

IN THE MISSISSIPPI SUPREME COURT

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NO. 2010-CA-00014

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RICHARD E. WILBOURN III  
APPELLANT

VS.

DEANNA A. WILBOURN, ELIZABETH W. WILLIAMSON, GARNETT W. HUTTON  
APPELLEES

---

Appeal From The Chancery Court of Lauderdale County, Mississippi

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BRIEF OF APPELLEE DEANNA A. WILBOURN

ORAL ARGUMENT REQUESTED

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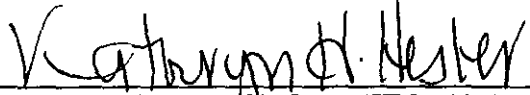
**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Deanna A. Wilbourn, Appellee
2. William C. Hammack and Kacey Guy Bailey, Hammack, Barry, Thaggard & May, LLP, Counsel for Deanna A. Wilbourn, Appellee
3. Kathryn H. Hester, Watkins Ludlam Winter & Stennis, P.A., Counsel for Deanna A. Wilbourn, Appellee
4. Elizabeth Wilbourn Williamson, Appellee
5. Garnett Wilbourn Hutton, Appellee
6. W. Wayne Drinkwater and Mary Clay Morgan, Bradley Arant Boult Cummings, LLP, Counsel for Elizabeth W. Williamson and Garnett W. Hutton, Appellees
7. Richard Eggleston Wilbourn, III, Appellant
8. Glenn Gates Taylor, William O. Brown, Jr., Christy M. Sparks, Copeland, Cook, Taylor & Bush, P.A, Counsel for Appellant Richard E. Wilbourn, III

9. Henry W. Palmer, Lawyers PLLC, Counsel for Appellant Richard E. Wilbourn, III

Respectfully submitted, this the 9<sup>th</sup> day of June, 2011.

  
KATHRYN H. HESTER, ATTORNEY FOR  
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## **STATEMENT OF THE ISSUES**

1. Did the Chancellor abuse his discretion or apply an erroneous legal standard in deciding to remove Richard E. Wilbourn III as Co-Trustee of the Deanna A. Wilbourn Marital Trust B?
2. Did the Chancellor abuse his discretion in dissolving the November 21, 2007 injunction which prevented the voting of the 41,910 shares of Bank stock in the Deanna A. Wilbourn Marital Trust B.
3. Were the Court's forty-one pages of findings of fact supported by substantial evidence?
4. Did the Court make an erroneous interpretation of law in finding that Richard E. Wilbourn III breached his fiduciary duties as Co-Trustee of the Deanna A. Wilbourn Marital Trust B?
5. Did the Court make an erroneous interpretation of law in finding that Richard E. Wilbourn III had an attorney-client relationship with Deanna Wilbourn and that he breached his fiduciary duties as an attorney?
6. Did the Chancellor make an erroneous interpretation of law in finding that Richard E. Wilbourn III had a confidential relationship with Deanna Wilbourn and that he breached his fiduciary duties in that relationship?
7. Did the Chancellor make an erroneous interpretation of law in finding that Richard E. Wilbourn III caused hostility which made it impossible for the Co-Trustee and beneficiaries to trust him and that the hostility impaired the administration of Marital Trust B?
8. Did the Chancellor make an erroneous interpretation of law in finding that Richard E. Wilbourn III attempted to thwart the provisions of the Deanna A. Wilbourn Marital Trust B which constituted a basis for removal?
9. Did the Chancellor make an erroneous interpretation of law in finding that Richard E. Wilbourn III surreptitious taping of his mother in her home for adversarial purposes constituted dishonest acts that made him unsuitable to be Co-Trustee?
10. Did the Chancellor make an erroneous interpretation of law in finding that Richard E. Wilbourn III exercised his discretionary duty as Co-Trustee of the Deanna A. Marital Trust B unreasonably?
11. Did the Chancellor abuse his discretion or apply an erroneous legal standard in declining to remove Deanna A. Wilbourn as Co-Trustee of the Deanna A. Wilbourn Marital Trust B or in declining to find that Elizabeth W. Williamson

and Garnett W. Hutton were prohibited from serving as successor Co-Trustees of the Deanna A. Wilbourn Marital Trust B?

12. After ultimately losing in Lauderdale Chancery Court, is Richard E. Wilbourn III entitled to request a new venue when he waived his right to challenge the Lauderdale Chancery Court jurisdiction after the Lauderdale Chancery Court ruled favorably on his then pending motion?

## **ORAL ARGUMENT REQUESTED**

The Chancellor issued a seventy-one page opinion after five weeks of trial. While Appellee Deanna A. Wilbourn believes that the law is settled with regard to the facts and law which give rise to a breach of fiduciary duty by a trustee of a trust, because of the size of the record, Deanna A. Wilbourn requests oral argument. It is not possible to refute every incorrect assertion in the Appellant's seventy-two page Brief or to defend every correct finding in the Chancellor's seventy-one page opinion within any reasonable page limit established by the Court. And while the time limits on oral argument may not allow that either, it would provide additional opportunities to answer any questions related to the record and the law. For that reason and others, Deanna A. Wilbourn asserts that oral argument would assist the Court in an understanding of the facts and the issues.

## I. STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition in the Trial Court Below

This matter arises out the Deanna A. Wilbourn Marital Trust ("Marital Trust B") established under the May 7, 1999, Will of Richard E. Wilbourn, II ("Richard II"). [Ex. 1, Ex. 403 5-7-99 Will](Vol. 1 of 18 Ex at 4-8; Vol. 11 of 18 Ex at 1642-46) (REWIII R.E. 6)<sup>1</sup>. Richard II died on October 23, 2004. The Plaintiff/Appellant, Richard E. Wilbourn, III ("Richard III"), and his mother, Deanna A. Wilbourn ("Deanna") were appointed co-trustees of Marital Trust B under the Will, with his sisters Elizabeth W. Williamson ("Elizabeth") and Garnett W. Hutton ("Garnett") named as successor trustees.

On May 18, 2007, Richard III sued Deanna, Elizabeth and Garnett, the Appellees herein, in the Chancery Court of Madison County, Mississippi, to have them declared ineligible to be co-trustees and successor co-trustees of Marital B Trust and to have a successor trustee appointed. (Vol. 1 of 40 of 62 CP at 12-67). Venue was transferred to Lauderdale County Chancery Court on November 2, 2007, (Vol. 1 of 40 CP at 8-10) pursuant to Deanna, Elizabeth and Garnett's Motions to Dismiss For Lack of Jurisdiction. (Vol. 1 of 40 CP at 69-74, 79-89, 90-97)<sup>2</sup>.

On November 26, 2007, Richard III filed with this Court a Petition for Interlocutory Appeal of the Madison County Chancery Court's transfer of the case. See *Richard E. Wilbourn, III v. Deanna A. Wilbourn*, Supreme Court Docket 2007-M-02086-SCT. Richard III voluntarily dismissed the Petition (Vol. 6 of 40 CP at 845) following a hearing in

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<sup>1</sup> (Vol. 1 of 18 Ex), references Trial Exhibits; (Vol. 1 of 40 CP), references the first 40 volumes of the Clerk's Papers; (Vol. 41 of 62 Tr), references Trial Testimony which is found in the last 22 volumes of the Clerk's Papers; (Vol. 1 of 5 SR CP), references the Supplemental Clerk Papers; (R.E.) references Record Excerpt No. or (R.E. REWIII) Richard III's Record Excerpts. This brief refers to the parties and key witnesses by their first names as the Chancellor did. The name of the exhibit and the witness, however, are included in the record cite to give the reader insight into the source of the record support. All references to CP, Ex, R.E. and Tr are in 11 point font to differentiate the cites from the substance.

<sup>2</sup> Motions to Dismiss the Amended Complaints were filed but are not listed separately.

Lauderdale Chancery Court on the meaning of Madison County Chancellor Goree's ruling (Vol. 6 of 40 CP at 836 – 838) and for revision of the Chancellor's November 21, 2007, injunction in the event that the Supreme Court of Mississippi took jurisdiction of the case pursuant to the interlocutory appeal. (Vol. 6 of 40 CP at 839-841).

Richard III filed a First Amended Complaint on July 6, 2007, (Vol. 1 of 40 CP at 100-131) and a Second Amended Complaint on November 26, 2007. (Vol. 4 of 40 CP at 532-591).

On December 6, 2007, Deanna, Elizabeth and Garnett answered and counterclaimed to have Richard III removed as co-trustee of Marital Trust B under the common law if the Chancellor found that Richard III had not already been successfully removed by Notice delivered pursuant to the Richard II Will. (Vol. 6 of 40 CP at 853-900; Vol. 7 of 40 CP at 901-940). Richard III answered the counterclaims on January 16, 2008. (Vol. 7 of 40 CP at 947-958).

The parties filed Motions for Summary Judgment and Partial Summary Judgment on June 16, 2008.<sup>3</sup> The Court granted partial summary judgment to Richard III on his claim that he had not been removed as Co-Trustee by the Notice delivered under the terms of the Richard II Will (Vol. 29 of 40 CP at 4233-51; 4288-4289); granted Deanna's Motion for Partial Summary Judgment, finding that Deanna was *not*, as Richard III charged, incompetent to serve as a co-trustee of Marital Trust B; (Vol. 29 of 40 CP at 4265-77; 4290-91) and denied the remaining motions, (Vol. 29 of 40 CP at 4252-4264; 4284-

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<sup>3</sup> (E&G: Vol. 12 of 40 CP at 1730-1800; Vol. 13 of 40 CP at 1801-1950; Vol. 14 of 40 CP at 1951-2100; Vol. 15 of 40 CP at 2100-2250; Vol. 16 of 40 CP at 2251-2400; Vol. 17 of 40 CP at 2401-2418; REW: Vol. 17 of 40 CP at 2419-2550; Vol. 18 of 40 CP 2551-2588; DAW: Vol. 18 of 40 CP at 2589-2700; Vol. 19 of 40 CP at 2701-2850; Vol. 20 of 40 CP at 2851-2856; E&G: Vol. 20 of 40 CP at 2857-2872; DAW: Vol. 20 of 40 CP at 2873-3000; Vol. 21 of 40 CP at 3001-3150; Vol. 22 of 40 CP at 3151-3300; Vol. 23 of 40 CP at 12-67 3301-3315; REW: Vol. 23 of 40 CP at 3316-3322; Vol. 24 of 40 CP at 3451-3589; 3592-3600; Vol. 25 of 40 CP at 3601-3750; Vol. 26 of 40 CP at 3751-3900; Vol. 27 of 40 CP at 3901-4050; Vol. 28 of 40 CP at 4051-4178; DAW: Vol. 28 of 40 CP at 4192-4200; Vol. 29 of 40 4201-4221).

4285) including Richard' III's Motion in Limine related to his job performance at Citizens National Bank of Meridian ("Bank"), his removal from Chairmanship of the Bank and Holding Company, and his January - March 2007 communications with Deanna and Archie McDonnell, Jr. ("Archie Jr."), President and Chief Executive Officer of the Bank. (Vol. 29 of 40 CP at 4278-83; 4286-87).

Trial was held in Lauderdale County Chancery Court on the following dates: December 15-19, 2008, May 4-7 and 11-15, 2009, and August 19-20, and 24-26, 2009. Richard III called as witnesses: Deanna, Elizabeth, Garnett, Archie Jr., Cindy Wilson, Von Burt, Lee Myer, (all associated with the Bank), Russell Williamson, his brother-in-law and Chairman of the Board of the Bank, his uncle and aunt, Jim and Jane Wilbourn, and Bill Nunnery, Kirk Reasonover, Janie Goodman, George Hill (all associated with the Bank). Richard III then testified on direct and cross and redirect for all or part of six days before resting. He testified in rebuttal for part of one day. The parties entered 460 exhibits. (Vol. 1 – 18 Ex).

After sixteen days of testimony, the Lauderdale County Chancery Court ("Chancery Court" or "Chancellor") dismissed Richard III's claims (Vol. 60 of 62 Tr at 2995-3000; Vol. 61 of 62 Tr at 3001-3008) pursuant to Deanna, Elizabeth and Garnett's Rule 41(b) Motions to Dismiss at the close of Richard III's case-in-chief. (E&G: Vol. 34 of 40 at 5008-29; 5057-82; DAW: Vol. 34 of 40 CP at 5030-56; 5064-5100; Vol. 35 of 40 CP at 5100-07). Testimony continued in the Defendants' case-in-chief over three more days with those witnesses who had not already appeared, and Richard III testified in rebuttal.

On December 8, 2009, the Chancellor issued a seventy-one page opinion, of which forty-one pages are Findings of Fact. (Vol. 38 of 40 CP at 5620-90) (REVIII R.E. 2).



On December 23, 2009, the Chancellor entered a Final Judgment. (Vol. 38 of 40 CP at 5692-5700; Vol. 39 of 40 CP at 5701-64) ( REWIII R.E. 3).

Richard III filed a Motion for a Stay Pending Appeal on December 29, 2009 (Vol. 40 of 40 CP at 5765-69) which was denied on January 22, 2010, (Vol. 40 of 40 CP at 5902-10), and a Notice of Appeal of the Chancellor's final judgment on December 30, 2009. (Vol. 40 of 40 CP at 5856-59).

On December 29, 2009, Deanna, Elizabeth and Garnett moved pursuant to Rule 59(e) to Amend the December 23, 2009 Final Judgment. (Vol. 39 of 40 CP at 5770-5850; Vol. 40 of 40 at 5851).

On January 22, 2010, the Chancellor entered an Amended Final Judgment (Vol. 40 of 40 CP at 5912-5984)(R.E. 3 REWIII) which

1. reaffirmed the dismissal with prejudice of all of Richard E. Wilbourn III's claims; and
2. permanently enjoined Richard E. Wilbourn III from future service as Co-Trustee of the Deanna A. Wilbourn Marital Trust B; and
3. vacated and held for nought the preliminary injunction previously entered by the Court on November 21, 2007 [which required the parties to maintain the status quo with regard to Marital Trust B and the 41,910 shares of stock which were its sole assets<sup>4</sup>]; and
4. appointed Elizabeth Wilbourn Williamson as successor Co-Trustee of the Deanna A. Wilbourn Marital Trust B to serve with the existing Co-Trustee, Deanna A. Wilbourn; and
5. ordered Richard E. Wilbourn, III to return to Deanna A. Wilbourn the stock certificates representing the 41,910 shares of stock in Citizens National Banc Corp. which are the property of the Deanna A. Wilbourn Marital Trust B in accordance with the Bench Opinion and Judgment entered January 22, 2010; and

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<sup>4</sup> None of the parties shall reissue, transfer, encumber or vote said stock, and the original certificates shall remain in the vault in the safe deposit box of Richard E. Wilbourn III in Citizens National Bank, Madison, Mississippi. [Nov. 21, 2007 Order](Vol. 4 of 40 CP at 525-526) (REWIII R.E. 12).

6. ordered Richard E. Wilbourn, III to return to Deanna A. Wilbourn all of the check books, bank statements and banking records of every kind and nature that are the property of the Deanna A. Wilbourn Marital Trust B in accordance with the Bench Opinion and Judgment entered January 22, 2010.

[1-22-10 Amended Judgment](Vol. 40 of 40 CP at 5912-13) (R.E. 3 REWIII). The January 22, 2010 Amended Judgment was identical to the December 23, 2009 Judgment with the addition of ¶3.

