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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 REPLY BRIEF OF APPELLANT-RESPONDENT

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Appellant-Respondent Rigdon H. Boykin ("Rigdon") submits this Amended Reply Brief to comply with this Court's Order of December 15, 2020, granting Respondents-Appellants' motion to strike. For the reasons stated in Rigdon's Return in Opposition to the motion, the references at issue in the motion relate directly to arguments asserted by Respondents-Appellants ("Wortley and Belger") in this appeal. In particular, they refer entirely to public court filings that refute Wortley and Belger's contention that Rigdon lacks standing to pursue his appeal, and hence were properly presented in reply. Rigdon respectfully submits that it was error for this Court to order his brief to be stricken because of those references. Accordingly, and with respect, Rigdon submits this Amended Reply Brief under objection and with full reservation of rights.

RESTATEMENT OF STANDARD OF REVIEW

As explained in Rigdon's Final Appellant Brief and acknowledged by Wortley and Belger in their response brief ("Resp. Br."), this Court must review this matter de novo, as the dispute involves the administration of a trust and accordingly sounds in equity.

Contrary to Worley and Belger's assertion, Rigdon does not seek here "a new trial." Resp. Br. 7. He does, however, ask this Court to employ the de novo standard of review to "find facts according to [its] own view of the preponderance of the evidence," *Wilson v. Gandis*, 430 S.C. 282, 290, 844 S.E.2d 631, 635 (2020), and not simply follow Wortley and Belger's repeated invitations to defer to the trial court's findings. Where Rigdon satisfies this Court "that the preponderance of the evidence is against the finding[s] of the circuit court," this Court should reverse those findings. *Finley v. Cartwright*, 55 S.C. 198, 202, 33 S.E.2d 359, 361 (1899). As the Supreme Court recently stated:

> The essence of the de novo standard of review is that the appellate court must not simply accept the factual findings of the trial court but instead must diligently review the record to make findings of fact based upon its own review of the preponderance of the evidence.

Wilson, 430 S.C. at 306, 844 S.E.2d at 644. That is exactly what Rigdon asks of this Court here.

ARGUMENT

Rather than engage head-on with the substance of Rigdon's arguments, Wortley and Belger spend the bulk of their response brief avoiding the merits and instead raising specious procedural points and hyper-technical objections that certain of Rigdon's claims are not preserved for appellate review. Their arguments are unsound and should not distract from the key reality that confronts this Court: Work begun below remains unfinished. The inherent conflict of interest at the center of this Trust has not been remedied, and the inherent economic infirmity in the structure of the Trust assets has not been addressed. Until these matters are resolved, either through division of this Trust or replacement of all the trustees with independent trustees, and with a judicial determination of the total net value of the Trust, litigation is bound to arise again. In making Rigdon a scapegoat for all ills, the court below was distracted from the important task of fashioning a lasting peace. The trial court's view, both of Rigdon and the Trust, was distorted, based on erroneous factual inferences, and short-sighted. This Court should embrace the broader vision that the record below demands, and lay the foundation for a lasting reconciliation.

I. Rigdon Has Standing to Appeal.

Wortley and Belger's bizarre suggestion that Rigdon lacks standing to appeal this matter, *see* Resp. Br. 9-10, is not supported by the law, the facts, or common sense. The gist of their argument is that because Rigdon was removed as a trustee, he no longer has standing to appeal the trial court's final judgment.

What Wortley and Belger ignore is (i) that the trial court's final judgment made numerous mistaken factual findings that vilify Rigdon and impugn his character; (ii) that the amount Rigdon may have to pay in attorney's fees out of his own pocket hangs in the balance both in this appeal and in Wortley and Belger's cross-appeal; and (iii) that Wortley and Belger themselves may

attempt to argue that certain findings of fact Rigdon challenges in this appeal are binding upon him under principles of res judicata and collateral estoppel and, if allowed to do so, may seek to impose additional liability upon him as a result. Each of the foregoing constitutes an independent and sufficient basis for Rigdon's standing in this appeal, and is discussed in turn below.

As an initial matter, this Court has explained that the standard in Rule 201(b) limiting the right to appeal only to "a party aggrieved by an order, judgment, ... or decision" imposes no additional requirement beyond those of "general standing principles." *Powell ex rel. Kelley v. Bank of America*, 379 S.C. 437, 447, 665 S.E.2d 237, 242-43 (Ct. App. 2008). As to the language of the rule itself, "the word 'aggrieved' refers to a substantial grievance, a denial of some personal or property right, or the imposition on a party of a burden or obligation." *Beaufort Realty Co., Inc. v. Beaufort Cnty.*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001); *see also id.* at 301, 551 S.E.2d at 589 (party is aggrieved by a judgment "when it operates on his or her rights of property or bear directly on his or her interest"). General standing principles require a party to show (1) that he has suffered an injury in fact that is "concrete and particularized and actual or imminent," (2) that the injury is "fairly traceable to the challenged action," and (3) that the injury "will be redressed by a favorable decision." *Id.* at 301, 551 S.E.2d at 589. These requirements are clearly met here.

