternative Appointed Independent Trustees To Replace Respondent-Appellants.

As Judge Toal observed a number of times, the best outcome for this litigation would be for the parties to find a conclusive way to end their differences and begin a process of reconciliation within their family. While her Final Order and Judgment of May 24, 2019 (R. pp. 9-71) ("Final Order") does address the immediate problem of the existing impasse among the trustees, it does

not resolve the conflict of interest that is inherent in the positions of Wortley and Belger,[4] nor does it deal with the logical impossibility of compliance with Mr. Boykin's Will whenever there is a difference of opinion among the trustees as to whether to sell or retain a particular piece of real estate.

Because of this, the Final Order merely sets the stage for future litigation. It resolves the immediate problem but does not bring about a long-term solution. If Whit and May come to believe that the current trustees are not acting in good faith to follow the Court's directive to diversify the trust assets, or that they have engaged in acts of self-dealing, partiality, or mismanagement subsequent to the trial, or that by either negligent or willful act or omission they are failing to achieve the results that they projected in trial and on which the Final Order was based, there will almost certainly be another lawsuit. The Circuit Court itself recognized these same concerns and acknowledged them in the Final Order, warning Wortley and Belger that "it is imperative that they implement the management and investment plan presented by their counsel and consultants" and expressing "reservations about whether Respondents are capable of executing the plan presented at trial, as it required sale of properties that their family has held dear for decades." (R. p. 57)

The Final Order similarly acknowledged this set of concerns too, with the court reminding Wortley and Belger that "[a]s times change, the Trustees must use their best judgment to prudently manage the Trust and maximize the Trust's benefits to all beneficiaries," and recognizing the need for the vacant trustee position to be "filled by a third party that can continue to provide a different

[4] Even witnesses testifying for Wortley and Belger acknowledged the conflict. (*See, e.g.*, R. p. 1640 (Helms testimony); R. p. 1866 (Bailey testimony))

perspective from that of Respondents." (R. p. 58 (emphasis added)) Yet the court's resolution does nothing to effectively address either concern.

In addition, if the trustees (with Rigdon's replacement) are unable at any point in the future to agree on whether to sell or retain a tract of property, there will likely be another lawsuit. Indeed, in that situation, the Will creates a Catch 22, in which it is impossible to comply with the Will no matter what is done. This logical dilemma arises because Item XIV of the Will requires unanimity among the trustees to either sell or retain real property. Thus, if the trustees cannot agree on whether to sell or retain certain property, retaining it violates the requirement of unanimity just as much as does selling it.[5] No matter what they do, the trustees who constitute the majority will be in violation of the Will as they will be either retaining or disposing of real property without unanimous agreement. Litigation is practically unavoidable.

The most effective long-term solution to these implacable problems is to split the trust so as to allow Whit and May to proceed on their own without further involvement with and control by Wortley and Belger. It would give them the opportunity to have some control over their own destiny and not be left feeling that their financial well-being is in the hands of siblings with whom they have a strained relationship and who have an inherent incentive to minimize distributions in order to maximize the property that will be left for those siblings' children. A proposal along these lines was made a number of times both pre-trial and during the trial by Rigdon and his counsel, and was frequently discussed in trustee meetings.[6] (R. pp. 179-215; p. 5259 ¶ 19(c); pp. 232-97;

[5] Thus, Wortley and Belger's insistence on retaining property that Rigdon wanted to put on the market was a violation of the Will as a matter of law. While the Final Order strove to honor the terms of the Will, in effect what it did was to endorse this violation.

[6] For this reason, the finding in the Final Order that this issue was not properly before the Court is simply incorrect. (*See* R. p. 59) In addition, the issue was fairly raised by the pleadings. Rule 8, SCRCP outlines the required contents for pleadings and states in subsection (f) that "[a]ll pleadings shall be so construed as to do substantial justice to all parties." In order to achieve

p. 5309; pp. 5359-63, ¶ 14 & Ex. 5; pp. 348, 352; p. 1362:14-25; p. 1363:12-13 ("I still think that the best solution would be splitting the trust."); pp. 2226:20-2227:18; p. 456:24-25; p. 3603; p. 4004; pp. 4129-30) While the proposal put forth to the trial court involved a 50/50 split of the trust assets, Rigdon stated in his supplemental memorandum in support of the motion to alter or amend that he would advocate and promote a division in which Whit and May received significantly less than 50% of the value of the trust assets. (R. p. 891) Under all proposals for splitting the Trust, the concept was that the split would operate only for purposes of apportioning income for distributions. When any of the lifetime beneficiaries died, his or her distribution would be allocated among the others, and when all of them had died, all remaining assets would pass to the children of Wortley and Belger. (R. pp. 5259 ¶ 19(c))

In the alternative, if this Court were to determine the Trust should not be split in two, the inherent conflict of interest in Respondent-Appellants' position could be addressed in another fashion by removing them and their hired gun as trustees and appointing truly independent trustees in their stead. In this respect, by removing only Rigdon, the court below did not go far enough. It eliminated a symptom of the underlying problem – the immediate impasse among the trustees – but failed to address the underlying condition itself – the conflict of interest inherent in Wortley and Belger's position as trustees and parents of the remainder beneficiaries. Judicial business was