On July 2, 2010, Richard III filed 334 proposed corrections to the Transcript, and on July 30, 2010, Deanna, Elizabeth, and Garnett filed two Rule 10 pleadings seeking to have missing pages to the Exhibits and the Clerk's Papers added to the record on appeal and responding to the 334 proposed corrections. (Vol. 1 of 5 SR CP at 4-72). The record issues were resolved by Orders on September 28 and 29, 2010. (Vol. 4 of 5 SR CP at 492-600; Vol. 5 of 5 SR CP at 601-627).

#### **B. Statement of Facts**

This case begins with Richard II, a distinguished Meridian attorney, and his family bank, Citizens National Bank of Meridian. Both Richard II's father and grandfather had important roles in the Bank, and Richard II himself accumulated sufficient stock in the Bank to be able to influence and control its actions through the vote of his own stock and that of his immediate family, Deanna and his children, Richard III, Elizabeth and Garnett. [Ex. 402, 1-6-99 Agreement](Vol. 11 of 18 Ex at 1628-38) (REWIII R.E. 4). Through his May 7, 1999 Will, Richard II established Marital Trust B into which he placed all of the shares of Bank stock which he had accumulated in his lifetime. Richard II died unexpectedly on October 23, 2004. At the time of his death, Richard II was Chairman of the Boards of the Bank and of Citizens National Banc Corp (also "CNBC" or "Holding Company") which had five directors, Richard II, Richard III, Archie

McDonnell, Sr., Archie Jr. and Garnett. [Pretrial Order 9(a)(2)](Vol 33 of 40 CP at 4927) (REVIII R.E. 17).

This law suit results from the actions of the life and residuary beneficiaries of Marital Trust B following Richard II's death. The suit required the Chancellor to determine whether either of the co-trustees or of the two successor trustees of Marital Trust B breached their fiduciary duties in a manner to warrant removal as co-trustee or preclusion to serve as successor co-trustees. The Chancellor's factual findings are supported by the following record facts.

**1. Citizens National Bank of Meridian**

Richard II invested both his time and a great portion of his money into the success of the Bank. [Ex. 402, 1-6-99 Agreement](Vol. 11 of 18 Ex at 1628-38) (REVIII R.E. 4). Four months before finalizing his Will, Richard II summarized his thirty-seven year involvement with the Bank as a shareholder and as a lawyer in a January 6, 1999, Agreement with his son, Richard III. [Ex. 402, 1-6-99 Agreement](Vol. 11 of 18 Ex at 1628-29) (REVIII R.E. 4).

In the January 1999 Agreement, Richard II stated that he had been invited to be on the board of the Bank after his father died. He detailed his frustrations at being unable to have influence over the actions of the Bank because of his age and other factors but concluded that he could gain influence "by acquiring a more substantial interest in" the Bank. [Ex. 402, 1-06-99 Agreement at 1](Vol. 11 of 18 Ex at 1628) (REVIII R.E. 4).

In the January 1999 Agreement, Richard II continued that he had been able, over a 25-year period, to accumulate sufficient shares of stock, including those held by his wife and children, to have a majority shareholder's interest in the Bank. [Ex. 402, 1-06-99

Agreement at 1-2](Vol. 11 of 18 Ex at 1628-29) (REVIII R.E. 4). He further stated that he had gifted shares of Bank stock to his children, had caused his mother to gift shares of stock to his children, and had made additional shares of stock available to them at reasonable prices for purchase, using the incomes from the investments he had made available to them. [Ex. 402, 1-06-99 Agreement at 2](Vol. 11 of 18 Ex at 1629) (REVIII R.E. 4).

After emphasizing the importance of the majority shareholder position to his ability to influence the Bank board and Bank management, Richard II noted that his only son, Richard III, then 36 years old, had expressed an interest in becoming involved with the Bank, and he wanted to give him an opportunity to gain knowledge and influence with the Bank if he had the talent and ability, by arranging for him to become a member of the Board of Directors. [Ex. 402, 1-06-99 Agreement at 2](Vol. 11 of 18 Ex at 1629) (REVIII R.E. 4). Richard II acknowledged, however, that he wanted to be protected from having his own influence diminished if Richard III's service as a board member was no longer an advantage to the family's overall interests. [Ex. 402, 1-06-99 Agreement at 2](Vol. 11 of 18 Ex at 1629) (REVIII R.E. 4).

To that end therefore, Richard II and Richard III entered into a contract by which Richard III would agree to step down from the Board if, in Richard II's sole opinion, Richard III's services on the Board "are no longer advantageous to the Wilbourn family's overall interest." [Ex. 402, 1-06-99 Agreement at 2](Vol. 11 of 18 Ex at 1629) (REVIII R.E. 4).

Richard III further agreed that upon his father's death he would nominate one or more members of the Wilbourn family to be on the Bank Board (including his in-laws) "as the remaining members of the family may conclude they would want to represent

them on the board." [Ex. 402, 1-06-99 Agreement at 2-3](Vol 11 of 18 Ex at 1629-30) (REWill R.E. 4).

Two months after executing the January 1999 Agreement, Richard II became Vice-Chairman of the Bank Board, General Counsel and Secretary, and Richard III was placed on the Bank Board at the March 1999 Bank shareholder meeting. (Richard III, Tr. May 13, 2009)(Vol. 55 of 62 Tr at 2167).

Two months after the March 1999 Bank shareholder meeting and four months after contracting with his son related to his service on the Bank Board, Richard II finalized his May 7, 2009, Will. In that Will Richard II created a marital trust for the sole use and benefit of Deanna during her life into which he placed the 41,910 shares of the Bank stock that he had accumulated. He affirmed that he had acquired sufficient shares of Bank stock to prevent unilaterally certain actions that would dilute his interest or the voting power of the stock. [Ex 1, Ex. 403, 5-7-99 Will at Item V(d)](Vol. 1 of 18 Ex at 4-8; Vol. 11 of 18 Ex at 1642-46) (REWill R.E. 6).

Richard II instructed the Co-Trustees that during his lifetime he was opposed to any merger or sale of the stock which would dilute his interest and that he had acquired enough stock to be able unilaterally to prevent such action. [Ex.1, Ex. 403, 5-7-99 Will at Item V(d)](Vol. 1 of 18 Ex at 6; Vol. 11 of 18 Ex. at 1644) (REWill R.E. 6). Thus, consistent with his intention, the Co-Trustees of Marital Trust B could not sell the stock or vote for any corporate action which would dilute the voting power or ownership of the stock or which would lead to the sale or exchange of the stock without the unanimous written consent of all of the beneficiaries of the income and principal of the trust. [Ex. 1, Ex. 403, 5-7-99 Will at Item V(d)](Vol. 1 of 18 Ex at 6; Vol. 11 of 18 Ex at 1644) (REWill R.E. 6).

In June 1999, just one month after the Richard II Will was executed, Richard II and Archie Jr created a Strategic Plan for the Bank which reorganized the management structure of the Bank. Richard II placed Archie Jr. as President and CEO under the new management structure. [Ex. 2, Ex. 404 , 6-8-99 Strategic Plan](Vol. 1 of 18 Ex at 22-28; Vol. 12 of 18 Ex at 1660-66) ( REWIII R.E. 5); [Archie, Tr. Dec. 15, 2008](Vol. 41 of 62 Tr at 96-102); [Garnett, Tr. May 12, 2009](Vol. 54 of 62 Tr at 222-26).

Archie Jr.'s family held the second largest block of shares of stock in the Bank. [Ex. 559, 3-6-07 Minutes of CNBC Annual Shareholder Meeting at CNB 609-611](Vol. 16 of 18 Ex at 2305-07). Richard II trusted Archie Jr. and had a good working relationship with him. [Ex. 408 Transcript of 10-29-04 and 10-30-04 Conversations](Vol. 12 of 18 Ex at 1700); [Garnett, Tr. May 12, 2009](Vol. 54 of 62 Tr at 224).

The Bank prospered under the leadership of Archie Jr. and the leadership team that he had built, [Archie Tr. Dec. 16, 2008](Vol. 44 of 62 Tr at 475-477), growing the Bank's assets from \$450,000,000 when Archie Jr. became President and CEO to \$820,000,000 at the time of Richard II's death. [Archie, Tr. Dec. 16, 2008](Vol. 44 of 62 Tr at 454); [Richard III, Tr. May 13, 2009](Vol. 55 of 62 Tr at 2196); [Ex. 310, 2005 Letter to Shareholders at E&G 0307](Vol. 11 of 18 Ex at 1603).

## **2. The Deanna A. Wilbourn Marital Trust B**

Marital Trust B, the trust at issue in this case is a marital trust<sup>5</sup> established for the sole use and benefit of Deanna during her lifetime. The sole asset of Marital Trust B is the 41,910 shares of Bank stock (now Holding Company stock) owned by Richard II at his death. [Ex. 1, Ex. 403 5-7-99 Will at Item V](Vol. 1 of 18 Ex at 4-8; Vol. 11 of 18 Ex at 1642-46) (REWIII R.E. 6); [Pretrial Order 9(a)(9)](Vol 33 of 40 CP at 4927) (REWIII R.E. 17).

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<sup>5</sup> A marital trust allows one spouse to transfer, during life or upon death, an unlimited amount of property to his or her spouse without incurring gift or estate tax. 26 C.F.R. § 20.2056(b)-5 (a) (1991); *Roberson v. Farm Credit Bank*, 818 F. Supp. 933, 937 & n.13 (N.D. Miss. 1993).

The sole discretionary task of the Co-Trustees of Marital Trust B is to vote the 41,910 shares of Bank stock for Holding Company Directors and on any corporate governance and corporate structure matters submitted to the shareholders by the Holding Company Board, including the number of directors, merger, sale of substantially all the assets, dissolution, and whether to utilize cumulative voting. [Ex. 401, By-laws](Vol. 11 of 18 Ex at 1618-19); [Richard III, Tr. May 15, 2009](Vol. 58 of 62 Tr at 2573, 2578).

In order to obtain the marital deduction and so that the 41,910 shares of Bank stock could pass to Marital Trust B without being taxed, the stock had to be left either outright to the spouse or placed into a trust for the sole benefit of the spouse, and the net income from the trust assets had to be paid to the spouse. [Ex. 1, Ex. 403, 5-7-99 Will, at ITEM V, V(a), V(b)](Vol. 1 of 18 Ex at 4-5; Vol. 11 of 18 Ex at 1642-43) (R.E. 6 REWill) & n.5.

Richard II left specific additional instructions related to the administration of Marital Trust B. Those instructions included in Item V are

- (a) Co-Trustees had no right, power or authority which would deprive the estate of the marital deduction for the 41,910 shares of stock.
- (b) All of the net income was to go to Deanna or for her benefit at least annually, and no one had the power to designate that anyone other than Deanna was entitled to the trust assets during her lifetime.
- (c) The Co-Trustees were entitled to a fee of up to six percent (6%) of the current income of the trust for normal services of disbursement and voting the 41,910 shares of stock, for execution of proxies or other services of a minor or perfunctory nature. Deanna had the sole authority to approve any additional fee or expenses.
- (d) After expressing his determination that during his lifetime he would vote against any mergers of the bank that would dilute his interest and would oppose the sale of the stock to another bank, bank holding company or individual; and after reiterating that he had acquired enough stock to be able unilaterally to prevent such actions, Richard II stated that "neither the Co-Trustees nor the proxy of the trust shall sell this stock or vote in favor of any merger or other corporate action which is calculated to lead to a merger which would dilute the voting power or ownership of the

stock in The Citizens National Bank of Meridian or would lead to the sale or exchange of this stock, without the unanimous consent in writing of all of the beneficiaries of the income and the principal of this trust."

(e) Deanna was given the sole authority to determine that the trust assets were underperforming and the power to require that they be made performing or sold.

(f) Upon Deanna's death the Co-Trustees could pay all taxes attributable to the trust by reason of Deanna's death from any asset remaining in the trust other than stock in Citizens National Bank. The Co-Trustees were then to terminate the trust and distribute the remaining principal to Richard III, Elizabeth and Garnett equally.

(g) In the event that either Richard III or Deanna were unable or unwilling to serve, Richard II appointed Elizabeth and in turn Garnett as Successor Co-Trustee, to serve as if originally appointed.

[Ex. 1, Ex. 403, 5-7-99 Will, at ITEM V](Vol. 1 of 18 Ex at 4-8; Vol. 11 of 18 Ex at 1642-46

(REWIII R.E. 6).

### **3. Richard II's Death and Richard III's Succession as Chairman of the Boards of the Bank and Holding Company**

Richard II died unexpectedly on October 23, 2004. [Ex. 444, 6-28-05 Petition to Chancery Court](Vol. 12 of 18 Ex at 1795); [Archie, Tr. Dec. 15, 2008](Vol. 41 of 62 Tr at 102). At the time of his death, there were no plans in place for a successor Chairman of the Boards of the Bank or the Holding Company. [Ex. 408, Transcript of 10-29-04 and 10-30-04 Conversations](Vol. 12 of 18 Ex at 1692, 1698-1700).

On October 29, 2004, one week after Richard II's death, Archie Jr., along with Don Rogers, Richard II's law partner, approached Deanna and sought to convince her to allow him to nominate Richard III to succeed his father as Chairman of the Boards of the Holding Company and Bank. [Ex. 408, Transcript of 10-29-04 and 10-30-04 Conversations](Vol. 12 of 18 Ex at 1692-94).

At the meeting, Deanna asked to record the meeting for Elizabeth and Garnett's benefit and placed a small recorder in the middle of the table. [Ex. 408, Transcript of 10-



29-04 and 10-30-04 Conversations](Vol. 12 of 18 Ex at 1691); [Deanna, Tr. May 4, 2009](Vol. 47 of 62 Tr at 1013-14). According to a transcript of the conversation, Archie Jr. thought that he and Richard III had a very good relationship and that allowing Archie Jr. to nominate Richard III as Chairman of the Holding Company and Bank Boards would give Archie Jr. an opportunity to express a professional confidence in Richard III and to build a relationship with Richard III like the relationship Archie Jr. had had with Richard II. [Ex. 408, Transcript of 10-29-04 and 10-30-04 Conversations](Vol. 12 of 18 Ex at 1693-94).

Archie Jr. had promised Richard II that he would mentor Richard III, and he likewise promised Deanna, Elizabeth and Garnett that he would mentor Richard III. [Ex. 408, Transcript of 10-29-04 and 10-30-04 Conversations](Vol. 12 of 18 Ex at 1692-93, 1695-95, 1701). Deanna, Elizabeth and Garnett were hesitant to place Richard III in the role of Chairman of the Board because of his inexperience and his difficulties relating to people, but they agreed to Archie Jr.'s proposal. [Ex. 408, 10-29-04 and 10-30-04 Conversations](Vol. 12 of 18 Ex at 1697-98, 1701); [Garnett, Tr. May 12, 2009](Vol. 54 of 62 Tr at 2034-36). In view of their concerns, Archie Jr. promised to keep the Wilbourn family members apprised of Richard III's progress in his role as Chairman of the Boards. [Archie, Tr. Dec. 16, 2008](Vol. 44 of 62 Tr at 491-492).