Rigdon's first basis for standing lies in the numerous wrong and unsupported factual findings the trial court made below which seriously impugn his character and professional reputation. Rigdon has challenged all these findings in his appeal, demonstrating why they are unsupported by the facts and against the weight of the evidence. *See* App. Br. 36-46 and *infra* pp. 14-25. Rigdon obviously has an interest in clearing his good name and restoring his personal and professional reputation. That interest is compelling given that he is an attorney with a long and

distinguished career, whose reputation in the legal and business community is of both personal and pecuniary value. He is a party, and very much an aggrieved one. Unless and until those findings are vacated or reversed, they will remain as judicial black marks against his character and integrity, and will continue to cause him very real personal and professional harm. This gives him standing.

Rigdon's second basis for standing is founded in the attorney's fee award made to him in this matter. The circuit court reduced that award based on its conclusion that "the beneficial results obtained" in the lawsuit did not warrant "the full amount" of fees he sought. (R. p. 66) Rigdon asks this Court to grant additional relief (in the form of splitting the Trust in two and/or removing Wortley and Belger as trustees) beyond that which the trial court granted, and has requested this Court "reassess" his fee award and "restore some, if not all of the portion of fees and costs the trial court determined not to award." *See* App. Br. 29. In addition, beyond the fees and costs Rigdon seeks to restore in this appeal, Wortley and Belger challenge in their cross-appeal even those fees and costs Rigdon has been awarded, and seek further to hold Rigdon personally liable for the fees incurred by them in the underlying litigation. Tellingly too, the near constant refrain of Wortley and Belger in support of their cross-appeal is the very set of factual findings that Rigdon is challenging in his appeal. *See e.g.*, Wortley and Belger's Initial Br. 7-10, 14, 28-29, 34. In sum, Rigdon is already on the hook for substantial fees and costs based on the trial court's underlying errors and mistaken findings that he seeks to reverse, and Wortley and Belger ask this Court to impose further liability on him for additional fees and costs based (at least in part) on the same mistaken factual findings. Thus, this appeal will decide whether Rigdon may recover additional fees or face liability for Respondents' fees, which also gives him standing.

The third basis for Rigdon's standing lies in the potential that Wortley, Belger, or related parties (such as their children) may try to assert in other litigation that Rigdon is bound by findings

of fact or conclusions of law in the Final Order and Judgment in this case under the doctrines of collateral estoppel and/or res judicata, and thereby attempt to impose additional liability upon Rigdon upon the basis of the very findings that Rigdon seeks to vacate or reverse through his appeal. Wortley and Belger should not be heard to assert, on the one hand, that Rigdon has no stake in this appeal so as to afford him standing but, on the other, that he is bound under the doctrine of collateral estoppel by the very findings of fact he asks this Court to vacate. Rigdon must have standing to seek to overturn those findings, so that they cannot be asserted against him in other litigation.

In short, the Circuit Court's judgment has caused Rigdon injury that is "concrete and particularized and actual or imminent," that is "fairly traceable to the challenged action," and that "will be redressed by a favorable decision." *Beaufort Realty Co.*, *supra*, at 301, 551 S.E.2d at 589. He has standing to pursue this appeal.

II. Rigdon Has Preserved the Issues He Raises on Appeal.

Wortley and Belger follow their meritless standing argument with another meritless procedural argument about issue preservation. Contrary to their claim, Rigdon has preserved all the issues he brings to this Court.

Wortley and Belger's suggestion that Rigdon's statement of issues on appeal was inadequate and that other arguments lack citation to authority, *see* Resp. Br. 11-13, is unsupported. It first bears emphasizing that the statement of issues "must be concise and direct." Rule 208(b)(1)(B), SCACR. It need not set out every argument in support of a party's position on a given issue, nor would the appellate courts want a party to do so. Wortley and Belger's preservation argument confuses the concept of an issue raised with that of arguments made on the issue.

As to the substance of Wortley and Belger's argument, each of the six bullet points listed on page 12 of Wortley and Belger's brief was either addressed in Rigdon's statement of issues or is an argument in support of one or more of the issues that was raised. Wortley and Belger's first, second, and fourth bullet points allege Rigdon did not raise (a) the trial court's error in appointing Cheryl Holland rather than an independent trustee; or (b) Wortley and Belger's inherent conflict of interest; or (c) the trial court's failure to remove all the trustees and replace them with an independent slate. In making that argument Wortley and Belger paraphrase the three questions that come at the conclusion of Rigdon's statement without acknowledging the two paragraphs that come before those questions. These paragraphs reference (a) the trial court's error in removing Rigdon and replacing him with "a trustee who was the hired consultant" of Wortley and Belger (i.e. Cheryl Holland); (b) the fact that "the administration of the trust is beset with an inherent conflict of interest that was not remedied below"; and (c) the trial court's failure to "effect a lasting peace" by "replacing all the trustees." App. Br. 1-2. As for the third bullet point – that Wortley and Belger's insistence on preserving family property over Rigdon's objection was itself a violation of the Will – that argument relates to the inherent conflict of interest that underlies the Trust and that Rigdon addressed (as already noted above) in his statement of issues. Wortley and Belger's fifth bullet point, which concerns grounds for splitting the Trust in two, is not itself an "issue" but rather an argument in support of modifying the Trust and is therefore subsumed in that issue, and Wortley and Belger's sixth bullet point, which claims Rigdon has not preserved his argument that his fee award should be modified, concerns only the relief that should be granted to Rigdon if he prevails on the other issues he brings to this Court.