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substantial justice for all parties, our courts have determined that pleadings should be construed liberally. *See Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). This court has also explained that "[i]t is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'" *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (quoting *Standard Fed. Sav. & Loan Ass'n v. Mungo*, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991)). Indeed, our Supreme Court has "repeatedly held that the plaintiff may obtain any relief appropriate to the case made by the pleadings and the evidence, without regard to the form of the prayer for relief . . . ." *Beaty v. Mass. Protective Ass'n*, 160 S.C. 205, 207, 158 S.E. 206, 207 (1931) (emphasis in original). "Especially is this true in an equity case." *Id.*; *accord Fountain v. Fred's, Inc.,* No. 2017-000688, 2020 WL 698352, at *9 (S.C. Ct. App. Feb. 12, 2020).

left unfinished. Rigdon sought to have Wortley and Belger removed as trustees,[7] and likewise sought removal of their expert when the court appointed her in place of Rigdon, and that issue was squarely before the court below. This Court, acting as a court of equity and reviewing this matter in full, de novo, could take this action now, and should.

A court of equity has unquestioned power to modify a trust in the event of changed circumstances. This broad statutory power is founded in S.C. Code Ann. § 62-7-412, which allows a court to "modify the administrative or dispositive terms of a trust" and even to "terminate the trust" entirely where circumstances warrant, provided such modifications will "further the purposes of the trust" and are, "to the extent practicable . . . made in accordance with the testator's wishes." *See S.C. Nat'l Bank v. Bonds*, 260 S.C. 327, 337, 195 S.E.2d 835, 840 (1973) (recognizing that courts are allowed "considerable discretion" to effectuate the intent of a testator when conditions substantially changed); *see also* 90 C.J.S. Trusts § 94 ("A court of equity has the power to modify the terms of a trust in order substantially to carry out the intention, or to effectuate the primary purpose, of the creator of the trust."). As recognized in blackletter law:

> When a court can see that unforeseen conditions have arisen which make it necessary to change the terms of the trust in order to preserve the rights of beneficiaries, it will not hesitate to direct such necessary modifications as will preserve the trust estate for the use of beneficiaries. Under these circumstances, equity considers not only the wishes of the testator but also the safeguarding of the interests of the beneficiaries.

76 Am. Jur. 2d Trusts § 313.

South Carolina courts have repeatedly used their equitable powers to modify trusts. *See Chiles v. Chiles*, 270 S.C. 379, 383, 242 S.E.2d 426, 429 (1978) ("It is true that a court of equity

[7] Rigdon's counsel also made clear in closing argument that Rigdon was willing to stand aside and have the court appoint a "blank slate" of trustees, so that the administration of the trust could have a fresh start and none of the prior factionalism would remain. (R. pp. 2227)

has the power to alter or modify a trust to effectuate the intent of the settlor."); *see also Furman Univ. v. McLeod*, 238 S.C. 475, 490, 120 S.E.2d 865, 872 (1961) ("[T]he Court of Equity has the power upon a proper showing, to permit a deviation from the strict terms of a trust if necessary or advisable to carry out the purposes thereof."). In situations such as this, where the conditions and circumstances surrounding the trust have undergone unanticipated changes since it was first settled, the Court even has the authority to "direct or permit a trustee to accomplish acts that are unauthorized or even forbidden by the terms of the trust." *Colin McK. Grant Home v. Medlock*, 292 S.C. 466, 473, 349 S.E.2d 655, 659 (Ct. App. 1986).

The Trust Code also specifically permits trustees to order a trust divided so long as the division does not "impair rights of any beneficiary or adversely affect achievement of the purposes of the trust," S.C. Code Ann. § 62-7-417, and recognizes that a division "is often beneficial and, in certain circumstances, almost routine," and that "[c]onflicts among beneficiaries, including differing investment objectives, often invite such a division," *id.* § 62-7-417 Reporter's Comments. Against a similar background of authority, courts in other jurisdictions have ordered trusts divided. *See Matter of Goldberg Irrevocable Tr.*, 608 N.Y.S.2d 382, 383 (N.Y. Sur. Ct. 1994) (approving application to split irrevocable trust into three subtrusts "to enable the trustee to invest the assets in a manner that will meet the disparate financial needs and investment goals of the individual trust beneficiaries"); *Bankboston v. Marlow*, 701 N.E.2d 304 (Mass. 1998) (approving split of three subtrusts created under will into two separate trusts each, for tax purposes).

In this case, over thirty years have passed since the establishment of this Trust. Family dynamics and circumstances have changed dramatically. When the decedent established the Trust in 1989, Whit, May, and Alice were all in their mid-20s and not married. The possibility that Whit and May might have children was a very real one, and the evidence is clear that decedent hoped

and expected Whit would have a son, as the decedent addressed specifically in the Will his desire that certain properties be distributed to "the oldest male child" of Whit. (R. p. 2458, Item X)

In other words, the family dynamics and conflicts of interest that have arisen in the last three decades as a result of Whit's and May's having no children and Appellant-Respondents' having children could not have been anticipated by decedent. The conflict of interest these changes have created has been further exacerbated, significantly, by the substantial loss of productivity of the Trust's real estate brought about by Hurricane Hugo (which occurred only four months before decedent's death, while he was very ill) and by the appreciation of land values in the area in which the real estate is located. These events have in effect created a "double whammy," diminishing the income-producing ability of the real estate if kept as farmland and timberland, while increasing the value of land parcels as saleable assets. *See infra* at 32-34. These changed circumstances warrant modification of the Trust in order to eliminate the conflict of interest and achieve a lasting peace and reconciliation in this family.