Richard was selected to replace his father as Chairman of the Boards of the Bank and of the Holding Company. Elizabeth was selected to replace her father as a Director of the Bank Board, and Deanna was selected to replace Richard II as a Director on the Board of the Holding Company. [Pretrial Order 9(a)(3), 9(a)(5)], 9(a)(4), 9(a)(6)] (Vol. 33 of 40 CP at 4927) (REVIII R.E. 17).

Richard III's tenure as Chairman of the Boards of the Bank and Holding Company was marked by discord and strife. Richard III expressed and/or demonstrated

distrust of Archie Jr. according to the senior management of the Bank and outside vendors.<sup>6</sup>

Based on Archie Jr.'s conversations with senior level employees, Archie Jr. was worried Richard III's actions were threatening the positive working culture of the Bank, which, if allowed to continue, could cause significant harm to the Bank. [Archie, Tr. Dec. 17, 2008] (Vol. 44 of 62 Tr at 530-531). During a meeting in Richard III's office on February 16, 2006, Archie Jr. let Richard III know of the complaints from the employees and the outside consultants and sought unsuccessfully to have Richard III change his method of interactions.<sup>7</sup>

Pursuant to his October 2004 promise, following his February meeting with Richard III, Archie Jr. communicated the problems he was having with Richard III to Deanna. [Archie, Tr. Dec. 15, 2008](Vol. 42 of 62 Tr at 255-256; 260-264). Deanna, Elizabeth and Garnett spoke to Richard III on the telephone with regard to those same complaints on February 27, 2006. [Richard III, Tr. May 13, 2009] (Vol. 56 of 62 Tr at 2374-2375).

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<sup>6</sup> [Archie, Tr. Dec. 15, 2008; Dec. 17, 2008](Vol. 42 of 62 at 173-174; 247, 264-265; Vol. 44 of 62 at 531-535); [Wilson, Tr. Dec. 18, 2008](Vol. 46 of 62 at 762, 767-771); [Barr, Tr. Aug. 24, 2009](Vol. 61 of 62 at 3017, 3019, 3025-29); [Bob Walters, Tr. Aug. 26, 2009](Vol. 61 of 62 Tr at 3094-3100).

<sup>7</sup> [Ex. 103, Ex. 480 2-16-06 Email from Archie Jr. to Richard III](Vol. 5 of 18 Ex at 639-641; Vol. 13 of 18 at 1946-48); [Archie, Tr. Dec. 15, 2008; Dec. 17, 2008](Vol. 42 of 62 Tr at 244-247, 250-251; Vol. 44 of 62 at 528-533); [Richard III, Tr. May 13, 2009 at 251](Vol. 56 of 62 Tr at 2365-72).

#### **4. Richard III's Removal as Chairman of the Boards of the Bank and Holding Company<sup>8</sup>**

In October 2006, after continuing attempts to develop a trusting working relationship with Richard III proved unsuccessful, Archie Jr. again reported to the Deanna, Elizabeth and Garnett that Richard III's manner of interacting with the Bank management was impeding his ability to run the Bank properly. [Archie, Tr. Dec. 15, 2008] (Vol. 42 of 62 Tr at 261-266). Archie Jr.'s management team had worked extremely hard to build a positive culture in the Bank and to create the success that the Bank had experienced up to that point. [Ex. 408, 10-29-04 and 10-30-04 Conversations](Vol. 12 of 18 Ex at 1702). Four senior members of that team, Chief Operating Officer David Barr, Chief Credit Officer Jeffrey Smith, Chief Sales Officer, Bobby Maddox and Chief Financial Officer Cindy Wilson, complained to Archie Jr. about Richard III's interactions, [Archie, Tr. Dec. 15, 2008; Dec. 17, 2008](Vol. 42 of 62 Tr at 173-174; 247, 264-265; Vol. 44 of 62 Tr at 531-535; Vol. 45 of 62 Tr at 685-687), and Archie Jr. did not want all of that hard work and that success to go for naught because of Richard III's actions. [Archie, Tr. Dec. 17, 2008](Vol. 44 of 62 Tr at 566; Vol. 45 of 62 Tr at 622-625).

Elizabeth followed up Archie Jr.'s statements with her own interviews of Cindy Wilson and David Barr to confirm the problems that were occurring with Richard III.<sup>9</sup> Cindy had had conversations with other executive officers who expressed concern

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<sup>8</sup> The Chancellor held that Richard III's Bank activities were relevant to the suit because "Plaintiff's performance in his positions with the Holding Company and the Bank are probative in that they aid the court in understanding the forces that caused the parties to take the positions that they have in this case, as well as to understand their actions. They also help the court to assess the reasonableness of the parties' respective positions and actions. Since these facts have probative weight, they are, indeed relevant..." [7-15-08 Order Denying Richard III Motion in Limine at 3-4](Vol. 29 of 40 CP at 4280-4281) (REVIII R.E. 14).

<sup>9</sup> [Elizabeth, Tr. May 6, 2009](Vol. 50 of 62 Tr at 1426-35; Vol. 51 of 62 Tr at 1608-18); [Ex. 168 11-14-06 Elizabeth Williamson Notes](Vol. 6 of 18 Ex at 853-857); [Archie, Tr. Dec. 16, 2008](Vol. 44 of 62 Tr at 592); [Wilson, Tr. Dec. 18, 2008](Vol. 45 of 62 Tr at 737-739; Vol. 46 of 62 Tr at 770-771).

about Richard III's involvement in the Bank. [Wilson, Tr. Dec. 18, 2008](Vol. 46 of 62 Tr at 771-772). At trial Cindy Wilson and David Barr confirmed that Richard III's interactions led them to believe that he did not trust the Bank's management team.<sup>10</sup> The officers expressed the same feeling that they would not be able to work under Richard III's management. [Wilson, Tr. Dec. 18, 2008](Vol. 46 of 62 Tr at 771-772).

Elizabeth discussed the substance of the interviews with Deanna, Garnett and Russell Williamson, her husband. [Elizabeth, Tr. May 6, 2009](Vol 50 of 62 at 1438).

Archie Jr. likewise reported complaints and concerns that he had heard from three outside consultants, Mike Higgins, Bob Walters and Jim Resnick. [Archie, Tr. Dec. 15, 2008; Dec. 17, 2008](Vol. 45 of 62 Tr at 675-677; 685-689). One of them, Bob Walters, testified at trial that Richard III, just seven months after becoming Chairman of the Boards of the Bank and Holding Company, invited Bob to come to the Bank to present an analysis of the Bank's financial situation. At his first meeting with Bob Walters in June 2005, Richard III "with substantial emotion," indicated that Archie Jr. would not want Bob to present negative financial information to the Board, that Archie Jr. could not be trusted, and, according to Walters, called Archie Jr. a "silver-tongued devil." [Walters, Tr. Aug. 26, 2009](Vol 61 of 62 Tr at 3095); [Archie, Tr. Dec. 17, 2008](Vol. 42 of 62 Tr at 247-248; Vol. 44 of 62 Tr at 523-526).

In October 2006, while Archie Jr. was communicating his concerns about Richard III to Deanna, [Archie, Tr. Dec. 16, 2008](Vol. 45 of 62 Tr at 632-633), Richard III was counting on the transfer of the 41,910 shares of Marital Trust B stock to the Providence Trust [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr at 2795) an estate planning trust over which Richard III had virtual sole control. [Richard III, Tr. May 15, 2009](Vol. 58 of 62 Tr at

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<sup>10</sup> [Wilson, Tr. Dec. 18, 2008](Vol. 45 of 62 Tr at 749-750; Vol. 46 of 62 Tr at 751-755; 759 – 762; 766-768); [Barr, Tr. Aug. 24, 2009](Vol. 61 of 62 Tr at 3029-3035).

2586-87; 2598- 99). Gina Silvestri was the Connecticut attorney who was creating the documents for the Providence Trust, [Richard III, Tr. May 14, 2009](Vol. 57 of 62 Tr at 2506-2507), and Richard III had assumed the role of, and acted as, the liaison between Silvestri and Deanna with regard to the Providence Trust. [Richard III, Tr. May 15, 2009](Vol. 58 of 62 Tr at 2587-94). Richard III had already convinced Deanna to place her 3,440 personal shares of Bank stock in the Providence Trust in order to fund the Trust when the proposed transfer of the 41,910 Marital Trust B shares was delayed for tax reasons the previous year. [Ex. 68; Ex. 458 12-30-05 Purchase (of Deanna's Bank shares) Agreement](Vol. 4 of 18 Ex at 540-547; Vol. 13 of 18 Ex at 1888-96); [Richard III, Tr. May 14, 2009; Aug. 19, 2009](Vol. 57 of 62 at 2509-10; Vol. 60 of 62 at 2865-66). Richard III convinced Deanna to make his friend Kirk Reasonover the Independent Trustee. The two trustees had sole control over the assets of the Providence Trust, and Richard III alone could dismiss the Independent Trustee during Deanna's lifetime. [Richard III, Tr. Aug. 19, 2009](Vol. 58 of 62 Tr at 2587-90, 2593-95; Vol. 59 of 62 Tr at 2795). All of this occurred at a time that Richard III thought that his mother was not competent to understand or to handle financial matters. [5-18-07 Complaint, ¶27](Vol. 1 of 40 CP at 18); [7-3-08 Richard III Response to Deanna Motion for Partial Summary Judgment, ¶¶1-25](Vol. 25 of 40 CP at 3614-27) (R.E. 35).

Deanna met with Richard III on October 24, 2006, to let him know that the way he was going about his role in the Bank was not working out and that he was not acting in the best interest of the Wilbourn Family. She further noted that Richard III had to establish a working relationship with Archie Jr. rather than the adversarial relationship he displayed. She told Richard III that her requirements were not negotiable and that the alternative was to say no. She wanted an answer the following week, and if Richard

III could not change his ways, then he needed to resign from the Board and “everything.” [Ex. 297, Ex. 587 Transcript of Oct. 24, 2006 Secret Recording](Vol. 8 of 18 Ex at 1169-70, 1173-74; Vol. 16 of 18 Ex at 2379-80, 2382A-2382B) (R.E. 21, 21(a)).

Three days after meeting with Deanna, Richard III contacted legal counsel and then requested a copy of the Bank By-Laws. (Ex. 504 10-28-06 REW III Email to CEO Assistant)(Vol. 14 of 18 Ex at 2004); [Richard III Tr. Aug. 19, 2008](Vol. 59 of 62 at 2806-09).

Shortly thereafter, in mid-November 2006, Archie Jr., Russell Williamson, Elizabeth, Garnett and Deanna met to discuss Richard III's role as chairman of the Holding Company Board. [Ex. 158, Ex. 167 11-13-06 Archie McDonnell Notation](Vol. 6 of 18 Ex at 776, 852); [Archie, Tr. Dec. 16, 2008](Vol. 43 of 62 Tr at 314-15). Archie Jr., Russell, Deanna, Elizabeth and Garnett, did not know that Richard III had already consulted twice with legal counsel following his mother's October 24, 2006, conversation. [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr at 2806-07, 2809-10).

On January 1, 2007, while having supper in her home with Richard III during an unexpected visit from him, Deanna discovered that Richard III was (and had been for three months) surreptitiously taping her in her own home. Richard III had just told Deanna that he thought he knew what his status was with regard to whether he would be reelected to the Holding Company Board and retaining the chairmanship of the Board but he wanted to know what her intentions were. [Ex. 297, Ex. 522 Transcript of Jan. 1, 2007 Recording](Vol.10 of 18 Ex at 1386-87; Vol. 15 of 18 at 2169-70) (R.E. 21, 21(c)). Deanna Wilbourn responded that she had no intentions and then asked if Richard III was taping her. [Ex. 297, Ex. 522 Transcript of Jan. 1, 2007 Recording](Vol. 10 of 18 Ex at 1387; Vol. 15 of 18 Ex at 2170) (R.E. 21, 21(c)).

The next day on January 2, 2007, Richard III joined his mother in her living room, and Richard III told Deanna that she should consider that any time she or anyone else was talking to him that they should assume that they were being recorded. [Ex. 297, Ex. 524 Transcript of Jan. 2, 2007 Recording](Vol. 10 of 18 Ex at 1400; Vol 15 of 18 at 2182) (R.E. 21, 21(d)).

Deanna told Richard III that she was both outraged and distraught that a person in such a high position of trust, indeed a person who was representing her in legal matters, would record her secretly in her own home. She stated that the commitments that she had made to him the evening before were no longer valid. Further she was not in a position to say exactly what changes would be made, but there would be meetings and decisions made with regard to his position at the Bank. [Ex. 297, Ex. 524 Transcript of Jan. 2, 2007 Recording](Vol. 10 of 18 Ex at 1407-11; Vol. 15 of 18 Ex at 2188-92) (R.E. 21, 21(d)).

At trial Deanna testified that Richard III had irreparably damaged his relationship with her by the secret taping of their conversations in her home and that she could no longer trust him. [Deanna, Tr. May 4, 2009](Vol. 48 of 62 Tr at 1021-22).

Although Deanna, Elizabeth and Garnett had for nine months repeatedly urged Richard III to work with Archie Jr., to develop a trusting relationship with Archie Jr., and to stop trying to manage the Bank, Richard III was unable or unwilling to change. [Richard III, Tr. May 13, 2009](Vol. 56 of 62 Tr at 2374-77); [Deanna, Tr. Dec. 19, 2008](Vol 46 of 62 Tr at 875-879); [Ex. 156 10-23-06 Deanna Prepared Statement](Vol. 6 of 18 Ex at 771-774) (R.E. 22); [Ex. 297, Ex. 587 Transcript of Oct. 24, 2006 Secret Recording](Vol 8 of 18 Ex at 1168-1175; Vol 16 of 18 Ex at 2378-2382C) (R.E. 21, 21(a)).

On January 9, 2007, Deanna, Garnett, Archie McDonnell, Sr., and Archie Jr. (four of the five members of the Board of the Holding Company) voted to remove

Richard III as Chairman of the Holding Company and Bank Boards and as a director of the Bank. [Ex. 208, Ex. 530 1-9-07 CNBC Board of Directors Minutes](Vol. 7 of 18 Ex at 967-971; Vol.15 of 18 Ex at 2204-08).

On January 9, 2007, the Holding Company Board nominated a slate of directors to be elected at the Holding Company board meeting on March 6, 2007. That slate included Archie McDonnell, Sr., Archie Jr., Russell Williamson, Deanna and Garnett but not Richard III.<sup>11</sup>.

#### **5. Richard III's Actions After Being Removed as Chairman of the Boards of the Bank and Holding Company**

On January 29, 2007, Jim Wilbourn, Richard III's uncle, notified Archie Jr. that he would nominate Richard III for Director of the Holding Company and that he would vote his shares and those of his family members for Richard III. [Ex. 230, Ex. 544, 1-29-07 James Wilbourn Nomination Letter to Archie McDonnell, Jr.](Vol 7 of 18 Ex at 1032-37; Vol. 16 of 18 Ex at 2257-59).

On January 30, 2007, Richard III notified Deanna, Archie Jr., Elizabeth, Russell Williamson, and Garnett that the 41,910 shares of Marital Trust B would not be voted and that he would be re-elected as a director of the Holding Company through the votes of his own Bank shares and that of the Jim Wilbourn Family. [Ex. 545, 1-30-07 Richard III letter to Archie Jr and Deanna](Vol. 16 of 18 at 2258A -2259) (R.E. 24)<sup>12</sup>.