Wortley and Belger otherwise critique the manner and timing of Rigdon's Rule 59(e) motion, and suggest his argument that the Court should have determined the value of the Trust has

not been preserved for review. Resp. Br. 13-14. The facts about Rigdon's Rule 59(e) motion are these. The trial court issued its Final Order on May 24, 2019, and Rigdon immediately began searching for new counsel to represent him, as Mr. Rosen had retired and Mr. Duffy had moved to a different firm. As that search was ongoing – but before the undersigned had been retained – Rigdon filed a timely Rule 59(e) motion *pro se* on June 3, 2019. His motion argued, among other things, that the trial court had erred in failing to determine the value of the Trust. After being retained, the undersigned counsel re-filed a verbatim copy of Rigdon's Rule 59(e) motion on June 13, 2019.

This sequence of events does not result in waiver of Rigdon's argument concerning valuation of the trust. First of all, no reported decision in this state holds that the trustee of a trust may not proceed in court *pro se* when acting in his capacity as a trustee.[1] A trust is not a separate juridical entity, like a business, but is instead "a fiduciary relationship with respect to property," Restatement (Second) of Trusts § 2 (1959), and for purposes of determining whether an attorney-client relationship exists, "the trust is not the client, because a trust is not a person," *Borissoff v. Taylor & Faust*, 93 P.3d 337, 340 (Cal. 2004). Instead "the trustee . . . is the real party in interest in litigation involving trustee property." *Moeller v. Superior Court*, 947 P.2d 279, 383 n.3 (Cal. 1997). In other words, in filing his motion *pro se*, Rigdon was simply representing himself, and an individual may always represent himself.

But even if this Court were to determine that Rigdon should not have proceeded *pro se*, that circumstance was swiftly remedied when his new counsel re-filed his Rule 59(e) motion ten days later. That re-filed motion was identical to the original *pro se* motion and filed long before

[1] In *Real Estate Unlimited, LLC v. Rainbow Living Trust*, No. 2004-UP-019, 2004 WL 6248341 (S.C. Ct. App. Jan. 15, 2004), this Court did find that a non-attorney trustee could not represent a trust in South Carolina state court. But that case is an unpublished, per curiam opinion.

the trial court addressed any of the parties' motions to alter or amend. We are not aware of any decision in this state (nor did Wortley and Belger or the trial court cite one below) that holds a procedural defect like the one alleged cannot be remedied as occurred here, and certainly nothing in Rule 59 precludes the refiling of the identical motion by new counsel, as happened here.

Moreover, after the parties had fully briefed the issue, the trial court elected to address the merits of Rigdon's argument that the court should have determined the net asset value of the Trust. (R. p. 76) Thus, no prejudice resulted to Wortley and Belger from the manner in which this argument was raised post-trial. It was unquestionably "raised to and ruled upon by the trial judge," thereby satisfying the most fundamental requirement for issue preservation. *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011).

III. Rigdon's Request to Split the Trust Was Before the Trial Court, and All the Parties Knew That.

Continuing with their elevation of procedure over substance, Wortley and Belger wrongly assert that Rigdon's request to split the trust was "untimely" and that they were "not on notice that [Rigdon] was seeking a court ordered split." Resp. Br. 15-19. The record demonstrates Wortley and Belger knew this remedy was among those the trial court was considering, raised no objection to its consideration, and would not be prejudiced by this Court ordering a split now. The trial court was wrong to have concluded the issue of a split was not before it,[2] and this Court can and should address the trial court's failure to pursue this most sensible of solutions.

[2] Wortley and Belger argue, without citation to relevant authority, that this court must review under an abuse of discretion standard the trial court's determination that splitting the trust was not before it. Resp. Br. 15. The question is (at least in part) one of construction of the pleadings – which is how the trial court addressed the issue, not as a matter of its discretion – and that is a matter of law reviewed de novo. *Stoneledge at Lake Keowee Owners Ass'n v. Clear View Const., LLC*, 413 S.C. 615, 621, 776 S.E.2d 426, 429 (Ct. App. 2015).

The filings below are replete with discussions that a split of the trust would be a just outcome, as well as details on how a split could be accomplished, and Wortley and Belger's contentions that Rigdon "never offered any proposed split of the Trust" nor provided "exhibits outlining or depicting a proposed split," Resp. Br. 17, are simply wrong. (*See, e.g.*, R. pp. 179-215; R. p. 5259 ¶ 19(c) (discussing a potential split of the Trust with one trust for Wortley and Belger consisting of "all the remaining Treasured tracts and the rest of the land around the Boykin area" that Belger wished to retain); R. pp. 232-98; R. pp. 5309, 5359-63 ¶ 14 & Ex. 5 (providing detailed, four-page proposal for splitting trust assets); R. pp. 348, 352 (explaining that "[t]he idea of trust splitting, or 'decanting' under [the applicable statute of the Trust Code] appeared to [Rigdon] to be the only way forward," that he had asked the trial court, as part of his third cause of action, to "'further instruct [him] in the exercise of his fiduciary duties,' and decanting is certainly one option available," and that "the Court can [] order the decanting.")) Splitting the Trust – both in concept and how to go about doing it – also was discussed in numerous trial exhibits (R. pp. 3677, 4004, 4129-30) and in trial testimony (R. pp. 1362:14-25, 1363:12-13; R. p. 2010:19-23).