In short, splitting the trust is the most equitable and effective resolution of this dispute, and the trial court erred by failing to do it. This Court, as a court of equity, is fully empowered to order such a split, and should either do so itself[8] or vacate the trial court's Final Order and remand with directions to do so. In the alternative, this Court could choose to address the conflict in a different manner by removing Appellant-Respondents as trustees and appointing independent trustees. To whatever extent this Court agrees with Rigdon and reverses the circuit court, this Court should also reassess Rigdon's fee award and restore some, if not, all of the portion of fees and costs the circuit court determined not to award, or remand with instructions for the circuit court to undertake

[8] While this Court has authority to effectuate a split on its own, and there exists abundant evidence in the record about the extent and value of trust properties, this Court could also appoint a special master for this task, who could then make a recommendation to this Court.

this analysis. *See* S.C. Code Ann. § 62-7-1004 ("In a judicial proceeding involving the administration of a trust, the court . . . may award costs and expenses, including reasonable attorney's fees, to any party, to be paid . . . from the trust that is the subject of the controversy."); *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 [his] official duties.").

II. The Trial Judge Should Have Determined the Net Asset Value of the Trust in Order To Decide the Amount of a Reasonable Distribution to the Lifetime Beneficiaries.

One critical element of the present controversy is the significant disagreement about the value of the Residuary Trust's substantial timberland and farmland holdings. This issue is essential to determining what would be a reasonable distribution to each income beneficiary when, as is indisputably the case here, the Trust does not generate net income and the trustees are empowered to distribute from principal in order to meet the needs of the income beneficiaries. Thus, for example, an annual distribution of approximately $900,000 of the Trust's net asset value to the four lifetime beneficiaries would be reasonable if the Trust was worth $30 million, but not if the Trust was worth only $15 million. If the current trustees are to remain, it is particularly acute that a judicial valuation of the Trust assets be put in place to provide a frame of reference by which the reasonableness of distributions to the lifetime beneficiaries may be assessed, especially now that the trustees are not making the minimum distributions to Whit and May that they represented at trial would be made.

Prior to trial, Judge Toal indicated that she viewed the value of the Trust assets as a critical issue. (R. pp. 5364-65) Following the judge's direction, the parties presented substantial evidence and briefing on the issue. Perhaps as much as half the trial testimony concerned valuation of the Trust. Inexplicably, however, Judge Toal did not make any finding of the net asset value of the Trust, and refused to do so in response to Rigdon's motion for reconsideration.

We will not rehash here all of the voluminous evidence and arguments made by the parties as to the overall value of the Trust assets. In summary, the Trust's real property assets consists of approximately 5,986 acres of timberland and farmland in Kershaw, Sumter, Lee, and Fairfield Counties of South Carolina. This acreage is comprised of approximately 44 different tracts or parcels. (R. pp. 4383-4629) The Item X Properties listed in Decedent's Will as those which he desired to retain, if possible, comprise approximately 1,977.5 acres out of the total 5,986 acres owned by the Residuary Trust. The Residuary Trust also owns some commercial properties in and around downtown Camden, South Carolina, much of which is dilapidated and in serious disrepair. (R. pp. 1629:6-1631:24, 1638-40) All parties agreed that the Trust's timberland and farmland holdings currently represent a significant majority of the overall value of the Trust, with some evidence and testimony suggesting as high as ninety percent (90%).

Early in this litigation, and even as late as two days before the start of trial, all parties appeared to be in general agreement that the Trust assets were worth $25 million to $27 million. *See* (R. pp. 697-98 (Am. Ans. and Counterclaim ¶ 67, filed July 2, 2018 ("[T]he value of Mr. Boykin's estate has more than doubled in value since he died in 1989, from an estimated value of $10,262.00 [*sic*] at the time of Mr. Boykin's death to a current estimated value of approximately $26,000.00 [*sic*].")); R. pp. 1211:24-1212:3 (Wortley: "[I]t's my understanding we have about Twenty-two Million and -- we have about Twenty-two Million in land, about Three Million in cash and about Two Million in commercial properties."); R. p. 1256:07–08 (Wortley: "[Decedent] left Ten Million Dollars. Now we have Twenty-five Million Dollars."); R. p. 2896 (stating that the value of the assets held by the Marital Deduction Trust and Residuary Trust is between $20,000,000 and $25,000,000); R. p. 4127:18–23 (J. Becker: "When Whit Boykin died, the value

of the land was basically $10 million. When Alice Boykin died, 20-plus years later, it was about 25 million, which means, over the course of that time, the value of that real property increased.”))