Deanna and Archie Jr. responded that they would move to revise the official slate of the Holding Company to replace Garnett on the slate with Richard III as the Board

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<sup>11</sup> [Deanna, Tr. Dec. 19, 2008](Vol. 47 of 62 Tr at 909-911); [Ex. 208, Ex. 530 1-9-07 CNBC Board of Directors Minutes](Vol. 7 of 18 Ex. at 973-977; Vol. 15 of 18 at 2210-14).

<sup>12</sup> ("1. The shares of Trust B will not be voted in March 2007. I have been promised the support of the Jim Wilbourn family. With that I will be elected to the Holding Company Board." [Ex. 545, 1-30-07 Richard III letter to Archie Jr. and Deanna](Vol. 16 of 18 Ex. at 2258A) (R.E. 24).



nominee for Director if Richard III would vote his own shares for that slate. [Ex. 549, 2-02-07 Archie Jr. and Deanna to Richard III](Vol. 16 of 18 Ex at 2262A-2263) (R.E. 26).

Richard III declined the offer. He subsequently wrote to his mother saying that they needed to meet to discuss the voting of the 41,910 shares of Bank stock. [Ex. 546, 2-02-07 Letter Richard III to Deanna](Vol. 16 of 18 at 2260). Deanna responded that she did not believe it was necessary to meet because she wanted to vote the shares for the slate that the Holding Company "nominates," (emphasis added) since she and Archie Jr. were attempting to have Richard III agree to vote his shares, and allow the Trust B shares to be voted, for a revised slate of Archie Jr., Archie McDonnell, Sr., Russell Williamson, Deanna and Richard III. (Ex. 243, Ex. 551, 2-07-07 Deanna to Richard III)(Vol. 7 of 18 Ex at 1046; Vol. 16 of 18 Ex at 2265) (R.E. 28).

Richard III responded that he had already voted against the slate that the Holding Company had nominated at the January 9, 2007, meeting, and if his mother wanted to discuss other options they should meet. There was, however, a deadline, and they would have to meet that day (the letter was dated February 9, 2007) or the next day (February 10, 2007), and failure to do so would result in the Trust shares not being voted because they could not agree on the way to vote them. Richard III did not fax the letter to Deanna until February 12, 2007, *two days after* the deadline he stated in his February 9, 2007 for nominating directors. [Ex. 553, 2-09-07 Richard III to Deanna Wilbourn, with 2-12-07 Fax Cover Sheet](Vol. 16 of 18 Ex at 2268-70) (R.E. 30).

Deanna responded that "if your desire not to vote the Trust B shares is because you were not nominated as a Director at the January 9, 2007 Holding Company Board meeting, Archie and I have already twice offered to replace Garnett with you on the Holding Company slate for the Board of Directors in response to your January 30 and

February 5, 2007 letters." (Ex. 554 2-14-07 Deanna to Richard III)(Vol. 16 of 18 Ex at 2271) (R.E. 31). Richard III did not respond.

Nonetheless, Deanna tried one more time to convince Richard III to agree to vote the 41,910 shares of Bank stock for Archie Jr., Archie McDonnell, Sr., Russell Williamson, Deanna and Richard III. Prior to the start of the March 6, 2007, shareholder meeting, Deanna filled out a ballot for the Deanna A. Wilbourn Marital Trust B to show how she wanted to vote the shares. [Deanna, Tr. Dec. 19, 2008](Vol. 47 of 62 Tr at 927-928). The ballot had the names of Archie Jr., Archie McDonnell, Sr., Russell Williamson, Deanna and Richard III. [Ex. 561 Proposed Ballot for Marital Trust B](Vol. 16 of 18 Ex at 2313) (R.E. 33).

Deanna asked to speak to Richard III before the start of the shareholder meeting. She met him in her husband's former law office across the hall from the meeting. She showed him the ballot that she wanted him to join in and asked him please to sign the ballot to vote the 41,910 Marital Trust B shares for Archie McDonnell, Jr., Archie McDonnell, Sr., Russell Williamson, Deanna Wilbourn and Richard E. Wilbourn, III. In so doing, Deanna asked Richard III to vote for two McDonnells and three Wilbourn family members, including in-laws. Richard III responded that he would not agree to vote the ballot for those people because he wanted to consider other people. When asked whom he had wanted to consider, he responded "Bill Grete and Kirk Reasonover." [Deanna, Tr. Dec. 19, 2008](Vol. 47 of 62 Tr at 929-933); [Richard III, Tr. May 14, 2009; Aug. 19, 2009](Vol. 57 of 62 at 2496-97; Vol. 59 of 62 Tr at 2770-71).

Richard III had asked Kirk Reasonover about his interest in serving on the Holding Company Board prior to Richard III's January 9, 2007, removal as Chairman of the Holding Company and Bank Boards, [Reasonover, Tr. May 11, 2009](Vol. 53 of 62 Tr at

1848-49, 1869-70), and Richard III had spoken to Bill Grete in August 2006 about serving on the Bank Board, [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr at 2752-53, 2824) thus indicating a seriousness to his intent, even though Deanna had told him in fall 2006 that she would not agree to having Richard III's "Jackson buddies" as directors of this "Meridian" Bank. [Ex. 297, Ex. 587 Transcript of Oct. 24, 2006 Secret Recording](Vol. 8 of 18 Ex at 1173-74; Vol. 16 of 18 Ex at 2382A-2382B); (R.E. 21, 21(a)); [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr at 2824).

Deanna placed the proposed ballot, signed by herself but not signed by Richard III, in the stack of ballots that were not to be voted or counted. [Deanna, Tr. Dec. 19, 2008](Vol. 47 of 62 Tr at 933-934); [Ex. 268, Ex. 558 CNBC Proxy for Marital Trust B](Vol. 8 of 18 Ex at 1099; Vol. 16 of 18 Ex at 2291) (R.E. 33). Cindy Wilson, one of the ballot counters, confirmed that the ballot was not counted. [Wilson, Tr. Dec. 18, 2008](Vol. 46 of 62 Tr at 776-777).

At the March 6, 2007, Holding Company shareholder meeting, the persons for whom Deanna had asked Richard III to vote the Marital Trust B shares were elected Directors of the Holding Company: Archie McDonnell, Sr., Archie Jr., Russell Williamson, Deanna and Richard III. [Ex. 559, CNBC Annual Meeting and Board of Directors Meeting Minutes] (Vol 16 of 18 Ex at 2294-95; 2302-03) (R.E. 32). Richard III was elected a director by the votes of himself, the Jim Wilbourn and the Margaret Vise families. Russell Williamson and Deanna were elected through the votes of Elizabeth and Garnett and their families and of non-Wilbourn family shareholders. [Nunnery, Tr. May 11, 2009](Vol. 52 of 62 Tr at 1774-77); [Ex. 559, CNBC Annual Meeting and Board of Directors Meeting Minutes at CNB 609-611](Vol. 16 of 18 Ex at 2305-07) (R.E.32).

At trial Richard III stated that he knew he could be elected a director through the vote of his own and the Jim Wilbourn family shares if the 41,910 shares of bank stock in

Marital Trust B were *NOT* voted. Richard III stated that he did not know if he could be elected a director if the 41,910 shares were in fact voted. [Richard III, Tr. Aug. 19, 2009](Vol 59 of 62 Tr at 2765-66). Accordingly, Richard III's refusal to agree to vote the Trust B shares for three Wilbourn family members and two McDonnells, by his own admissions, was done for personal benefit and gain in order to secure his position on the Holding Company Board, and the Chancellor so found. [Opinion at 40](Vol 38 of 40 CP at 5659) ( REWIII R.E. 2).

On or about April 10, 2007, Deanna, Elizabeth and Garnett executed a Notice of Removal of Richard III as Co-Trustee of Marital Trust B pursuant to the terms of Marital Trust B.<sup>13</sup> A copy of the Notice was delivered to Richard III on or about May 10, 2007, via fax. [Pretrial Order 9(a)(15)](Vol. 33 of 40 CP at 4928) (REWIII R.E. 17); [Ex. 566 4-10-07 Notice of Removal](Vol. 16 of 18 Ex at 2321-25) (REWIII R.E.11).

The factual basis given for the Notice of Removal was that Richard III was attempting to use the 41,910 shares in Marital Trust B for his own benefit and to the detriment of the other beneficiaries of Marital Trust B by blocking the voting of the shares at the March 6, 2007, Holding Company shareholder meeting and by attempting to use the voting power of the shares to take over control of the Bank. [Ex. 566 4-10-07 Notice of Removal](Vol. 16 of 18 Ex at 2323-25) (REWIII R.E.11).

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<sup>13</sup> The Richard II Will allowed removal of a sibling co-trustee if the three other beneficiaries agreed in writing that the sibling co-trustee has "become incompetent, unable to serve or grossly mismanages the trust." Will at Item (V)(g). Because "incompetent" is defined as "lack of ability, legal qualification or fitness to discharge the required duty," the Notice, signed by the three other beneficiaries, removed Richard III in writing because he lacked the ability or fitness to discharge his duties as Co-Trustee insofar as he sought to use his position as Co-Trustee and the voting of the Marital Trust B shares to reinstate himself into his positions at the Bank from which he had been removed. Richard III's self-dealing in this way made him unfit to serve as Co-Trustee, and his conflict of interest made him unable to discharge his duties in the best interest of the beneficiaries of Trust B. [Ex. 566 4-10-07 Notice of Removal](Vol. 16 of 18 Ex. at 2323-28) (REWIII R.E. 11).

Shortly thereafter, Richard III sued his mother and sisters to remove his mother as Co-Trustee, to have his sisters declared ineligible to be Co-trustees of Marital Trust B and to have himself reinstated as Co-Trustee of Marital Trust B. Deanna, Elizabeth and Garnett counterclaimed to have Richard III removed as Co-Trustee of Marital Trust B under the common law if the Notice of Removal under the Richard II Will was not sufficient to remove Richard III as Co-Trustee of Marital Trust B. (E&G: Vol. 6 of 40 CP at 853-866; DAW: Vol 6 of 40 CP at 867-900; Vol 4 of 40 CP at 901-940) .

After sixteen days of trial the Chancellor found that the evidence presented by Richard III did not provide a basis for removing Deanna as Co-Trustee of Marital Trust B or to disqualify Elizabeth and Garnett from serving as successor co-trustees. Based on the full nineteen days of trial the Chancellor concluded that Richard III should be removed as Co-Trustee of Marital Trust B and found, *inter alia*,

- that Richard III abused his sole discretionary duty as co-trustee by refusing to vote Richard II's 41,910 shares of stock in the Trust, thus damaging the ability of the Wilbourn Family to influence and control the management of Citizens National Bank in violation of Richard II's purpose for the Trust asset; and [66]
- that Richard III's reasons for refusing to vote the stock were not for a professional disagreement with his co-trustee but rather a decision to block the voting of the shares in order to get himself elected to the Board of the Holding Company which constituted using the trust assets for his own benefit to the detriment of the remaining Trust beneficiaries; and [40, 61]
- that Richard III's secret taping of his mother in her home for the purpose of obtaining information to use against her was so deceitful that it both constituted a serious breach of trust and of his fiduciary duties and caused such hostility that it made it impossible for the co-trustees to work together to manage the trust. [55]

[Opinion at 66, 40, 61, 55](Vol. 38 of 40 CP at 5685, 5659, 5685, 5674) (REWill R.E. 2).

## **II. SUMMARY OF THE ARGUMENT**

In March 2007 the Co-Trustees of Marital Trust B deadlocked on how to vote the 41,910 shares of Marital Trust B which alone represented nearly one-third of the shares of Citizens National Bank. Voting the shares is the sole discretionary duty of the Co-

Trustees of Marital Trust B. Finding that the shares would never be voted if Richard III were Co-Trustee with either Deanna or his successor co-trustee sisters, the Chancellor was asked to determine 1.) whether failure to vote the shares impaired operation of Marital Trust B; and if so, 2.) whether either of the Co-Trustees should be removed, and if so, 3.) whether the interpretation of the facts and law presented by Deanna, Elizabeth and Garnett, the life beneficiary/Co-Trustee and the two residual beneficiaries/successor trustees, was more persuasive and better supported than the interpretation of the facts and law presented by Richard III, the other Co-Trustee and residuary beneficiary of the trust. The issue is not whether the Chancellor could have ruled as Richard III sees the facts and the law; the issue is whether the Chancellor was entitled to rule as he did.

This was a nineteen-day trial held over a five-week period. Richard III called all four Will-Call witnesses on the Defendants' Pretrial Witness List. Those four witnesses, Deanna, Elizabeth, Garnett and Archie Jr., testified on cross and direct and re-cross over a period of ten days. Richard III himself testified on direct and cross and redirect and rebuttal over a period of seven days. The Chancellor had ample opportunity to observe and judge the witnesses, their testimony and their credibility.

In the nineteen months prior to trial (May 17, 2007 – December 15, 2008), the parties filed at least fifty-two different motions and briefs with over 3,300 pages of law and proposed facts. All parties moved during trial for a Rule 41(b) dismissal of the other side's claims. Those motions totaled over 140 pages. The judge issued orders on the motions. After trial the parties filed proposed findings of fact and conclusions of law that totaled 310 pages.

In short, the parties had abundant opportunity to present their positions to the

Chancery Court before, during, and after trial. The Chancellor had more than ample opportunity to review the facts and the law and to observe the witnesses at length. After due consideration, the Chancellor declined to accept Richard III's version of the facts and of the law in either his claims or his defense to Deanna, Elizabeth and Garnett's counterclaims.

There is overwhelming record evidence to support the Chancellor's forty-one pages of findings of fact; case law and statute give a chancellor the discretion to remove a trustee from a trust; and the law allowing removal is correctly applied to the record evidence in the Chancellor's thirty pages of conclusions of law.

The Chancellor found that Richard III was a fiduciary to his mother and sisters as Co-Trustee of Marital Trust B, as an attorney who was representing his family and as a son who was in a confidential relationship of trust with his mother. As a fiduciary Richard III owed his mother and sisters certain duties which he breached by, among other things,

- using the assets of Marital Trust B for his personal benefit to the detriment of the other trust beneficiaries; (64, 68)
- failing to administer the trust according to its terms; (25-26, 66)
- failing to exercise his discretion under the trust in a reasonable manner; (52, 61, 65-66)
- surreptitiously taping his mother in order to obtain information to use against her; (55)
- seeking to persuade his mother to take actions which benefited him and which were not in Deanna's best interest; (62-63)
- creating such hostility with Deanna, Elizabeth and Garnett through his deceit and disloyalty that it made it impossible for the co-trustee and beneficiaries to work with Richard III. (64)

[Opinion at 64, 68; 25-26, 66; 52, 61, 65-66; 55; 62-63; 64](Vol. 38 of 40 CP at 5644-45, 5671, 5674, 5680-85, 5687) (REVIII R.E. 2).