Beyond this evidence, as the trial drew to an end, the court directed the parties to focus closing argument on "what you're asking the Court to do" and not rehash evidence except to the extent it was "particularly significant to the relief that is sought." (R. pp. 2155:10-12, 2156:17-20) These directives were key, especially given the wide-ranging nature of both the trial and the extensive evidence. Following the court's guidance, at closing argument Rigdon's counsel identified a split of the Trust as the very first form of relief Rigdon was requesting:

> Your Honor, you asked us to consider the requested relief that we've asked for in this case. ... [O]ur view, as expressed many times to this court, is that under the trust, the Court has a variety of tools and remedies available to it to try to resolve this dispute.

> The first one, Your Honor, splitting the Trust. I have mentioned this several times today. Mr. Boykin has, of course, raised this. And Ms. Thomas testified that she discussed it and thought it was a good idea. ...
>
> [O]rdering a splitting of the Trust would allow the parties to control their destiny ... in that they can negotiate the various parcels to go in each trust.

(R. pp. 2226-27; *see also id. at* 2228: 24-25)

That request was again made clear following trial, when Rigdon's counsel submitted his proposed order, which set out over four pages the details of a 50/50 split of the Trust. (R. pp. 5745-48) The proposed order was accompanied by a letter from Rigdon's counsel to the court (with copy to counsel for the other parties), stating as follows:

> As you will see from a review of the Proposed Order, the preferred relief sought by the Petitioner and Cross-Claim Respondents is a division of the Residuary Trust(s) .... We believe this result to be the most just and equitable under the circumstances, and to be in keeping with (and not in contravention of) the Decedent's expressed intent. We also believe such a result is permissible under the law.

(R. pp. 5694-95 (emphasis added))

Three things are abundantly clear from the foregoing. First, Rigdon put forward the remedy of splitting the Trust during the pretrial, trial, and post-trial phases preceding entry of the Final Order; second, Wortley and Belger were well aware this proposal was on the table; and third, Wortley and Belger never objected to the presentation of this proposed remedy or suggested they were prejudiced by how or when it was presented. All parties, and the trial court, knew that Rigdon sought this remedy and that it was among the options the court could consider.

Not only that, but as Rigdon argued in his initial brief, his pleadings must be "construed liberally," *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991), and a 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. Massachusetts Prot. Ass'n.*, 160 S.C. 205, 207,

158 S.E. 206, 207 (1931) "Especially is this true in an equity case." *Id.* (emphasis added). Doubtless aware of this legal background, and despite her erroneous conclusion that the issue of a Trust split was not before her, Judge Toal still addressed the issue. (R. pp. 61-62)

In response to this blackletter law, Wortley and Belger point out Rule 54(c), SCRCP, which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," is limited to prevailing parties. Resp. Br. 19. That is true but does not undermine Rigdon's argument – he contends for all the reasons set forth here and in his initial brief that he should have been the prevailing party. Wortley and Belger's remaining allegation about the "prejudice" that would result to them if such relief is granted, Resp. Br. 19, is wrong for the reasons already discussed. They knew a split had been proposed and watched as evidence and argument were presented concerning a split. They had ample opportunity to complain below about resulting prejudice but said nothing.

Faced with the fact that a split of the Trust is not procedurally barred, Wortley and Belger try to dissuade this Court from pursuing such an obvious and sensible remedy by raising the specter that a split would require a "new trial" before this Court. Resp. Br. 19. In so doing they even misstate that "Boykin does not ask this Court to remand the case to the trial court to determine an appropriate division of the Trust," Resp. Br. 19, when that is precisely one of the proposals that Rigdon did make, explicitly, in his initial brief. *See* App. Br. 29. To reiterate, this Court could undertake to fashion an appropriate split, and unquestionably has the power to do so as a court of equity and sufficient record evidence upon which to rely. But this Court could also simply order a split and remand to the circuit court with instructions to carry one forth, or appoint a special master for this task, who could make a recommendation to this Court.

Wortley and Belger address almost nowhere the actual merits of this issue and the extensive factual underpinnings justifying this relief. As Rigdon argued in his initial brief – and Wortley and Belger do not refute – the Trust is beset by an inherent conflict of interest in which two of the income beneficiaries have no children to inherit the remaining assets in the Trust and no voice at the Trust's administrative table, and the other two income beneficiaries have children and serve as trustees. This reality has led to deep distrust and to the tragedy of this litigation, and the stage is set for further tragedies unless this Court reverses. Splitting the Trust would allow Wortley, Belger, and their children to retain all the "cherished" properties and also enable Whit and May to have some control over their own destiny, free of financial domination by siblings who have shown that they are all too willing to subordinate the interests of their younger brother and sister.