Subsequently, however, Wortley and Belger reversed their position to assert figures that are substantially less than the previously agreed upon values. John R. Helms of Milliken Forestry Company, a real estate appraiser hired by Wortley and Belger, testified about the “Investment Plan and Strategy” proposed by Wortley and Belger. (R. pp. 4383-4629) Mr. Helms explained that he evaluated the Residuary Trust’s expansive acreage and arrived at both a “retail” value and a “wholesale” value for the roughly 5900 acres of real property (including timber and improvements). According to Mr. Helms, the wholesale value “involves the whole property considered in bulk, as if [one] were faced with trying to sell 6,000 acres” at one time. Retail value, on the other hand, is “concerned with the fact that over time, at opportunistic times, if all the property went on the market at the same time, you would be trying to sell a lot of different tracts of land that are all near each other.” (R. pp. 1620:19-1621:01)

Helms’ total estimated wholesale value for the Residuary Trust’s 5,986.79 acres, including land, timber, and improvements, was $16,036,188.17. His total estimated retail value was $20,458,825.21. (R. pp. 4410, Tab C) Wortley and Belger later moved to amend their pleading to revoke their allegation that the Trust assets were worth $26 million and instead claim that they were worth only $19.05 million. (R. pp. 824-25 (Respondents’ Second Motion To Amend, ¶ 3))

Rigdon disputed Helms’ valuation of the Residuary Trust property. He testified that the highest and best use of the Residuary Trust’s timberland and farmland in lower Kershaw County around Boykin, South Carolina—which composes approximately fifty-four percent (54%) of the total value of the Residuary Trust—had changed since the Will’s execution, such that this land’s fair market value was now dramatically higher than what a rational investor would pay for growing

timber or row crops. In other words, the value of much of the Residuary Trust's land far exceeds the use to which it is currently being put.

In rebuttal to Helms' valuation, Rigdon offered at trial his own valuation of the same Trust properties. (R. pp. 4256-72) Using information supplied by the various appraisals performed by Mike Robinson of Charleston Appraisal Services, Inc., Jimmy Lofton of J.B. Lofton Realty, John Helms, and Carter Commercial Appraisal Group, Rigdon arrived at a total valuation of $26,468,674.73 for the real property assets. (R. pp. 4256-72) The trial record also contains a number of exhibits which support Rigdon's valuation and argument regarding heightened real estate prices near and around the Trust properties, especially in the Boykin area and southern Kershaw County. (*E.g.,* R. p. 4232)

Rigdon also presented testimony and evidence that the Item X Properties and other Residuary Trust properties in lower Kershaw County have increased in value because of small farm and equestrian uses, such that those properties are now worth multiples of typical fair market value if those same properties were restricted in use to traditional timber or farming purposes.

> [W]hen [Decedent] died, those tracts were priced – the value of them was, basically, a fair value for using it for timberland and farmland. But what's happened is over the intervening years Boykin's become a real hot place to own land. So much so that in the recent reappraisal that the tax assessor did for Kershaw County, they assigned a value for most of the land around there of $5,000 an acre . . . .

(R. pp. 1344:08–15)

The deposition testimony of Mr. William Harrison, Rigdon's real estate valuations and investments expert, strongly supports Rigdon's assertions. Mr. Harrison teaches investment portfolio theory and real estate valuation at the University of South Carolina's Darla Moore School of Business and has extensive experience valuing the types of real properties at issue in this case. (R. pp. 2262:19-23, 2277:24-2280:25, 2268-88; *see also* R. p. 2288:1-3 (has performed "probably

a thousand" real estate valuations)) Mr. Harrison testified that he had never before seen or heard of Mr. Helms' "retail" and "wholesale" methodology or concepts with respect to real estate, prior to their use in Wortley's and Belger's Investment Plan and Strategy (and accompanying documentation). (R. pp. 2305:23-2306:04) He also testified about the importance of asset diversification, stating that "if you don't follow the tenets and the premise of modern portfolio theory, you're putting yourself in a situation for, let's say, claims of negligence by your clients." (R. p. 2284:10-13) As Mr. Harrison explained,

> [M]odern portfolio theory relies on the principles of diversification and that diversification really has two components. The first component is diversification is, generically, we know it, don't put all your eggs in one basket. That's a truism we tend to quote that makes sense on a certain level, and the first part of that is why does that make sense.
>
> So that's the first part of modern portfolio theory. The second part [of] the modern portfolio theory is the more interesting part, and it has to do with correlations amongst classes of assets, how do stocks relate to bonds, which relate to real estate, which relate to natural resource investments, which relate to derivatives.
>
> And so modern portfolio theory says that if you're smart and careful, you can build a portfolio of varied assets that have either lower risk for the same return or higher return for the same risk. And it has to do with correlations, low correlations between classes of assets.