The Chancellor found that these breaches of trust constituted independent bases

to remove Richard III as Co-Trustee of Marital Trust B and that the alternative to Richard III's removal – intervention of the court using injunctive relief – was not a suitable remedy.<sup>14</sup>

The legal bases on which a chancellor may remove a trustee of a trust are not in dispute. Richard III argues, however, that the Chancellor could not legally rely on certain evidence to reach his decision. The challenged evidence related to Richard III's actions as Chairman of the Board at Citizens National Bank gave the Chancellor the context to determine whether Deanna, Elizabeth and Garnett acted with improper motive when they removed Richard III as Co-Trustee of Marital Trust B, using the terms of the Richard II Will itself. The challenged evidence related to Richard II's reasons for accumulating the 41,910 shares of Bank stock – the sole asset of Marital Trust B - allowed the Chancellor to determine whether Richard III exercised his Co-Trustee discretionary duty reasonably when he refused to allow the 41,910 shares of Bank stock to be voted for two McDonnells and three Wilbourns, including himself, for the Holding Company Board. Richard III's promotion of the Providence Trust threatened specific provisions of Marital Trust B and breached his fiduciary duties to the Trust Settlor and its beneficiaries – all issues under the Pretrial Order, as are the bases for reliance on the other challenged evidence. Richard III's communications with his mother and Archie Jr. related to his removal as Chairman of the Boards of the Bank and Holding

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<sup>14</sup> First, injunctive relief such as ordering that the shares of Marital Trust B be voted according to the wishes of a majority of the beneficiaries does not resolve the underlying conflict between Richard III and all the other beneficiaries and leaves all the parties in a situation fraught with the likelihood of future strife and legal and personal struggle. Second, it was not the wish of the settlor that the shares be voted according to the wishes of a majority of the beneficiaries, but rather that they be voted by co-trustees. Third, application of injunctive relief would leave Richard III in place, which would have the effect of ignoring the misconduct that has disqualified him from acting further as a fiduciary. The court does not find injunctive relief to be a suitable remedy in the particular facts of this case. [Opinion at 65](Vol. 38 of 40 CP at 5684) (REWill R.E. 2).



Company, which Richard III challenges as settlement negotiations, reflect disputes that are not claims in this case, and they do not fall within M.R.E. 408's preclusion.

Richard III was removed as Co-Trustee of Marital Trust B because he breached his fiduciary duties in the administration of Marital Trust B; because he exercised his discretionary duty as Co-Trustee unreasonably; because his hostility to the beneficiaries of Marital Trust B made exercise of the discretionary duties of Co-Trustees of Marital Trust B impossible; and because the Chancellor found Richard III to be dishonest in his dealings with the beneficiaries, a legal basis to remove a trustee regardless of whether the actions involved administration of the trust.

Richard III's myopic view of the facts must be discounted because the Chancellor was entitled to adopt the factual findings that he made as the sole judge of the credibility of the witnesses. Richard III's claim that the surreptitious taping of his mother in her own living room, dining room and kitchen was reasonable and that he cannot imagine why such deceit would engender both hurt and distrust is but one example. The Chancellor was entitled to find that the hostility in Richard III's relationship with Deanna, Elizabeth and Garnett was caused by him and not by his mother and sisters, as he claims.

From the beginning of this case until now, Richard III has refused to acknowledge that the actions he took against his mother and sisters made them unable to trust him and thus affect the administration of the Trust. Richard III is either disingenuous or clueless about the effects that his actions have on others. Neither attribute is conducive to a fiduciary role.

Richard III's arguments should be rejected. The Chancellor did not abuse his discretion by discrediting them, and his decision must be affirmed. Deanna responds to certain of Richard III's assertions<sup>15</sup> as follows.

### III. ARGUMENT

#### A. Standard of Review

Because this is an appeal from a chancellor's findings of fact and conclusions of law, this Court has a limited standard of review. If the chancellor's decision is one for which he has discretion to render, and if he applies the correct legal standard to the record facts, then the appellate court will not reverse that decision. Moreover, where the chancellor has viewed the witnesses, their demeanor and their testimony first hand, it is not the appellate court's role to substitute its own judgment for the one who was in the best position to judge their credibility.

This Court last year reiterated the limited standard of review in *III. Cent. R.R. Co. v. Byrd*, 44 So. 3d 943 (Miss. 2010).

It is well-settled that "this Court will not disturb the findings of the chancellor unless it is shown the chancellor was clearly erroneous and the chancellor abused his discretion. ... In determining whether a trial judge abused his discretion, the reviewing court must have a "'definite and firm conviction' that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." (citations omitted)

*III. Cent. R.R. Co. v. Byrd*, 44 So. 3d at 948.

Although the term "abuse of discretion" is used often without a definition, this Court defined the term as well as the steps to take in the review of a decision within the discretion of a trial court in *Burkett v. Burkett*, 537 So. 2d 443 (Miss. 1989).

When we say that the trial court has discretion in a matter, we imply that there is a limited right to be wrong. At the very least the statement imports a view

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<sup>15</sup> The Appellant Brief and the Opinion combined are 143 pages of Times Roman type, and one cannot respond to every argument or defend every finding within any reasonable page limits.

that there are at least two different decisions that the trial court could have made each of which on appeal must be affirmed. Indeed, if there are not at least two possible affirmable decisions, by definition the trial court is without discretion. When we review on appeal the decision of a trial court within the discretion vested in it, we ask first if the court below applied the correct legal standard. If so, we then consider whether the decision was one of those several reasonable ones which could have been made. (citations omitted)

*Burkett v. Burkett*, 537 So. 2d at 446.

Finally, in view of the nineteen days of the trial during which the Chancellor had the opportunity to observe the parties and the other witnesses, this Court's admonition in *Frazier v. Shackelford (In re Estate of Carter)*, 912 So. 2d 138 (Miss. 2005), related to the trial court's witness credibility determinations is particularly pertinent.

Our standard of review is indeed deferential, as we recognize that a chancellor, being the only one to hear the testimony of witnesses and observe their demeanor, is in the best position to judge their credibility. Moreover, since the chancellor is best able to determine the credibility of the witnesses' testimony, it is not this Court's province to undermine the chancellor's authority by replacing the chancellor's judgment with our own. [citations omitted]

*Frazier v. Shackelford*, 912 So. 2d at 143. As this Court more recently stated in *Tentoni v. Slayden*, 968 So. 2d 431 (Miss. 2007),

The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable.

*Tentoni v. Slayden*, 968 So. 2d at 440.

Under this Court's holdings, the Chancellor was in the best position to judge the credibility of the witnesses. His decision to remove Richard III as Co-Trustee of Marital Trust B must be affirmed if (a) the decision to remove a trustee is within a chancellor's discretion; (b) if the bases considered for removal are allowed by law and (c) if the chancellor, in weighing the evidence, appropriately applied the law to the facts and

rendered an order which is reasonable in view of both. The Chancellor's decision satisfies all three prerequisites.

**B. A Chancellor Has Discretion to Remove A Trustee**

The decision to remove a trustee is within the discretion of a chancellor. See *Walker v. Cox*, 531 So. 2d 801, 805 (Miss. 1988)(chancellor has inherent power to remove the trustee for good cause); *McWilliams v. McWilliams*, 994 So. 2d 841, 846 (Miss. Ct. App. 2008)(chancellor's removal power is part of chancery court's duty to see that trust estates are preserved and properly executed).

**C. The Chancellor's Bases for Removing Richard III as Co-Trustee are Allowed by Law**

The Chancellor removed Richard III as Co-Trustee of Marital Trust B for at least three separate and independent reasons which constituted a breach of fiduciary duty and serious breach of trust. The breach of a fiduciary duty can constitute a breach of trust. See *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 765 (Miss. 2004)(breach of fiduciary duty is a breach of trust). Richard III's actions which constituted a breach of trust included the following.

1. Richard III sought to use the shares of Marital Trust B to further his own interest, putting his own personal interests ahead of those of the Trust and of the beneficiaries.

[Opinion at 60](Vol. 38 of 40 CP at 5679) (REVIII R.E. 2). By using the shares of Marital Trust B to further his own interest (electing himself to the Holding Company Board), Richard III put his own personal interests ahead of those of the Trust and of the beneficiaries, and thus breached his fiduciary duty of loyalty.

2. By refusing to vote the 41,910 shares of Bank stock in order to promote his own agenda, Richard III violated the intent of Marital Trust B and abused the sole discretionary duty which is to vote the Bank shares to preserve the Wilbourn Family influence and control of Citizen's National Bank.

[Opinion at 47-49](Vol. 38 of 40 CP at 5666-68) (REVIII R.E. 2). By refusing to vote the 41,910 shares of Bank stock so he could elect himself to the Holding Company Board and if possible prevent the election of Deanna and Archie Jr. whom he wished to replace with his friends, Richard III violated his trustee's duty to exercise his discretionary duty reasonably.

3. Richard III recorded his mother surreptitiously in her own home for "adversarial purposes and not for the reason Richard III offered at trial. When Deanna reacted with surprise, shock and disappointment that her own son, lawyer and adviser had been secretly taping their conversations, Richard III was not apologetic but rather told her that she "need[ed] to assume that ... all conversations with me are recorded." The Chancellor found that, "The only conceivable use of a secret recording can be to confront and trap the person recorded. It is not the role of a fiduciary to confront and trap the person to whom he owes a duty of loyalty, honesty and candor."

[Opinion at 55-56, 59](Vol. 38 of 40 CP at 5674-75, 5678) (REVIII R.E. 2). When he recorded his mother surreptitiously in her own home for "adversarial purposes," Richard III breached his fiduciary duties of honesty and disclosure.

The Chancellor listed additional actions by which Richard III violated his fiduciary duties.

4. By seeking to persuade Deanna to transfer the shares of Marital Trust B to the Providence Trust, over which Richard III had virtually sole control, Richard III violated the explicit terms of Marital Trust B to Deanna's detriment, and placing his own financial interest above hers.

[Opinion at 61-62](Vol. 38 of 40 CP at 5680-81) (REVIII R.E. 2). Richard III, as Co-Trustee of Marital Trust B, had a fiduciary duty to Richard II, as settlor of the Trust, to carry out the terms of Marital Trust B. The Chancellor found that Richard III, by attempting to move the Marital Trust B assets – the 41,910 shares of CNBC stock – from Marital Trust B to the Providence Trust - was in violation of two specific instructions in Item V of the Richard II Will. Moving the 41,910 shares of stock would cause the income from the stock to go to the Providence Trust and not to Deanna and would prevent the 41,910

shares of stock from being divided among Richard III, Elizabeth and Garnett at Deanna's death as Richard II instructed. Such action would also prevent Deanna from having input into the voting of the Bank shares as Richard II had wished by his appointment of her as Co-Trustee of Marital Trust B.

5. Richard III refused to resign as co-trustee of the Providence Trust after his mother learned of his disloyalty, thus allowing him to retain control of Deanna's personal bank stock to use for his own personal and strategic interest to Deanna's detriment.

[Opinion at 62](Vol. 38 of 40 CP at 5681) (REVIII R.E. 2). While he was a fiduciary to his mother, Richard III persuaded Deanna to place her personal shares of Bank stock in the Providence Trust over which he had sole control. By refusing to resign as co-trustee of the Providence Trust after Deanna learned of his disloyalty, Richard III retained control of Deanna's personal bank stock to use for his own personal and strategic interest to Deanna's detriment.<sup>16</sup> He breached his duty of loyalty as both trustee and attorney when he placed his need to control those shares for his own benefit ahead of Deanna's own welfare.

6. Richard III was both deceitful and disloyal to the beneficiaries of Marital Trust B, and the hostility that his actions engendered in his co-trustee and beneficiaries made it impossible for Richard III to work with any of the three.

[Opinion at 64-65](Vol. 38 of 40 CP at 5683-84) (REVIII R.E. 2). Hostility of a trustee to a beneficiary which impedes operation of the Trust is a separate basis for removal of a

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<sup>16</sup> The Chancellor noted that Richard III persuaded Deanna to relinquish her own Bank shares to him at a time he claimed she was incompetent. [Opinion at 62-63](Vol. 38 of 40 CP at 5681-82) (R.E. 2 REVIII). Richard III's claim [Richard III Brief at 52] that the Chancellor could not consider that Richard III was acting against Deanna's best interests at a time that he claimed that she was incompetent should be rejected out of hand. The fact that the Chancellor refused to allow evidence of whether Deanna was *in fact* incompetent because he had already granted Summary Judgment in Deanna's favor does not eliminate the fact that Richard III nonetheless claimed that he thought his mother was not competent to handle financial matters [Richard III Response to Motion for Partial Summary Judgment](Vol. 25 of 40 CP at 3614-27) (R.E. 35) at the time he was convincing her to take actions that were not in her financial interest, but which benefited him.

trustee. The hostility created by Richard III's actions made it impossible for his co-trustee and beneficiaries to trust Richard III or for the Co-Trustee to work with Richard III to carry out the duties of Marital Trust B.

### **1. A Trustee Can Be Removed for Serious Breach of Trust**

There is no dispute that a trustee can be removed for a serious breach of trust. See Restatement (First) of Trusts §107 (1935) (A trustee can be removed by a proper court ...for the commission of a serious breach of trust). A court will remove a trustee not only if he has committed a sufficiently serious breach of trust but also if it is *probable* that he will commit such a breach of trust or where for any other reason "his continuance as trustee is likely to be detrimental to the interest of the beneficiary," Restatement (Second) of Trusts § 199, cmt. e (1959). As part of his deliberations, the Chancellor was required to determine whether Richard III was a fiduciary who committed a serious breach of trust.

As Co-Trustee of Marital Trust B, Richard III was a fiduciary to his mother, the Co-Trustee and life beneficiary of the trust, and to his sisters, the residuary beneficiaries of the trust. See *Robley v. Blue Cross/Blue Shield*, 935 So. 2d 990, 994 (Miss. 2006)("Traditional fiduciary relationships are found in cases of trustee and beneficiary,..."). As a trustee, Richard III owed Deanna, Elizabeth and Garnett the duty to administer the trust impartially and according to the settlor's intent, and the duty of loyalty, candor and honesty to all three trust beneficiaries as their fiduciary.

Richard III weakly denies that he was in an attorney-client relationship with any of the Defendants.<sup>17</sup> Don Rogers, his law partner from 2001 until May 2007, however,

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<sup>17</sup> "At the time that Richard III made the recordings at issue, Richard III was (and still is) an attorney; however, he was not in an attorney client relationship with any of Defendants." [Richard III Brief at 56]. Richard III testified that he did not represent Deanna individually – but

testified that the Rogers and Wilbourn law firm was representing Deanna in individual matters while Richard III was a partner in the law firm and that Richard III had in fact asked Rogers to seek a waiver of conflict for the law firm after Richard III filed suit (without Rogers' knowledge) against Deanna and her daughters in May 2007. [Rogers, Tr. Aug. 25, 2009](Vol. 61 of 62 Tr at 3066-68).