The conflict of interest and family dynamics also provide solid legal ground (along with other reasons discussed in Rigdon's Final Appellant Brief at 27-29) for this Court to split the Trust due to "changed circumstances," S.C. Code Ann. § 62-7-412, as the Trust Code unquestionably allows this Court to do. Again, Rigdon's extensive legal argument about this Court's ability to split the Trust is nowhere refuted (or even addressed) by Wortley and Belger, a further tacit admission that Rigdon is correct. *See* App. Br. 27-29.

IV. Rigdon's Request to Remove All the Trustees Was Timely.

As with their other arguments, there is no merit to Wortley and Belger's suggestion that Rigdon's request to remove all the Trustees was untimely. *See* Resp. Br. 21. Rigdon's fifth cause of action unquestionably sought removal of Wortley and Belger, and Rigdon plainly could not specifically request the trial court remove Cheryl Holland until after she was appointed. Her appointment was referenced in the trial court's Final Order but not finalized until the trial court issued a subsequent order on June 21, 2019 confirming removal of Rigdon and appointment of

Ms. Holland. (Supp. R. pp. 5786-88) Rigdon in fact addressed the issue of her appointment in three post-trial motions: his initial *pro se* motion to alter or amend the Final Order, his re-filed motion to alter or amend the Final Order, and his motion to alter or amend the trial court's June 21, 2019 order removing him and appointing Ms. Holland. (Supp. R. pp. 5801-04) Wortley and Belger's assertion that Rigdon "abandoned" this issue is nonsense. He argued it at every occasion he could.

Prior to Ms. Holland's appointment, Rigdon also specifically proposed removal of all three trustees (including himself) as one of his requests for relief in the alternative should the trial court decide not to split the Trust. This request was made clear at closing argument (R. p. 2227: 20-23), and in Rigdon's proposed order (R. p. 5759-60), and in the letter accompanying that proposed order (R. pp. 5694-95). For all the reasons that Rigdon's request to split the Trust was clear to all the parties and the trial court, and justified under a liberal construction of the pleadings, *see supra* pp. 9-11, so too is his request to remove all three trustees and appoint one or more neutral persons preserved for this Court to consider as appropriate relief.

V. The Trial Court Should Have Determined the Value of the Trust.

In arguing that the trial court need not have determined the value of the Trust, Resp. Br. 21-23, Wortley and Belger have done an about face, reversing the position that they, the other parties, and the trial court assumed at trial, where all believed this determination would be key, and copious evidence was introduced on the question. As Rigdon argued in his initial brief, only by determining the net value of the trust is it possible to evaluate the principle claims that led to this lawsuit – namely, (i) claims that the income beneficiaries were not receiving a reasonable share of the Trust's value; (ii) claims that the assets of the Trust were not being diversified with sufficient speed to ensure the Trust grows in size for the income beneficiaries and Remainder

Beneficiaries; and (iii) claims concerning what amount of principal was appropriate for the trustees to invade in providing for the income beneficiaries' needs as required in Item VIII of the Will.

The precarious position of Whit and May, who have no children and are reliant upon income distributions as set by their siblings Wortley and Belger, both of whom have children who are Remainder Beneficiaries, illustrates the compelling need for a valuation. Whit and May's belief (and Rigdon's) that they were not being treated fairly by Wortley and Belger, who had demonstrated a desire to keep the vast bulk of the Trust's assets bound up in illiquid real estate and preserved for the Remainder Beneficiaries, is at the root of the distrust and division in the family. If this Court determines to leave Wortley and Belger in place, that decision should – at a minimum – be conditioned on a judicial valuation of the Trust and establishment of a standard by which to measure the fairness of their actions in setting income distributions.

Wortley and Belger's suggestion that a valuation is not necessary because "the Trust value may change over time," Resp. Br. 23, does not support leaving the current valuation wholly subject to the whim of Wortley and Belger. Values are necessarily fluid and subject to increases and decreases, and any valuation is admittedly a point-in-time snapshot. But the importance of that snapshot here cannot be understated: the parties spent considerable time below fighting about what was the right value of the Trust, and what implications flowed from that value, including the fairness (or not) of current income distributions and the reasonableness of projections for the Trust's long-term growth as it moved from less of a position in illiquid real estate. A judicially determined yardstick by which to measure income distributions (at least in the near future, while tensions remain high) and the Trust's growth in value over time is imperative.

VI. The Weight of the Evidence is Against Many of the Findings of the Trial Court.

As Rigdon's initial brief pointed out, the circuit court made a number of findings that are either contrary to the evidence, unsupported by any evidence, or against the weight of the evidence.

In so doing, the court committed reversible error by buying into a fictitious soap opera narrative pushed by Wortley and Belger and ignoring the inherent conflict of interest and fundamental economic infirmity that beset the Trust.