(R. pp. 2281:16-2282:17)

He testified that, using appraisals performed by Mike Robinson of Charleston Appraisal Services, Inc., who he believed to be the "gold standard of appraisers in this region," he conducted a fair market value analysis of the Boykin Trust real property assets. (R. p. 2306:05-15) Mr. Harrison's fair market value inventory has been marked as Harrison Deposition Exhibit 5. (Supp. R. pp. 5820-23) Whereas Helms testified that the "wholesale" and "retail" values of the Trust's 5900 acres of timberland were $16,036,000 and $20,458,900, respectively, Mr. Harrison's assessment was that those same properties actually have a fair market value of $27,362,507. This

assessment was predicated on the "highest and best use" of the Trust properties, which the Helms approach intentionally did not utilize.[9] (R. p. 2305:15-22) Mr. Harrison's analysis was thorough, detailed, and reliable (*see* R. pp. 2309-49); its resulting figure was consistent with what the parties themselves agreed on up to the trial; and it should have been adopted by the Circuit Court.

After directing the parties to present this evidence, and receiving substantial testimony and documentation on the issue, Judge Toal failed (and later refused) to make a finding of the Trust's net asset value. This was a clear error of law, and provides an independent basis for vacating and reversing the trial court's Final Order.

Decedent's Will provides that the four lifetime beneficiaries shall receive from the Residuary Trust, in reasonably equal shares, all of the Trust's net income for their "medical care, comfortable maintenance, welfare and education." (R. p. 2455) Further, the Will provides that these beneficiaries may receive such sums from the principal of the Residuary Trust that shall be necessary for their "medical care, education, support and maintenance, and reasonable comfort." (R. p. 2456) As it is undisputed that the Trust will not generate sufficient net income to meet the needs of the lifetime beneficiaries, the Trustees will have no choice but to use the power to adjust between principal and income to make distributions, which the Will expressly allows them to do. Indeed, by not converting underproductive assets to more productive assets, the current trustees are ensuring that there will never be any significant net income for at least the next 15 years. In these circumstances, how much should be distributed each year must be determined on the basis of the net asset value of the Trust. By failing to make this determination, Judge Toal committed reversible error.

[9] Mr. Harrison also noted a number of highly material mistakes in the Helms model (R. pp. 2351:13-2384:04) and opined that the Helms plan does not provide an accurate reflection of the value of the Trust assets or the likely 15-year cash flow of the Trust. (R. p. 2351:13-20)

Rule 52, SCRCP, specifically requires that "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon . . . ." While the Supreme Court has explained that Rule 52 does not "require a lower court to set out findings on all the myriad factual questions arising in a particular case," the findings "must be sufficient to allow [the appellate court] to ensure the law is faithfully executed below." *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 133, 568 S.E.2d 338, 343 (2002). The reasons underlying the decision below cannot be "left to speculation." *Id.*, 568 S.E.2d at 343. Wright and Miller summarizes of the corresponding federal rule "that the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue." 9C CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2579 (3d ed.)

These obligatory standards were not met here. Without question it was necessary for the court, in rendering its judgment, to determine a contemporaneous value for the Trust. Before the Court were (i) claims that the income beneficiaries were not receiving between 3-5% of the Trust's value, which South Carolina law recognizes is reasonable, *see* S.C. Code § 62-7-904(B); (ii) claims that the assets of the Trust were not being diversified with sufficient speed so as to ensure the Trust grows in size for the beneficiaries and remainder persons; and (iii) claims concerning what amount of the principal was appropriate for the trustees to invade in providing support for the beneficiaries' needs as required in Item VIII of the Will. Addressing each of these claims is contingent upon determining the value of the Trust. That did not occur.

III. The Trial Judge's Findings of Fact Are Against the Weight of the Evidence.

Judge Toal's Final Order contains a number of findings of fact that are against the weight of the evidence. We wish to be clear that it is not necessary for this Court to reverse Judge Toal's findings of fact in order to reverse on either of the preceding grounds. Nonetheless, because the Final Order contains egregious mis-statements of fact that cast Rigdon in a very harsh light, we ask the Court to vacate the findings of the Final Order. Sitting as a court of equity in this appeal from a single-judge decision in an equitable matter, this Court has the authority and responsibility to assess the weight of the evidence and make its own factual determinations, and we urge the Court to do so.

We will not attempt here to review the entire record, which is voluminous, and address every factual error contained in the Final Order. Rather, we point out here some of the starker examples of erroneous findings, and ask the Court to vacate the Final Order and make its own findings along the lines of those set forth in the Statement of the Facts above.

- *Finding: Rigdon planned to "sell all" or "virtually all" Trust real estate, including the legacy tracts, as quickly as possible.* (R. pp. 22, 26, 30)

This finding is clearly erroneous and affects the entirety of the Court's Final Order. Unlike Helms' "wholesale" formulation, which supposes that approximately 5,900 acres would be put on the market at one time, Rigdon testified clearly and unequivocally:

> - [S]omehow it's been put forth that I wanted to go and have a fire sale right away and sell everything. Well, that was never the case.
>
> - I knew it would take years to sell some of this property. Some of it wouldn't take years. Of course, if I went and -- and put a price on it that Helms has put on it, even in his retail value, we could probably sell it all in a year. But I think that isn't responsible. I think we need to get more than what Helms says.
>
> - And I think it will take -- we would probably be able to liquidate maybe 10 million of it within two, two and a half years. It would take more than that

now that we've rejected the [Haile Gold Mine] option.[10] But with the option, we would have liquidated 10 million easily in -- in two years. And we'd probably liquidate another 10 million in another two years and we would keep some land.