The Chancellor found [Opinion at 53-54](Vol. 38 of 40 CP at 5672-73) (REVIII R.E. 2), and the evidence supports, that Richard III represented his mother because he was a partner in the law firm that was representing his mother even as of the date of the trial. [Rogers, Tr. Aug. 25, 2009](Vol. 61 of 62 Tr at 3066-68) The Chancellor further found [Opinion at 53-54](Vol. 38 of 40 CP at 5672-74) (REVIII R.E. 2), and the evidence supports, that

- Richard III was a paid advisor to the Richard II Estate, of which Deanna was Executrix, [Ex. 17 Estate Minutes](Vol. 1 of 18 Ex at 74-150; Vol. 2 of 18 Ex 151-300; Vol. 3 of 18 Ex at 301-379); [Richard III, Tr. May 15, 2009](Vol. 58 of 62 Tr at 2586-98; 2618-24);
- that Richard III represented his mother in the formation and funding of the Wilbourn Family LLC, in the purchase of a condo through that entity and in the pursuit of claims for uninsured damage to the condo; [Ex. 120, Ex. 486 4-19-06 Richard III to Deanna with Bank distribution](Vol. 5 of 18 Ex at 711; Vol. 14 of 18 Ex at 1961-62); [Ex. 564 3-13-07 Richard, III to Deanna re Perdido](Vol. 16 of 18 Ex at 2318);
- and that Richard III advised Deanna on the Providence Trust and billed the Richard II Estate for his work on the trust document itself and for his work with

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as executrix of the Richard II Will, as principal of the Wilbourn Family LLC, and he billed the Richard II Estate for his work on the Providence Trust. [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 at 2779-82).



Gina Silvestri, the attorney actually hired to prepare the Providence Trust document. [Ex. 17, Ex. 448 09-12-05 Estate Minutes](Vol. 2 of 18 Ex at 1060-61; Vol 13 of 18 Ex at 1828-29); [Richard III, Tr. May 15, 2009](Vol. 58 of 62 Tr at 2586-97, 2621-22).

These findings are overwhelmingly supported by the record evidence as the citations above reflect, and the Chancellor was entitled to find that Richard III represented Deanna as an attorney and had a fiduciary duty to her.<sup>18</sup> As such he owed her the duties of loyalty, honesty, and disclosure.

For a trustee, the duty of loyalty requires administering the trust solely for the benefit of the beneficiaries and communicating all material facts which the trustee knows or should know. See *McWilliams v. McWilliams*, 994 So. 2d at 849 (trustee owes duty of loyalty to trust beneficiaries which precludes conflicts of interest; duty requires trustee to administer trust solely in interest of beneficiaries); *Bryan v. Holzer*, 589 So. 2d 648, 657 (Miss. 1991) (duty of loyalty requires trustee to administer the trust solely in the interest of the beneficiary; to deal fairly with him and to communicate all material facts in connections with the transaction that the trustee knows or should know).

For an attorney, the duty of loyalty includes safeguarding the client's confidences, avoiding conflicts of interest and not acting adversely to the client. *Tyson v. Moore*, 613 So. 2d 817, 823 (Miss. 1992) (attorney's duty of loyalty precludes taking

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<sup>18</sup> The Chancellor also found that Richard III was in a confidential relationship with his mother and sisters which arises when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger. Richard III agreed that his mother relied on him with regard to her role as executrix and just, generally, as her son, for a long period of time. [Richard III, Tr. Aug. 19, 2009] (Vol 59 of 62 at 2779-81) . Thus apart from his fiduciary duty to his mother and sisters as trustee and as an attorney, Richard owed his mother and sisters a duty of honesty and loyalty arising from his familial status as son and brother. [Opinion at 54](Vol. 38 of 40 CP at 5673) (REWIII R.E. 2). In this case, Richard III's duty of loyalty, candor and honesty extended to his personal interactions with Deanna, Elizabeth and Garnett.

unfair personal advantage of a client or having interests adverse to the client); *Singleton v. Stegall*, 580 So. 2d 1242, 1245 (Miss. 1991) (attorney's duty of loyalty includes the requirements of confidentiality, candor and disclosure).<sup>19</sup>

The duty of disclosure is equally applicable to the trust-trustee and attorney-client relationships. The duty requires the trustee to reveal facts to the beneficiaries that he has a duty to disclose, and his silence, when he ought to speak, breaches that duty. *Frazier v. Shackelford*, 912 So. 2d at 146-147. See *Bennett v. Hill-Boren P.C.*, 52 So. 3d 364, 372 (Miss. 2011) (when fiduciary relationship exists, failure of disclosure may constitute affirmative act of concealment for fraud); *Waggoner v. Williamson*, 8 So. 3d 147, 154 (Miss. 2009) (fiduciary relationship between attorney and client creates a duty of disclosure).

The duty of honesty imposes on both the trustee and the attorney the utmost good faith, fairness, and honesty in their dealings with their trustee and client. See *Laseter v. Sistrunk*, 168 So. 2d 652, 656 (Miss. 1964). See also *Smith v. Sullivan*, 419 So. 2d 184, 187 (Miss. 1982) (fiduciary relationship requires full disclosure, frankness and honesty); *Tyson v. Moore*, 613 So. 2d at 823 (Attorney must deal with client in a manner of "utmost honesty, good faith, fairness, integrity, and fidelity. . . ."); *Brumfield v. Mississippi State Bar Ass'n*, 497 So. 2d 800, 808 (Miss. 1986) ("Any acts committed by an attorney, contrary to the highest standards of honesty, justice, or morality . . .

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<sup>19</sup> Similar to the duty of loyalty is the duty to deal impartially with trust beneficiaries. This duty requires a trustee to exercise good faith and to treat the beneficiaries evenhandedly and to act in the interest of the trust as a whole. See *Friedman v. Friedman*, 844 So. 2d 789, 792 (Fla. App. 2003). See *Matter of Duke*, 702 A. 2d 1008, 1023 (N.J. Super. 1995) (trustee is required to deal impartially with all of the beneficiaries and to protect all of their interests). Unwarranted preference to the interests of one or more beneficiaries constitutes a basis for removal of a trustee. The Chancellor appropriately found that a trustee violates the duty of impartiality by using the trust assets for his own benefit to the detriment of the other beneficiaries of the trust. [Opinion at 60-61](Vol. 38 of 40 CP at 5679-80) (REWill R.E. 2).

whether committed in his capacity as attorney, or otherwise, may constitute cause for discipline.”).

A trustee may be removed where his dishonesty or improper acts breach his duty of loyalty. See Scott and Ascher on Trusts §11.10 (trustee may be removed where he breaches his duty of loyalty by dishonest or improper acts, including engaging in professional misconduct).

**2. A Trustee Can Be Removed Where Hostility Impairs Administration of the Trust**

Where administration of the trust requires the mutual exchange of ideas, mutual hostility between the trustee and the beneficiaries is a sufficient basis for removal of the trustee if the hostility has the potential to defeat the purposes of the trust. See, e.g., *Walker v. Cox*, 531 So.2d at 803-804 (“mutual hostility between the beneficiaries and the trustee is a sufficient ground for the court to remove the trustee if 1) the provisions of the instrument creating the trust require mutual interchange of ideas, and 2) if the hostility tends to defeat the purpose of the trust.”)

The sole discretionary duty of Marital Trust B is to vote the 41,910 Bank shares, *inter alia*, for Holding Company directors. This requires the Co-Trustees of Marital Trust B to agree on the persons for whom to vote. The hostility created by Richard III caused Deanna, Elizabeth and Garnett to distrust him and made it impossible to carry out the sole discretionary duty of Marital Trust B. The hostility between Richard III and Deanna, regardless of the source, which impairs carrying out the Marital Trust B duties is likewise a legitimate basis for Richard III's removal as Co-Trustee of Marital Trust B.

**3. A Trustee Can be Removed for Dishonest or Improper Conduct Towards his Beneficiaries Regardless of Whether the Conduct Relates to the Trust or Arises in the Course of its Administration.**

Although Richard III claims that the only actions that the Chancellor and this Court can consider are those related to his administration of Marital Trust B, which he apparently limits to holding the stock certificates and distributing the proceeds of the Trust to Deanna,<sup>20</sup> the law is otherwise. First, to the extent that removal is based on a trustee's dishonesty or other misconduct, it is not necessary that such dishonesty or misconduct be connected to the trust itself or to its administration. Restatement (Third) of Trusts, § 37 cmt. e (2003) ("serious or repeated misconduct even unconnected with the trust itself may justify removal."); G. Bogert & G. Bogert, Law of Trusts and Trustees § 527 (2007) ("If a trustee is found guilty of . . . conduct involving dishonesty, the court may find that he is unfit to be a trustee, even though the reprehensible actions were not connected with the trust administration.")

Second, when hostility between the co-trustees impairs the efficient administration of the trust, removal of the co-trustee is warranted, regardless of the source of the hostility.

Although the Chancellor found that Richard III abused his discretion and his fiduciary duty in his co-trustee duties, both of which actions are related to Marital Trust B, the Chancellor also found that the deceitful taping of Deanna was dishonest and

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<sup>20</sup> Richard III defines the "routine administration" of Marital Trust B as "keeping the stock certificates for the Trust's shares in the holding company, maintaining a bank account for the Trust, receiving and distributing the monthly bank account statements, receiving and depositing distribution checks from the holding company, and distributing the Trust's income (less a trustee's fee) to Deanna Wilbourn." [Richard III Brief at 14]. Even in that limited role Richard III failed to insure that the first distribution of income from the stock was timely dispersed to Deanna when he told his mother this was her only source of income for the year. Three-fourths of the initial distribution was 97 days late because Richard III did not look at the checking account to see that the full amount of the distribution was not paid to Deanna in January 2006 because of a check reading error. [Ex. 463 1-12-06 Richard III to Deanna](Vol 13 of 18 Ex at 1907); [Ex. 602 Marital Trust B Checking Account](Vol. 17 of 18 Ex at 2494-99).

constituted professional misconduct. [Opinion at 58, 67](Vol. 38 of 40 CP at 5677, 5686) (REVIII R.E. 2). Because the Chancellor's finding of dishonesty is supported by the record and the law, Richard III is wrong to assert that his misconduct outside of what he contends are his sole trustee administrative duties, see n.20 *infra*, cannot be used to remove him.<sup>21</sup> Thus in addition to Richard III's breach of trust related to his co-trustee duties, the Chancellor was entitled to consider that his dishonesty and the hostility which he caused with the Trust beneficiaries served as a basis to remove Richard III as Co-Trustee of Marital Trust B.

#### **4. A Trustee Can Be Removed For Attempting to Thwart a Settlor's Plan of Administration**

It is the rule generally that the "administration of a trust must accord strictly with the intent of the settlor and the terms of the trust." *Reedy v. Johnson's Estate*, 26 So. 2d 685, 687 (Miss. 1946). A trustee's discretion cannot be exercised to defeat the settlor's intent or the trust purposes. *In re Ruth Easton Fund*, 680 N.W. 2d 541, 549 (Minn. App. 2004). Thwarting or *attempting to thwart* specific instructions in the trust instrument is grounds for removal. According to Bogert's Trusts and Trustees § 527,

Disobedience of directions in the trust instrument is usually a ground for removal. Attempts to thwart the settlor's plan of administration, [has] all been held to justify removal. The basis of removal is not that the estate has been depleted or is in danger of depletion, but rather that it is not being administered as the settlor had directed.

An intended or attempted appropriation is just as much an indication of danger as though it had been consummated, and hence is a ground of removal. Similarly, repudiation of the trust is a clear ground of removal even though the trust property has not yet been devoted to personal uses.

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<sup>21</sup> From the beginning of this case until now Richard III has claimed that the only relevant actions related to his removal as Co-Trustee are whether he handled Marital Trust B's administrative matters appropriately and that any actions he took related to his family, their business, or the Bank are totally irrelevant to this case. The idea that a sibling and son could be dishonest and deceitful to his family members in business and then expect them to trust him or deliberate with him in order to vote the 41,910 shares of stock in Marital Trust B strains credulity.

G. Bogert & G. Bogert, Law of Trusts and Trustees § 527.

As Co-Trustee of Marital Trust B, Richard III was required to administer Marital Trust B according to its terms, and to the extent that Richard III attempted to deviate from specific instructions in that Trust, the Chancellor was entitled to find that Richard III violated his fiduciary duties as Co-Trustee of Marital Trust B.

The record evidence proves that Richard III's actions related to the Providence Trust violated specific instructions in Marital Trust B, and the Chancellor was entitled to find that such actions breached his fiduciary duties as Co-Trustee of Marital Trust B.

**D. The Chancellor Appropriately Weighed the Evidence, and His View of the Record Facts Was Within His Discretion to Adopt**

The removal of Richard III as Co-Trustee of Marital Trust B lay within the Chancellor's discretion, and the bases on which the Chancellor relied for determining whether to remove the co-trustee are legal bases approved by this and other courts.

The remaining issues, therefore are whether the Chancellor's interpretation of the record facts and the evidence on which he relied were within the Chancellor's discretion to rely and whether the bases for removal are supported by both law and the record evidence. There was no legal error in the Chancellor's conclusions, upon weighing the evidence, and his decision must be affirmed under this Court's standard of review.

**1. Richard III Violated His Duty to Administer Marital Trust B According to Its Terms By Attempting to Move the 41,910 Bank Shares to the Providence Trust**

The Providence Trust proposal which Richard III pressed, was to make Richard III and his friend, Kirk Reasonover, the Family and the Independent Trustee respectively of an Intentionally Defective Grantor Trust.<sup>22</sup> The plan was for Deanna to sell the 41,910

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<sup>22</sup>IDGT allows the trustee to purchase and pay premiums on a life insurance policy on the life of the grantor. For income-tax purposes, the grantor is treated as the owner of the assets even though they are

shares of Marital Trust B Bank stock to the Providence Trust in return for which she would receive a promissory note, with interest payable to her annually. The value of the Marital Trust B shares would be frozen as of that date, and the distributions on the Bank shares would go into the Providence Trust. Because of the nature of the Trust, Deanna would pay the taxes on the income from the Bank stock, even though she would not receive the income from the Bank stock. [Richard III, Tr. May 14, 2009; Aug. 19, 2009](Vol. 57 of 62 Tr at 2508-09; Vol. 59 of 62 at 2789-92). The distributions on the stock would be used to pay for a life insurance policy on Deanna's life, which policy would be used to pay the estate taxes at Deanna's death. The distributions would also pay the interest on the promissory note to Deanna. Richard III and Kirk Reasonover would have sole authority to vote the 41,910 Bank shares, and Deanna would have no input into the voting of the Bank shares. [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 at 2792-93); [Ex. 508 11-15-06 REW III Memo](Vol. 14 of 18 Ex at 2010-11) (R.E. 23).

The Richard II Will had specific instructions for administration of Marital Trust B which removing the 41,910 shares of CNBC stock from Marital Trust B to the Providence Trust would thwart.

The Co-Trustees shall hold, administer and distribute this marital trust in accordance with the following provisions:

(b) After the payment of all expenses, taxes and costs incurred in the management of the trust estate, the Co-Trustees shall distribute all the net income to my wife or for her benefit at least annually during her life. No person shall have the power to appoint any part of the property constituting the trust to any person other than my said wife during her lifetime.

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legally owned by a trustee, and grantor herself remains liable for income taxes on the trust's income for the rest of her life. This arrangement removes the assets held in trust from grantor's estate, reducing estate-tax liability at her death. It also allows the grantor to make income-tax payments for the trusts without the IRS' treating those payments as additional gifts to her children. *Estate of Petter v. Comm'r*, T.C. Memo 2009-280 (U.S. Tax Court 2009, at 9-10).

(f) Upon the death of my wife and to the extent of the assets of the trust other than stock in The Citizens National Bank of Meridian, the Co-Trustees shall have the power to pay from the principal of this trust; without recovery from any party, all federal and state estate, inheritance or other succession taxes, including any interest and penalties thereon, attributable to such corpus and payable by reason of the death of my wife. The Co-Trustees shall then terminate the trust and distribute the remaining principal in the same manner as hereinafter provided in the event my wife shall predecease me. [... to my children, Richard E. Wilbourn, III, Elizabeth W. Williamson and Garnett W. Hutton, share and share alike].