In response, Wortley and Belger contend that Rigdon must demonstrate that all findings of fact are against the weight of the evidence in order for this Court to vacate the trial court's order, and that we are asking this Court to "comb the record" in search of error. Resp. Br. 24. This is, of course, an impossible task with a 62-page order and a voluminous record, and we are asking no such thing. Rather, we have pointed out what we believe to be the most egregious examples of erroneous or unsupported findings, and on that basis ask this Court to vacate the order below and make findings consistent with its view of the preponderance of the evidence. This is a perfectly appropriate role for the appellate court in an appeal from a single-judge ruling in an equity case.

With respect to the specific findings challenged in this appeal, Wortley and Belger's attempts to rehabilitate them are based on misrepresentations of the record or of Rigdon's position, and therefore must be rejected.

- *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)

Nowhere in the record is there a shred of evidence to support this finding. Rigdon's testimony was clear that what he advocated was selling about 40% of the real estate within two to two and a half years and another 40% within another two years, equating to approximately 80-85% over a five-year span. (R. p. 1708:2-24) With 15-20% of the real estate retained, the Trust would have been able to keep all of the Item X Properties. As shown in his email of October 16, 2016 (just two months after Mrs. Boykin's death), Rigdon was seeking a "long range" plan to

diversify the trust assets (R. p. 3264), with a goal of being 85% liquid in five years (R. p. 4010) – not a sale of "all" or "virtually all" real estate as quickly as possible. [3]

To support the Court's erroneous finding, Wortley and Belger point to testimony that Rigdon thought there was a real estate "bubble" in their market and that they should therefore try to sell land before the bubble burst, Resp. Br. 25, but this evidence simply does not support the finding that he pushed to sell "all" or "virtually all" of the real estate, including the Item X Properties, in a precipitous and hurried manner. To the contrary, the evidence is clear that he favored selling approximately 80-85% over a 5-year period in a manner that would have allowed retention of all of the Item X Properties.

- *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. 18-19)

As shown in Rigdon's initial brief, this finding simply does not make sense. Further, there is no documentation that the alleged exchange with Rigdon in 2012 ever occurred, which is inconceivable if events had really transpired as Judge Toal found. Moreover, the finding contradicts the trial court's other findings that Rigdon wanted to sell as much real estate as possible as quickly as possible, as transferring a 100% interest in the property (rather than 20%) would have made the property much easier to sell later.

In response, Wortley and Belger point to "ten different trial exhibits devoted exclusively to his topic." Resp. Br. 25. None of those ten exhibits supports the finding – in fact, two of them clearly contradict it. All of these exhibits simply deal with the proposal to transfer ownership in

[3] The evidence shows that, initially, Wortley and Belger were only too happy to sell Trust land, including the "treasured" tracts, when they thought they could buy what they wanted at below market prices. (R. pp. 4013-15) It was only when they learned they would have to pay market prices that they began to oppose the sale of such land. From that point, they maintained that they wanted to "hold property until the judge rules." (R. p. 5016)

eight tracts of land in order to take advantage of the exemption. Not a single one contains even the slightest suggestion that Rigdon opposed a 100% transfer and insisted that it be limited to 20%. To the contrary, in one of the exhibits, George Bailey documents that it was Rigdon who suggested "that anything that Alice receives [from the Marital Trust] be dumped into the children's trust." (R. p. 4935) (emphasis added) Thus, what Rigdon was proposing was that the entire 100% interest that was being transferred to Mrs. Boykin would be gifted to the Residuary Trust. The 80%-20% division was Bailey's idea, as confirmed by his contemporaneous letter to Mrs. Boykin in which Bailey advised her that "the safer course of action would be to reduce the gift target to something along the lines of say $2 Million Dollars and take a more aggressive position on the amount of valuation discount claimed," referring to his belief that the estate could claim a "market value 'discount' ... because you will be gifting undivided interests in the properties, as opposed to one hundred percent of the properties." (R. p. 4951-52) Thus, the division of the property interest was clearly Mr. Bailey's professional advice to his client, based on his view of what was "the safer course of action," not something that Rigdon maliciously insisted upon.

Nor do Wortley and Belger make any effort to explain why, if things had happened as the trial court found, there was no attempt to transfer the remaining 80% in 2013, 2014, or 2015 while the $5.12 million tax exemption was still in effect. Instead, they assert that Rigdon could have "offered to reconsider" his position in 2013, 2014, or 2015, Resp. Br. 27, an argument that is obviously fallacious as our whole point is that Rigdon never took this position in the first place. And again, one of the very trial exhibits they reference undermines their argument: In Mr. Bailey's letter to Mrs. Boykin referenced above, one of the reasons that Mr. Bailey advocates gifting only a 20% interest at that time (December 2012) was that he was concerned that the appraiser would not be able to finish his work in time, and that gifting 20% would "allow the appraiser to complete

his work next year." (*Id.*) Thus, Bailey clearly contemplated that they might revisit the strategy in 2013 if the exemption was maintained, as in fact it was.