- I -- I don't have a problem with keeping some land. The problem is how much land we keep. The problem is we've gotten into a posture where they don't want to just keep the -- the treasured property. They went to keep almost all the timberland, too.

(R. p. 1390:02–24)

- *Finding: Rigdon opposed the 2012 transfer of assets to Alice Boykin that George Bailey proposed to take advantage of the generation skipping tax exemption, and insisted that no more than 20% be transferred.* (R. pp. 19-20)

This finding is non-sensical. Initially, it should be noted that these events allegedly occurred in 2012, which was while Alice Boykin was still alive and before any friction developed between Rigdon, Wortley, and Belger, before there was any dispute over selling versus retaining real estate. Further, while George Bailey did testify to this effect, his cross examination revealed that he was somewhat confused about exactly what had happened in this connection in 2012 (R. pp. 1836-38) and it is inconceivable that, if things transpired as Judge Toal found, there would have been nothing to document it. Surely, if events had transpired as Judge Toal found, there would have been some written communication or memorialization of it, some complaint to Rigdon, some email urging him to reconsider. Yet there was no written evidence that this exchange ever occurred.

[10] Haile Gold Mine, Inc. approached Rigdon in late 2017, after institution of this action, with interest in purchasing the Boykin Millpond and some surrounding watershed property from the Trust for approximately $4,000,000 and then donating the land to a conservation group as part of Haile's mitigation efforts to conserve and protect land near its Kershaw operations. The company's president later determined to withdraw the offer after threats by Belger's former counsel to derail a sale by appealing any judicial decision made on Petitioner's motion to authorize the sale, which was filed in early 2018.

In addition, the concern that Congress would not enact new legislation to continue the $5,120,000 exemption was not borne out – Congress did extend the exemption. If Mr. Bailey and the others wanted to take advantage of the exemption as Judge Toal found, they could have continued to ask for it in 2013, 2014, and 2015 – yet there is no evidence whatsoever that this happened. In short, this finding simply does not stand up to scrutiny. The record contains no evidence that, after Congress voted to extend the $5,120,000 exemption, there was a proposal to transfer 100% of the property to save on taxes, only a proposal to do 20% undivided pieces of certain properties, to which Rigdon agreed.

- *Finding: Rigdon's argument that Wortley and Belger failed to conduct regular trustee meetings is "specious."* (R. p. 46)

A critical fact in this case is Wortley and Belger's refusal to hold, and affirmative prevention of, trustee meetings from May through October 2017. Judge Toal cavalierly dismissed this undisputed fact with the flip observation that "[t]here was a brief period between May and October of 2017 where meetings were not held." (*Id.*) This period, however, was a critical time in the history of the Trust, and it encompassed <u>five months</u> when multiple actions needed to be taken in order for the Trust to be prepared to meet its financial obligations. Further, it is a gross mischaracterization to say only that "meetings were not held" during this time. Wortley and Belger <u>refused</u> to meet, repeatedly calling off meetings that had been scheduled. Their conduct was irresponsible and a breach of their fiduciary duties as trustees.

- *Finding: Rigdon took positions that were intended to manipulate his co-trustees into acquiescing to his approach.* (R. p. 51)

The weight of the evidence shows that Rigdon acted throughout in good faith and with the objective of doing what was best for all of the Trust beneficiaries. Indeed, Judge Toal made this precise finding on multiple occasions, including in the Final Order itself and in the Order denying Wortley and Belger's motion to alter or amend. (R. pp. 64-65, 80 ("[T]he 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."))

- *Finding: Rigdon treated his co-trustees and Karen Thomas with disrespect and "frequently belittled" them. (Final Order at 21)*

Once the trustees began to have significant disagreement, all of their meetings were recorded and transcribed. Thus, all of their dealings and communications with each other are embodied in the recordings, transcripts, and emails between them. There is absolutely no evidence in these materials to support the finding that Rigdon acted disrespectfully or belittled his co-trustees or Karen Thomas. (*See* R. pp. 3397-99, 4077-4138) And up to that point in time, Karen Thomas testified that Rigdon was "extremely helpful" and "of considerable assistance," that she "loved working with him," and that his attitude toward Wortley, Belger, Whit, and May was "like a loving big brother or a daddy. I mean, you could feel his love for [them]." (R. pp. 1922:23, 1923:2-4, 1923:12-13)

- *Finding: "There is no evidence that [Wortley and Belger] have improperly balanced their loyalties." (R. p. 56)*

This finding is clearly erroneous. Substantial evidence in this case demonstrated that Wortley and Belger acceded to their inherent conflict of interest and favored the interests of their children, again and again, over the interests of Whit and May as lifetime beneficiaries. They did so by refusing to meet for five months from May to October 2017, by repeatedly blocking effective steps to market and sell real estate so that it would pass to their children (while requiring Whit and May to share in the expense of maintaining the property), and by failing to provide information to Whit and May. Further, the undisputed evidence shows that Belger initially wanted to purchase certain Legacy Property when she thought she could do so at below-market prices, but then when she learned that she would have to pay market price began to oppose the sale of such properties.