[Ex 1, Ex. 403, 5-7-99 Will at Item V(b)and (f)](Vol. 1 of 18 Ex at 5, 7-8; Vol. 11 of 18 Ex at 1643,1645-46) (REWIII R.E. 6).

The assets of Marital Trust B were Richard II's 41,910 shares of Bank stock. The Richard II Will instructed that all of the net income from the stock was to go to Deanna during her life time. Any action which sought to move the 41,910 shares of CNBC stock out of Marital Trust B or which prevented Deanna from receiving all of the net income from the shares, constituted a violation of the settlor's specific instructions.

The Richard II Will instructed that the 41,910 shares of Bank stock were to be divided equally between his three children at Deanna's death. Any action which sought to change that distribution violated the settlor's specific instructions.

Richard, III breached his duty to the Settlor and to Deanna as Co-Trustee and Life Beneficiary in the following ways when he attempted to move the 41,910 shares of Bank stock from Marital Trust B to the Providence Trust:

(a) Marital Trust B was a marital trust, the net proceeds of which were to be used for the sole use and benefit of Deana Wilbourn. [Ex.1, Ex. 403 5-7-99 Will at Item V] (Vol. 1 of 18 Ex at 5; Vol. 11 of 18 Ex at 1643) (REWIII R.E. 6).

(b) Placing the 41,910 shares of Marital Trust B stock in the Providence Trust would have deprived Deana Wilbourn of the use of the proceeds of the stock and would further have required her to pay taxes on money that she did not receive. [Ex. 468



2/2/06 Gina Silvestri to Deanna et al re Providence Trust](Vol. 13 of 18 Ex at 1913-14); [Richard III, Tr. May 14, 2009; Aug. 19, 2009] (Vol. 57 of 62 Tr at 2508-09; Vol. 59 of 62 Tr at 2789-91)

(c) Richard II believed the Bank stock to be a good investment. In his instructions to the Co-Trustees, he wrote,

During my life it has been my belief that the stock of The Citizens National Bank of Meridian constitutes capital and provides for current income and reasonable growth. Other investments may look better at a particular time, but year in and year out this stock has, in my judgement, proven to be much better than the average investment."

[Ex. 1, Ex. 403 5-9-99 Will, V. (d)](Vol. 1 of 18 Ex at 6; Vol. 11 of 18 Ex at 1644) (REWIII R.E. 6).

(d) Substituting the revenue from a fixed rate promissory note in place of the distributions from appreciating bank stock would have deprived Deanna of income to which she was otherwise entitled under Marital Trust B.

(e) Because Marital Trust B is a QTIP<sup>23</sup> trust, its form allowed Richard II to direct where the Bank stock would go at Deanna Wilbourn's death. [Ex. 1, Ex. 403 5-9-99 Will, V(f)](Vol. 1 of 18 Ex at 7-8; Vol 11 of 18 Ex at 1645-46) ( REWIII R.E. 6).

(f) The stock in the Providence Trust, as a dynasty trust, would not be distributed at Deanna's death. [Richard III, Tr. Aug. 19, 2009](Vol. 60 of 62 Tr at 2855-56).

(g) Placing the 41,910 shares of Bank stock in the Providence Trust would have violated Richard II' s directive that the stock was to be divided equally and distributed to Richard III, Elizabeth and Garnett at Deanna's death.

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<sup>23</sup> "Qualified Terminable Interest Property means a separate interest in property, ... (1) which passes from the decedent, (2) from which the surviving spouse is entitled to all income for life, payable no less frequently than annually, no part of which can be appointed by any person (including the surviving spouse) to any person other than the surviving spouse, ... " *Estate of Clayton v. Comm'r*, 976 F.2d 1486, 1498 (5<sup>th</sup> Cir. 1992).

(h) Richard, III knew that the QTIP provision of Marital Trust B prevented the 41,910 shares of stock from going to Providence Trust. As Richard III testified, he had emailed Connecticut lawyer Gina Silvestri the following:

The other issue I wanted to run by you concerns getting the Estate Judge to work with us. I am going to have to come up with a decent legal argument as to why the will would allow us to transfer the stock in the estate to my Mother when it clearly says the stock goes to a QTIP trust.

Q. And you were concerned about -- at that time, I think about how to get the trust -- how to get the stock out of Trust B into your mother and then into the Providence Trust, is that right?

A. I was concerned as to how -- what the proper way to do that would be.

[Richard III, Tr. Aug. 19, 2009](Vol. 59 of 60 Tr at 2826).

(i) Even though he knew that placing the 41,910 share of Marital Trust B stock in the Providence Trust violated the Settlor's instructions and intent, Richard III pursued placing the 41,910 shares in the Providence Trust for fifteen months, from August 2005 through November 2006 when his mother told him she would not allow the shares to be placed in the Providence Trust. [Ex. 508 11-15-06 memo](Vol. 14 of 18 Ex at 2010-11) (R.E. 23).

A fair review of the evidence proves that Richard III attempted to violate his father's specific instructions and intent for the 41,910 shares of Bank stock when he sought to move the shares from the marital trust to a dynasty trust over which he had virtually sole control. The move would have deprived Deanna of income to which she was entitled under the Will and of the input into voting of the shares for which Richard II had provided by making her a Co-Trustee. Such a move would have also violated the division of the stock at Deanna's death in the manner Richard II instructed.

Richard III claims that his actions related to the Providence Trust had nothing to do with his duties as Co-Trustee of Marital Trust B, that it was not part of the Pretrial

Order,<sup>24</sup> and additionally that his sisters also supported the proposal. [Richard III Brief at 32-33, 54-55]. Richard III, as Co-Trustee of Marital Trust B, however, had a fiduciary duty to administer Marital Trust B according to its terms, regardless of the desires of the Trust beneficiaries, and his sisters did not have such a duty. See *Reedy v. Johnson's Estate*, 26 So. 2d at 688 (trust will not be modified, in violation of settlor's intention, "merely because the interest of the parties will be served by doing so."); *McWilliams v. McWilliams*, 994 So. 2d at 847 (Trustee was obligated "to act with due regard to his obligation as a fiduciary" regardless of the wishes of the beneficiary's guardian.)

Moreover, Richard II was entitled to dispose of his 41,910 shares of Bank stock in the manner he chose, even if his children wanted to make other provisions to reduce the estate taxes for which they would be liable at Deanna's death. See *Rosenbaum v. Fliegelman*, 375 So. 2d 223, 225 (Miss. 1979) (Individuals have right to dispose of their property and to make provisions concerning same, even though such disposition may not be satisfactory to their beneficiaries). Richard II noted in his Will that he had already provided financially for his three children during his lifetime and that there was no further need for an additional cash bequest.<sup>25</sup> He intentionally decided how he wanted his cash and his stock to be handled at Deanna's death, and he was entitled to have those instructions followed.

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<sup>24</sup> Because Richard III exactly constricts his duties as Co-Trustee of Marital Trust B to handling the stock certificates and distributing net income to Deanna, he discounts that the pretrial issues posed by himself and by the Appellees regarding whether he breached his trustee duties could cover his breach of trust in attempting to violate the specific terms of his father's will.

<sup>25</sup> ITEM IV. I will, devise and bequeath unto each of my children, Richard E. Wilbourn, III, Elizabeth W. Williamson and Garnett W. Hutton, the sum of One Thousand Dollars (\$1,000.00). My said children have already been well provided for financially during my lifetime and are being devised my Delta real estate in Item III above, and there is no need to make further taxable bequests at this time. [Ex. 1, Ex. 403 5-9-99 Will, IV](Vol. 1 of 18 Ex at 4; Vol. 11 of 18 Ex at 1642) (REWill R.E. 6).

By establishing Marital Trust B in the manner that he did, Richard II expressly instructed that the 41,910 Marital Trust B shares would be used solely for Deanna during her lifetime, and that at her death the 41,910 shares would be divided evenly between Richard III, Elizabeth and Garnett. Richard III, as Co-Trustee, was required to administer Marital Trust B according to its terms, and thwarting or attempting to thwart the Trust's specific instructions, regardless of any beneficiary's desire, was an independent basis for his removal as Co-Trustee of Marital Trust B.

**2. Richard III Violated His Discretionary Duty By Refusing to Allow the 41,910 Shares of Marital Trust B to Be Voted**

A key disagreement of the parties is whether the sole discretionary duty of the Co-Trustees – voting the 41,910 shares of Marital Trust B – was reasonably carried out by Deanna and by Richard III. The burden of proving that a discretionary power has been properly used is on the person who is asserting rights resulting from the use of the power. See G. Bogert & G. Bogert, Law of Trusts and Trustees § 560. Richard III claimed that his refusal to vote the shares was a reasonable exercise of the duty. The Chancellor disagreed.

Richard II's 41,910 shares of Bank stock, the sole assets of Marital Trust B, equaled nearly thirty percent of the outstanding shares of the Bank. Until 2007, all of those shares, as well as the shares of each Richard II family member, which combined equaled 52% of the outstanding shares of the Bank, had been voted for the Directors' slate proposed by the Holding Company Board.<sup>26</sup>

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<sup>26</sup> [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr. at 2733-34, 2763-64); [Archie, Tr. Dec. 16, 2008; Dec. 17, 2008](Vol. 43 of 62 Tr at 432-433, 480; Vol. 44 of 62 Tr at 480-481; Vol. 45 of 62 Tr at 626, 629).

**a. Chancellor Must Consider Whether Trustee is Acting in A Mind Not Contemplated by the Settlor in Judging Exercise of Discretionary Duty**

In considering whether the Co-Trustees exercised their discretionary duty reasonably with regard to the voting of the 41,910 shares of stock, the Chancellor had to consider the general duty of a trustee to manage the trust assets with the care that a prudent owner would undertake, *cf. McNair v. Capital Elec. Power Ass'n.*, 324 So. 2d 234, 240 (Miss. 1975), and then whether the Co-Trustees exercised their discretionary duty in a manner contemplated by the Trust Settlor.

In judging whether a trustee's exercise of a discretionary duty is reasonable, a court will consider the terms of the trust, the nature of the power and all of the circumstances surrounding the trust. *In re Scheidmantel*, 868 A. 2d 464, 481 (Pa. Super. 2005); Restatement (First) of Trusts § 187 cmt. d and j (1935). In any case, however, the trustee "must not act in a state of mind not contemplated by the testator, for example, dishonestly or from some motive other than the accomplishment of the purposes of the trust, arbitrarily without an exercise of his judgment." *In re Sullivan's Will*, 12 N.W. 2d 148, 150 (Neb. 1943); *Estate of Ferrall*, 258 P. 2d 1009, 1012 (Cal. 1953); see *Estate of Koos v. Koos*, 69 N.W. 2d 598, 606 (Wis. 1955) (court will interfere if the trustee acts in a state of mind not contemplated by the settlor).

The Tennessee Court of Appeals summarized the prevailing view in *Cansler v. Unknown Heirs of Chairs*, 250 S.W. 2d 579 (Tenn. App. 1951).

We quote a clear statement of the controlling principle, taken from Restatement, Trusts, Section 187, Comment J:

(T)he court will interfere if the trustee acts in a state of mind not contemplated by the settlor. Thus, the trustee will not be permitted to act \* \* \* from motives other than the accomplishment of the purpose of the trust, or ordinarily to act arbitrarily without the exercise of his judgment.

*Cansler*, 250 S.W. 2d at 581.

Accordingly, in judging the reasonableness of a trustee's exercise of his discretionary duties, "The real question is whether it appears that the trustee is acting in that state of mind in which it was contemplated by the settlor that he should act." *In re Frances M. Johnson Trust*, 320 N.W. 2d 466, 469 (Neb. 1982); *Davison v. Duke University*, 194 S.E. 2d 761, 786 (N. C. 1973); *In re Estate of Manahan*, 125 N.W. 2d 135, 138 (Iowa 1963). Even when there is no evidence of bad faith or improper motive, the exercise of discretion by trustees is subject to the limitation that they must not act outside "the bounds of reasonable judgment." *Industrial Nat'l Bank of Rhode Island v. Rhode Island Hosp.*, 207 A. 2d 286, 290 (R.I. 1965), *Estate of Koos v. Koos*, 69 N.W. 2d 598, 605 (Wis. 1955), *In re Clement Trust*, 679 N.W. 2d 31, 39 (Iowa 2004). See also *In re Ruth Easton Fund*, 680 N.W. 2d 541, 549 (Minn. App. 2004) (A trustee may not exercise its discretion in a manner that defeats the trustor's intent or the purpose of the trust).

Mississippi case law is similar. In *Yeates v. Box*, 22 So. 2d 411, 415 (Miss. 1945), this Court held that "whenever the circumstances require, [the Court will] review the exercise of ... discretion given to a trustee, and decide whether it is reasonable or unreasonable,..." Quoting the Restatement, Trusts, §187 as did the other jurisdictions, this Court in *Heneage v. Federal Land Bank*, 84 So. 2d 137, 139 (Miss. 1955), stated:

If discretion is conferred upon the trustee in the exercise of a power, the court will not interfere unless the trustee in exercising or failing to exercise the power acts dishonestly, or with an improper even though not a dishonest motive, or fails to use his judgment, or acts beyond the bounds of a reasonable judgment.

**b. Richard III Claims Not Voting the Shares Is Reasonable and Has No Impact on the Bank or on the Trust**

Richard III's position is that not voting the 41,910 shares of Bank stock was

reasonable and had no impact on the Bank or on Marital Trust B. Since he does not believe that the shares must be voted, he discounts the hostility in his family, which would preclude consultation on how to vote the shares and which would thus impair the administration of Marital Trust B. [Richard III Brief at 62, 64].

Richard III's further position, though not stated in these terms, was that a reasonable prudent business man holding thirty percent of a family bank's stock would refuse to vote those shares or use them to influence actions at the Bank. He would also posit that a reasonable, prudent business man, which Richard II was, would not vote those shares for the CEO of the Bank, whose family had the second largest percent of Bank shares, and two of his own family members but would replace them with two of his own friends, one of whom lived 90 miles away, had no banking relationship with the Bank, and held no stock in the Bank, and the second who held 100 shares of Bank stock and had never before voted them or attended a shareholder meeting. [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr at 2752-53); [Reasonover; Tr. May 11, 2009](Vol. 53 of 62 at 1869); [Ex. 263, CNBC Shares Not Voted](Vol. 8 of 18 Ex at 1093).

**c. Deanna Sought to Vote the Shares as Richard II Would Have Wanted**

Deanna's position, and the one she pleaded with Richard III to accept at the March 6, 2007 Holding Company meeting, was that the shares should be voted for two McDonnells, Archie Sr. and Archie Jr., and three Wilbourns, Deanna, Richard III and Russell Williamson, the Chairman of the Bank, in order to carry out Richard II's intent for the use of the 41,910 CNBC shares. [Ex. 266, Ex. 561 3-6-07 Deanna Wilbourn Proposed Ballot](Vol 8 of 18 Ex at 1098; Vol. 16 of 18 Ex at 2313) (R.E. 33).