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

The evidence is undisputed that, during a critical time in the history of the Trust comprising five months when multiple actions needed to be taken, Wortley and Belger refused to meet and repeatedly called off already scheduled meetings, often at the last minute. (R. pp. 1370-71, 5257-57 ¶ 15, 1404:9-22, 5268-69 ¶ 14)

In response, Wortley and Belger argue that 24 meetings were held over 24 months, thus averaging one per month. Resp. Br. 27-28. This argument invokes the adage of the man with his feet in an oven and head in a freezer, who on average is comfortable. It is an evasion of the undisputed fact that Wortley and Belger refused to hold a single meeting during the five months of May to October 2017, resuming meetings only after Rigdon brought this lawsuit. They try to excuse themselves by blaming Karen Thomas's schedule, *id.* at 28, but Ms. Thomas testified only that she was out for "a couple of weeks" during the summer of 2017. (R. p. 1961:1) Wortley and Belger also contend that business continued to be done by phone and email, but the record demonstrates beyond question that not a single concrete action was taken or a single material decision made through those telephone and email communications.

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

Rigdon was the sole disinterested trustee, the only one with no personal interest in how the trust was managed, how it invested its assets, and how and when it made distributions. Nowhere in Wortley and Belger's brief do they even attempt to explain why he would want to try to manipulate his co-trustees for the sole purpose of forcing the Trust to sell property. This is the great unanswered question in Respondents' position: they go to great lengths to paint Rigdon as

an utter villain, but fail to advance any reason that he would act in the manner they portray. To the contrary, Judge Toal expressly found, more than once, that although she disagreed with Ridgon's positions in the suit, he acted throughout in good faith and with the aim of doing what he thought was best for all Trust beneficiaries. (R. pp. 64-65; R. p. 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."))

In light of this finding, which is clearly borne out by the vast weight of the evidence, there is no basis to the conclusion that Rigdon took action with the intent of manipulating his co-trustees. As noted in Rigdon's initial brief, after conflict arose between him and Wortley and Belger, all of the trustee meetings were recorded, those recordings were transcribed, and all trust business was documented by the meeting transcripts and email communications. There is not a single piece of evidence in this documentation to support the finding of intent to manipulate. None. And Wortley and Belger have failed to identify any.

Instead, they point to Karen Thomas's testimony that Rigdon told her he opposed the 6166 election because, "if the Trust did not receive additional time to pay its tax obligations, it would have to sell property immediately." Resp. Br. 28. In fact, what Ms. Thomas testified to was that she thought Rigdon was confused between the 6166 election and the 2032 election. (R. p. 1954:14-16) As to the 6166 election, it was undisputed that Rigdon was relying on the advice of legal and accounting professionals that, since changes to the law were made in 2001, the IRC § 6166 election had become disadvantageous. (R. pp. 1407:08-1409:09) Further, as to the 2032 election, it was undisputed that Rigdon's opposition was due to 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) This concern was also based on the advice of tax and accounting professionals.

- *Finding: Rigdon treated his co-trustees and Karen Thomas with disrespect and "frequently belittled" them.* (R. p. 29)

As noted, once the trustee relationships became contentious, all of their dealings and communications with each other were documented in the recordings of trustee meetings, transcripts of the recordings, 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. 3397-3999, 4077-4138) It is true, as Wortley and Belger point out, that they testified that Rigdon was disrespectful in trustee meetings and that Belger testified that Rigdon yelled at her in trustee meetings, Resp. Br. 30. However, the best evidence of those meetings, the recordings, do not corroborate that testimony – there is no yelling in the recordings, and no evidence of "belittling," disrespectful, or insulting behavior by Rigdon. If the de novo standard of review means anything, it must mean that this Court should give greater weight to the actual recordings of the meetings rather than Wortley and Belger's self-serving and unsubstantiated testimony about what happened in them.

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

As shown in Rigdon's initial brief, substantial evidence in this case demonstrated that Wortley and Belger acceded to their inherent conflict of interest and elevated 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 intentionally withholding information from Whit and May. Further, it is undisputed that Belger initially wanted to purchase

certain Item X 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 she began to oppose the sale of such properties.

Wortley and Belger do not cite any evidence to refute these facts (because they cannot), and instead make the extraordinary claim that they met their fiduciary duties because six of the eight beneficiaries supported their decisions. Resp. Br. 31. This, of course, is the whole point of our argument: they owe a duty to all beneficiaries, not just to themselves and their children; and it is precisely the two beneficiaries who did not support their decisions – Whit and May – who have had their interests subordinated to those of Wortley, Belger, and their children. Fiduciary duty is not a matter of pleasing a majority of the beneficiaries to the detriment of the minority.

Similarly, Wortley and Belger applaud themselves for offering to reduce the distributions they received from the Trust in order to give more money to Whit and May. Resp. Br. 31. What they fail to note, however, is that they compensated themselves for this "generosity" by paying themselves trustee fees in the exact amount of the reduced distribution – trustee fees that Whit and May, of course, did not receive. (R. pp. 4390, 4655)

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

Respondents do not dispute – and cannot dispute – that the Will states clearly that the Trustees "shall attempt to be as nearly equitable as possible among beneficiaries." (R. p. 2459) There is no way this directive can be squared with the trial court's erroneous finding that the Will prefers the interests of the remainder beneficiaries over those of the income beneficiaries. Respondents go on to concede that the Will may indeed be "neutral," Resp. Br. 33, and of course this concession recognizes that the trial court's finding is not correct. Whether this is a question of law or an issue of fact, Resp. Br. 32, is immaterial as either one is subject to de novo review in this appeal, and the court's finding is clearly erroneous.