Finally, Wortley and Belger agreed on a $26 million valuation of the Trust assets throughout the litigation and up to the very eve of trial (R. pp. 225-26 (Wortley/Belger Answer & Counterclaim ¶ 55), but then sought to amend their pleadings to reflect a lower figure in order to justify smaller distributions to Whit and May.

- *Finding: "The Will ... expresses a preference for the interest of the remainder beneficiaries over those of the income beneficiaries."* (R. p. 56)

This is a gross factual error, and it colors the entirety of the Final Order. In fact, the Will is quite clear that the trustees are to give equal if not greater consideration to the income beneficiaries as to the remainder beneficiaries. Item X states explicitly that the Trustees "shall attempt to be as nearly equitable as possible among beneficiaries." (R. p. 2459) Item VIII(1) likewise states that the trustees shall make "a reasonably equal division of income as the need arises." (R. p. 2455 (emphasis added)) Item VIII(2) states that the trustees "may pay to or apply for the benefit of any one or more of my said children such sums from the principal of this trust … as … shall be necessary or advisable from time to time for the medical care, education, support and maintenance and reasonable comfort of my said children, taking into consideration … other income or resources of my said children." (R. p. 2456 (emphasis added)) Clearly, therefore, the trustees could invade principal (to the detriment of the remainder beneficiaries) if necessary to provide for the comfort of one of the income beneficiaries "as the need arises." Further, there was substantial evidence that Whit Boykin is significantly challenged and incapable of supporting himself, a fact of which his father was well aware. (*E.g.*, R. pp. 1262-65) The dictate in the Will that the trustees consider the economic resources of each beneficiary in determining distributions expresses a preference, if any, for the income beneficiaries and Whit in particular.

- *Finding: Rigdon refused to consent to the Insurance Trust ("ILIT") loan to the Residuary Trust for payment of estate taxes.* (R. pp. 21, 24)

This is clearly inaccurate. The evidence shows that Rigdon's concern was that the Residuary Trust was too illiquid to make any distributions, and therefore he asked Karen Thomas if it would be legal to use the Insurance Trust funds under the power to adjust between principal and income to distribute $100,000 annually to the lifetime beneficiaries until they knew the total value of the Residuary Trust assets. Rigdon's understanding of the Insurance Trust was that it was to be used to pay taxes, and therefore it might not be permissible to use it for distributions. As Karen Thomas testified, Rigdon "wanted to make sure that the decision to support the beneficiaries from this money that they didn't have to be used to pay the estate taxes was proper. That under the documents, they weren't required to use it to pay estate taxes and could use if for distributions." (R. p. 1925:1-5) When the time came to pay an estimated tax, Rigdon testified, he told Thomas that he would "arrange for all the money in the insurance trust to be deposited in the residual trust so that it can be lent to the marital trust and used to pay taxes (R. p. 2183:17-20) Following through, Rigdon had roughly $2 million deposited into the marital deduction trust account from the Insurance Trust to pay the tax. (R. p. 2185:5-7) That testimony was never contradicted or refuted.

- *Finding: Lafrage was hired to prepare date of death valuations, which Rigdon delayed and then, on his own, "required the appraisers to employ a unique valuation method that caused the properties to have inaccurate, but higher, values.* (R. pp. 23-24)

As to Rigdon's valuations, the record contains numerous exhibits supporting their validity and accuracy. (R. pp. 3046-3131, 3132-36, 3137-43, 3144-45, 3234-37, 4224-26, 4227-29, 4231-4232, 4256-4272) As to Mr. Lafrage, he was not valuing properties but rather was doing timber cruises, which were completed in 2017 and were not the cause of the delay in Helms' valuations.

Helms' delay, the result of his own action, was the cause of not having valuations in 2017. (*See* R. pp. 1716:20-1717:06)

- *Finding: Rigdon opposed the Section 6166 tax election to gain leverage over the other co-trustees.* (R. p. 25)

This finding is clearly erroneous. The Final Order even goes so far as to say that Rigdon "admitted error" in refusing to consent to the Section 6166 tax election (R. p. 48), which is a blatant mis-statement of his testimony. What Rigdon actually testified was merely that "perhaps" he should not have opposed the election, though he felt he had good reasons to do so. (R. pp. 2182:13; *see id.* at 2180:17-2181:02) Further, it was undisputed that James Hardin advised Rigdon that, since changes to the law were made in 2001, the IRC § 6166 election had become less attractive because the interest payments were no longer tax deductible and because it "really restricted the trustees of the residuary trust going forward not only in the financial plans that were made upon them in terms of interest and principal payments, but, also, on such things as the fact that they would probably be having to offer surety bonds to the Internal Revenue Service, mortgages for the real estate for the estate taxes." (R. pp. 1407:08-1409:09)

- *Finding: Rigdon refused to consent to the Section 2032 election to gain leverage over the other co-trustees.* (R. p. 26)

This finding, again, is simply not supported by the evidence. It was undisputed that Rigdon's opposition to the 2032 election was based on his concern that in the long term it would end up costing the Trust money, and Karen Thomas agreed with him. (R. pp. 2178:22-2179:14) Thomas expressly admitted that there were good reasons not to make an election under IRC § 2032 and that some clients viewed that strategy as "a bridge too far." (R. pp. 1895:22-1899:05, 5010-5012) She also admitted, on cross examination, that she had stated in a February 2018 email that "we never planned on using the 2032(a) [election]" and "did not ever ***want*** to do the 2032(a) that would commit the trust stay in a business." (R. p. 2018:15-16, :21-22) (emphasis added)). Further,

James Hardin advised both Rigdon and William Tetterton (Whit and May's counsel) to withhold consent because it would severely constrain the Trust's ability to sell property in order to diversify. Expert witness William Harrison further demonstrated that the taxes saved through the election were much less than the money that would be made by diversifying into more productive assets. (R. pp. 2419:14-2420:06; *see generally id.* at 2384-2418) In any event, Rigdon's opposition was irrelevant once Tetterton advised counsel for Wortley and Belger that Whit and May would not consent, as a prerequisite to making the election was that all trustees and all beneficiaries consented to it.

- *Finding: Rigdon caused the bank to freeze the Trust accounts.* (R. p. 26)

This finding is directly contrary to the evidence. Rigdon actually worked very hard to transfer cash from the Insurance Trust into the Marital Trust to pay the estimated tax. At that time, he was told by the bank with the Marital Trust account that it could not accept money from the Insurance Trust because the name of the payee on the transfer documents did not match the name on the recipient account. The bank further informed Rigdon that they had previously asked Alice Boykin to correct the papers on repeated occasions because of the problems the discrepancy created. (R. pp. 2183:21-2184:17) After getting the name discrepancy resolved, Rigdon was able to have sufficient money transferred to pay almost all of the estimated tax. (R. p. 2185:05-07)

- *Finding: Rigdon withheld the identity of the other party in the "Haile Gold Mine" transaction[11] for no reason.* (R. p. 32)

It is undisputed that David Thomas, the President of Haile Gold Mine, Inc., wanted to keep the proposed transaction out of public knowledge until all the stakeholders had agreed on the basic terms, and Rigdon felt that this required him to restrict knowledge of who was making the proposal.

[11] The background of the proposed Haile Gold Mine transaction is discussed above, *see supra* n.10.

(R. pp. 230-31 ¶ 5; R. pp. 1387:10-25, 2388:05-15) Thomas eventually met with all of the trustees in March 2018 to discuss his organization's interest and the structure of the proposed transaction. (R. pp. 3874, 2871-2965, 2948 (Thomas Dep. 72:21-73:03)) However, Thomas withdrew the offer because of numerous threats by Belger's attorney to derail the sale by appealing any judicial decision to allow it. (R. pp. 4068-70; *see also id*. at 232-97, 241 ¶ 8 & n.2) These threats were made during the pendency of a motion to the Circuit Court to allow the sale, and thus were done with the intent and effect of preempting a judicial ruling on the matter. They clearly justify Rigdon's judgment not to share the identity of the offeror to Wortley and Belger in the early stages.

* * *

With all due respect to the trial judge, the erroneous findings of fact set forth above led to a lack of focus on the economics of the Trust assets, which in turn has allowed the trustees to keep nearly all of the assets in their highly underproductive state. Aside from the actions of Wortley and Belger to benefit them and their children, however, this case revolves around the value of the Trust assets, the un-productive or under-productive nature of the vast majority of the real estate, and the need for prudent and conflict-free management of the Trust. The Trust assets are so underproductive that they cannot support any reasonable distribution without severely diminishing the Trust principal. The Item X Properties consist of 1,977.5 acres, approximately 33% of the land, but about 50% of the Trust value. Wortley and Belger have further enlarged the land they want to retain for their children by creating a category of "Family Legacy Properties" that adds 466.75 acres of land adjacent to the 1977.5 acres of Item X Properties. Thereafter, they treat the new total, 2,444.25 acres, as if it all is Item X Property to be retained for their children. The Helms plan then sets aside another 2,580.97 acres that is a low priority to sell beginning in 6 years to year

15. In essence, therefore, Wortley and Belger have set aside 5,025.22 of the approximately 6,000 acres that, after deducting the liabilities from the cash, comprise all of the net Trust assets.

CONCLUSION

The Court should reverse with directions to split the trust, remand with directions to determine the net asset value of the Trust and to fix a minimum reasonable distribution to the income beneficiaries, or vacate the findings of the trial court and remand to carry out either of the foregoing directions. In addition, the trial court should be directed to award Rigdon all of his costs and attorneys' fees incurred in this litigation and appeal or, alternatively, to re-assess the award of fees in light of this Court's ruling.

Respectfully Submitted,

s/Wallace K. Lightsey

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January 19, 2021

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

Appellate Case No. 2019-001632

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,.....Appellant-Respondent

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,

Of whom Mary Deas Wortley and Alice B. Belger are ..... Respondent-Appellants

And

Lemuel Whitaker Boykin, III, and May Cantey Boykin are..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellate-Respondent complies with Rule 211(b), SCACR.

Dated: January 19, 2021

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