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

Rigdon's understanding of the Insurance Trust was that it was intended to be used to pay taxes, and he stated this multiple times in contemporaneous emails. (*E.g.,* 5.3.17 email; 5.4.17 email) Respondents cite a "memo ... outlining the proposal," Resp. Br. 33, but in fact this was a memo that Rigdon had requested. (R. p. 1924:13-23) Karen Thomas did testify Rigdon voted against the proposal, but Rigdon disputes this testimony and would suggest his contemporaneous emails are the best evidence on this point. In any event, there is no dispute that when the time came to pay an estimated tax, Rigdon 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. (*Id.* at (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)

Respondents claim that it is "undisputed" that Rigdon forced LaFrage to delay his work, but they cite no evidence to support this claim other than Petitioner's Exhibit 24, which in fact says nothing to that effect. What is undisputed is that Helms's delay, the result of his own action, was the cause of not having valuations in 2017. (*See* R. pp. 1716:20-1717:6)

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

As shown in Rigdon's initial brief, this finding is clearly erroneous. In response, Wortley and Belger cite evidence to the effect that Rigdon opposed the 6166 election. That much is clear, and we do not dispute it. What we do dispute is that Rigdon did so "to gain leverage," and there

is absolutely no evidence to support that finding. To the contrary, it was undisputed Rigdon received the advice of independent trust counsel that, since changes to the law were made in 2001, the § 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) Thus, while Rigdon did oppose the election, there is no evidence that he did so to gain leverage, and substantial evidence that his opposition was taken in good faith on the advice of trust counsel.

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

Again, Respondents do nothing more than point to evidence that Rigdon opposed the 2032 election. Again, we do not dispute this, but we vehemently dispute the trial court's pejorative conclusion that Rigdon's purpose was to gain leverage. That finding has no record support, and Respondents do not identify any. To the contrary, 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 and admitted there were good reasons not to make an election under IRC § 2032. (R. pp. 2178:22-2179:14, 1895:22-1899:05, 5010-12) Further, it is undisputed that Rigdon was advised by independent trust counsel James Hardin to withhold consent because it would severely constrain the Trust's ability to sell property and diversify, and that advice was corroborated by expert witness William Harrison. (R. pp. 2419:14-2420:6; *see generally id.* at 2384-2418) Harrison computed that the 2032 election would end up costing the Trust $1 million to $2 million over time, and on top of the Item X properties would tie up over

80% of the Trust's real estate. There is no basis whatsoever for the finding that Rigdon's opposition was for the purpose of gaining leverage.

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

This finding is directly contrary to Rigdon's testimony of why the bank accounts were frozen – reasons that he had nothing to do with and worked to overcome so the accounts could be un-frozen. (R. pp. 2183:21-2184:17, 2185:5-7) Respondents assert the trial court's finding is "amply supported by other evidence," and cite to a trial exhibit and testimony, but neither the exhibit nor the testimony contain evidence from someone with personal knowledge of the alleged actions. The only person with knowledge who provided evidence on this point was Rigdon, and his testimony refutes the trial court's finding. If the de novo standard of review is to have any real meaning, it must mean that this Court should give weight to the testimony of a witness with knowledge over that of witnesses without knowledge.

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

Respondents' argument on this point is based on testimony by David Thomas, the President of Haile Gold Mine, that he did not ask Rigdon to keep his identity secret from the other trustees. This is true, but the argument ignores the point that Thomas wanted to keep the proposed transaction out of public knowledge until all stakeholders had agreed on the basic terms, and Rigdon felt that this required him to restrict knowledge of who was making the proposal during the initial negotiations. (R. p. 3874-75; R. pp. 230-231 ¶ 5; R. pp. 1705:10-25, 1706:5-15) Rigdon's judgment in this regard was justified later when, after the identity of the purchaser was revealed, Belger's attorney threatened Thomas with litigation and an appeal of any decision to allow the sale, resulting in Thomas's withdrawal of the offer. (R. pp. 4068-70; *see also* R. pp. 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 the court's ruling on the matter. Accordingly, it cannot be said that Rigdon withheld the identity of the Haile Gold Mine "for no reason" – he had very good reason indeed.

CONCLUSION

At stake in this appeal is the long-term viability of this Trust. At the end of the day, this Trust cannot survive and provide the income beneficiaries a reasonable yearly distribution, if the ruling of the trial court stands. Aside from the actions of Wortley and Belger to benefit themselves and their children to the detriment of Whit and May, 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 – all of which the trial court failed to address. Only by reversing and directing a split of the Trust or appointment of independent trustees can the situation be remedied. This Court should also vacate the findings against Rigdon and re-assess his fee award.

Respectfully Submitted,

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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.

CERTIFICATE OF COUNSEL

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

Dated: January 19, 2021

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