**d. The Chancellor Was Required to Consider All of the Circumstances of the Creation of the Trust in Determining Reasonableness of the Co-Trustees' Actions**

The Chancellor was called on to decide which Co-Trustee was exercising the sole discretionary duty of Marital Trust B reasonably and whether either was acting in a "state of mind not contemplated by the testator." In making that judgment, the Chancellor determined Richard II's reasons for accumulating the shares.

Under the law governing discretionary duty, the Chancellor was required to determine the circumstances under which Marital Trust B was created and the role Richard II wanted for the sole assets of Marital Trust B – his 41,910 shares of Bank stock - in determining whether Richard III exercised his discretion reasonably, with judgment, or with an improper motive when he refused to vote the 41,910 shares of Marital Trust B for three Wilbourns and two McDonnells. Intent is to be determined at the time the [May 1999] will was created. *Yeates*, 22 So. 2d at 414.

The Chancellor was likewise entitled to determine how a "prudent owner" would exercise his discretion in deciding whether to vote or prevent the voting of one third of the shares in the Bank. In assessing reasonability, the Chancellor reviewed the Richard II Will, [Ex. 1 and Ex. 403](Vol. 1 of 18 Ex at 1 -21; Vol. 11 of 18 Ex at 1639-1650; Vol 12 of 18 Ex at 1651-1659) (REWill R.E. 6), the January 1999 Agreement that Richard II entered with Richard III four months before executing his Will [Ex. 402, 1-6-99 Agreement](Vol. 11 of 18 Ex at 1628-38) (REWill R.E. 4) and the June 1999 Strategic Plan executed by Richard II and Archie Jr. one month after Richard II executed his will. [Ex. 2, Ex. 404, 6-8-99 Strategic Plan](Vol. 1 of 18 Ex at 22-28; Vol. 12 of 18 Ex at 1660-66) (REWill R.E. 5).



**e. Richard III Failed To Exercise His Discretionary Duty Reasonably**

The Chancellor found, and the record evidence supports, as follows with regard to Richard III's refusal to vote the shares:

Another violation of Richard III's fiduciary duties involves his refusal to vote the shares of Marital Trust B at the 2007 shareholder meeting. At the March 6, 2007, annual shareholder meeting, Richard III took the position that he would not agree to vote for the slate nominated by the Holding Company, which was favored by Deanna. Deanna even proposed a compromise, but Richard III was adamant. He believed that both the company-nominated slate and the compromise slate would thwart his efforts to regain the Holding Company and Bank positions from which he had been ousted. Instead, he proposed to nominate his friends, Bill Grete and Kirk Reasonover because he believed they would back him in his efforts.

[Opinion at 59](Vol. 38 of 40 CP at 5678) (REWIII R.E. 2).

Richard III testified at trial that he knew he could be elected to the Holding Company Board by using his own Bank shares and those of his Uncle Jim Wilbourn's family if the 41,910 shares were *not* voted, but he did not know whether he could be elected if they were in fact voted. He testified, moreover, that he did not wish to vote the shares for Archie Jr., Deanna, or Russell Williamson and that the two people he wanted to consider, Bill Grete and Kirk Reasonover, had not yet been nominated.

[Richard III, Tr. May 14, 2009](Vol. 57 of 62 Tr at 2496-97, 2501).

In determining whether Richard III or Deanna abused their discretionary duty to vote the 41,910 Marital Trust B shares, the Chancellor considered four options with regard to the voting of the shares at the March 2007 Shareholder meeting: (1) the shares could have been voted as Richard III wished - for himself and his friends Bill Grete and Kirk Reasonover; (2) as Deanna, Elizabeth and Garnett wished - for Archie McDonnell, Sr., Archie Jr., Deanna, Richard III and Russell Williamson - (3) or the shares could have not been voted, as happened; or (4) Richard III could have resigned as Co-Trustee as he should have recognized that his personal interests conflicted with

the interests of the three other beneficiaries of Marital Trust B. [Opinion at 59-60](Vol. 38 of 40 CP at 5678-79) (REVIII R.E. 2).

The Chancellor determined that there was no benefit to the Trust or to the beneficiaries and was in fact in conflict with Richard II's intent for the use of the 41,910 Bank shares for the shares not to be voted. The Chancellor further found that there was no benefit for the shares to be voted as Richard III wished by putting non-Wilbourn Family members on the Holding Company Board since the Trustor's stated wish was that Wilbourn Family members be placed on the Holding Company Board in order for the Wilbourn Family to influence the actions of the Bank. [Opinion at 60](Vol. 38 of 40 CP at 5679) (REVIII R.E. 2).

The Chancellor was entitled, moreover, to consider that no reasonable business person, controlling thirty percent of a closely-held bank, would reasonably choose not to use the influence of the shares by voting to elect the people who would control the Bank's activities unless his personal interests conflicted with his trustee duties. The Chancellor was entitled to credit the testimony of Archie Jr, the Bank CEO, that the failure of the shares to be voted, took the Wilbourn Family's share of the voted stock and influence from 52% to 32% and left the Bank vulnerable to votes and influence by stockholders who might not share Richard II's vision for the Bank. [Archie, Tr. Dec. 17, 2008](Vol 45 of 62 Tr at 626-630).

By refusing to vote the shares in the manner proposed by Deanna – a reasonable compromise – Richard III violated the intent of the Settlor to ensure the influence of the Wilbourn family. Richard III argues that three Wilbourn family members, Richard III, Deanna and Garnett, were elected to the Holding Company Board *before* the March 2007 Shareholder meeting, and three Wilbourn family members, Richard III,

Deanna and Elizabeth's husband, Russell Williamson, were elected to the Holding Company Board in March 2007 *without* the vote of the 41,910 shares of Marital Trust B,. That argument, however, overlooks the fact that Richard II accumulated the majority shares in the Bank in order not to have to depend on the vote of anyone outside his family in order to elect three family members to the Holding Company Board. In March 2007, Deanna and Russell Williamson were elected *only* through the vote of non-Wilbourn family members. Without those non-Wilbourn Family votes, there would not have been three Wilbourn family members elected. [Ex. 559, CNBC Annual Meeting and Board of Directors Meeting Minutes](Vol. 16 of 18 Ex at 2294-95; 2302-03) (R.E. 32). *With* the 41,910 shares, the Wilbourn family shares represented 52% of the total outstanding shares of Bank stock; *without* the 41,910 shares, Richard II's family controlled only 32%. [Opinion at 40](Vol. 38 of 40 CP at 5659) (REWIII R.E. 2); [Ex. 559 3-6-07 CNBC Minutes](Vol. 16 of 18 Ex at 2294-95; 2302-03) (R.E. 32); [Archie, Tr. Dec. 17, 2008](Vol 45 of 62 Tr at 626-627).

The Chancellor was entitled to find that by blocking the voting of the shares, Richard III both failed to cooperate in the voting of the shares of Marital Trust B – the sole discretionary duty of the Marital Trust B Co-Trustees - and that he exercised that discretionary duty unreasonably. He abused his discretionary duty by acting imprudently, to the detriment of the beneficiaries and by violating Richard II's intent for use of his 41,910 shares of Bank stock, which is to ensure and promote Wilbourn family influence and control of the Bank. [Opinion at 65-66](Vol. 38 of CP at 5684-85) (REWIII R.E. 2).

**3. Richard III Violated His Duty of Loyalty By Refusing to Allow the 41,910 Shares of Marital Trust B to Be Voted In Order to Secure His Election to the Holding Company Board**

The Chancellor found that Richard III used the assets of Marital Trust B for his own benefit. Richard III claims that his refusal to allow the shares to be voted for two McDonnells and three Wilbourns was merely a business disagreement that had no impact on administration of Marital Trust B. [Richard III Brief at 28, 41].

The Chancellor found that Richard III violated his duty of loyalty by using the Marital Trust B shares for his own benefit and to the detriment of the income beneficiary and the other two residual beneficiaries. [Opinion at 60-61](Vol. 38 of 40 CP at 5679-80) (REWIII R.E. 2). As Co-Trustee, Richard III had a special duty of loyalty to the beneficiaries of the trust which precluded him from engaging in transactions that involved self-dealing or that otherwise involved or created a conflict between his fiduciary duties and personal interests. According to this Court, by "enforcing the duty of loyalty" a court is seeking to deter "trustees from getting into positions of conflicts of interest." *McWilliams*, 994 So. 2d at 849.

Richard III's position on the issue was that both Deanna or Richard III could vote the Marital Trust B shares for themselves and that the failure of the shares to be voted had no negative impact on Marital Trust B. [Richard III Brief at 41].

The Chancellor was entitled to view the following facts in support of his conclusion that Richard III had a conflict and used the Marital Trust B assets to benefit himself at the expense of the other trust beneficiaries. After he was removed as Chairman of the Boards of the Bank and Holding Company and replaced with Russell Williamson on the slate for Holding Company Directors, Richard III notified Deanna, Archie Jr., Elizabeth, Garnett and Russell Williamson that the 41,910 shares of Marital

Trust would not be voted at the March 2007 Holding Company meeting, and that he would thereby be elected to the Holding Company Board through the vote of his own shares and those of his Uncle Jim Wilbourn. [Ex. 545 1-30-07 Richard III letter to Archie Jr. and Deanna](Vol. 16 of 18 Ex at 2258A-2259) (R.E. 24).

At trial Richard III admitted that he knew he could be elected to the Holding Company Board if the 41,910 Marital Trust B shares *were not voted*; he did not know whether he could in fact be elected if those shares were voted. [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr at 2765-66). This was but one indication of the conflict between Richard III's personal interests and his fiduciary duties to his Co-Trustee and trust beneficiaries.

Consequently, the Chancellor had evidence that Richard III was seeking to use the Marital Trust B assets to his own benefit (to get elected to the Holding Company Board by keeping the shares from being voted) to the detriment of the other beneficiaries of Marital Trust B who pleaded with Richard III to allow the shares of Marital Trust B to be voted.

Each of these factual findings are supported by the record evidence, and the Chancellor's view of these record facts was within the Chancellor's discretion to adopt.

**4. Richard III Violated His Duty of Loyalty and Disclosure and Created Hostility By His Deceitful Surreptitious Taping of Deanna In Her Home**

The Chancellor found that Richard III's most egregious violation of a fiduciary duty was the secret taping of his mother. In so ruling, the Chancellor found that Richard III's recordings were made for adversarial purposes and not for the reason Richard III

offered at trial,<sup>27</sup> and that they were deceitful, dishonest and constituted professional misconduct. [Opinion at 55-58](Vol. 38 of 40 CP at 5674-77) (REWill R.E. 2). Richard III counters that his secret taping was reasonable under the circumstances. [Richard III Brief at 56-58]

The Chancellor was entitled to find deceit and dishonesty from the following record facts. In August 2006, Richard III talked to his best friend Bill Grete about being placed on the Bank Board. [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr at 2752-53, 2824). Richard III in October 2006 was counting on moving the 41,910 Bank shares in Marital Trust B to the Providence Trust for which he served as Family Trustee. [Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr at 2795). Richard III had already convinced Deanna to place her 3,440 personal shares of Bank stock in the Providence Trust in order to fund the Providence Trust when the proposed transfer of the 41,910 Marital Trust shares was delayed for tax reasons. [Richard III, Tr. May 14, 2009; May 15, 2009; Aug. 19, 2009](Vol. 58 of 62 at 2509-11, 2586; Vol. 59 of 62 Tr at 2784); [Ex. 68, Ex. 458 12/30/2005 Purchase Agreement](Vol. 4 of 18 Ex at 540-547; Vol. 13 of 18 Ex 1888-96). Richard III and his friend Kirk Reasonover, the Independent Trustee, had sole control over the assets of the Providence Trust, and Richard III alone could dismiss the Independent Trustee during Deanna's lifetime. [Richard III, Tr. May 15, 2009; Aug. 19, 2009](Vol. 58 of 62 at 2598-99; Vol. 59 of 62 at 2792).

As long as he believed that all of his father's bank shares would be under his control in the Providence Trust, Richard III had no need to consider his mother's or his

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<sup>27</sup> Q And did it ever occur to you, Mr. Wilbourn, to say, "Mom, if we're going to talk about my role at the bank, I want a record of this conversation, want to be able to remember it, do you mind if I record it?"

A No, it really didn't occur to me. I mean, I wouldn't have said I was taking notes -- I mean, I wouldn't have said that. It was in lieu of taking notes is what it amounted to.

[Richard III, Tr. Aug. 19, 2009](Vol. 59 of 62 Tr at 2800).

sisters' advice and urgings to change his behavior with regard to his relationship to Archie Jr. and the Bank management team. That would soon change.

On October 24, 2006, Richard III taped his mother for the first time, in order to have a "personal record" of what was said instead of having to take notes. (Richard III, Tr. May 14, 2009)(Vol. 57 of 62 Tr at 2434-35). At the meeting, Deanna told Richard III the following

(a) she appreciated everything he had done for the Estate but that after two years she had concluded that his role in the Bank was not working out.

(b) what Richard III was doing in the Bank was not in the best interest of the Wilbourn family, since the Bank stock was the family's largest holding.

(c) Richard III did not have good rapport with the employees, and some of his ideas are humiliating "to us."

(d) rather than having a working relationship with Archie Jr. – "which is absolutely essential" – Richard III had an intense distrust of him and in fact an adversarial relationship.

(e) Richard III must put himself under the authority of the Bank and not think of himself as the authority and that his behavior must coincide with this reality.

(f) Richard III must return in a week and let her know whether he is going to adjust and change, and if he did not, then he must resign from the Board "and everything."

(g) Richard III's idea about putting his Jackson buddies on the Board was not going to happen because "this is a Meridian Bank."

[Ex. 156 10-24-06 Deanna Prepared Statement] (Vol. 6 of 18 Ex at 771-774) (R.E. 22); Ex. 297, Ex. 587 Transcript of Oct. 24, 2006 Secret Recording] (Vol. 16 of 18 Ex at 2347A-2348; Vol 8 of 18 Ex at 1168-74; Vol 16 of 18 Ex at 2378-2382C) (R.E.21, 21(a)).

On October 27, 2006, three days after his mother's pronouncement, Richard III contacted legal counsel and then requested copies of the Bank By-laws. [Ex. 504 10-28-06 E-Mail To CEO Asst. Re: Bylaws Of Bank] (Vol. 14 of 18 Ex at 2004); [Richard III, Tr. Aug. 19, 2009] (Vol. 59 of 62 at 2751-52). He contacted legal counsel again on October 31, 2006, [Richard III, Tr. Aug. 19, 2009] (Vol. 59 of 62 Tr at 2806), one day after his next secret taping of his mother, an hour-long telephone call. [Ex. 297 Transcript of Oct. 31, 2006 Secret Recording] (Vol. 9 of 18 Ex at 1204-23) (R.E. 21).

Although his mother asked him on October 24, 2006, to report back to her the following week with a decision as to whether he would agree to change his ways, [Ex. 297, Ex. 587] (Vol 8 of 18 Ex at 1170) (R.E. 21); Vol 16 of 18 Ex at 2380) (R.E. 21(a)), Richard III did not return to talk to Deanna in person until three weeks later, after a Bank Board meeting. [Ex. 508,11-15-06 REWill Memo To Providence Trust File](Vol. 14 of 18 Ex at 2010-11) (R.E. 23); [Ex. 509 Transcript of Dec. 4, 2006 Secret Recording](Vol. 14 of 18 Ex at 2022-23) (R.E. 21(b)),

On November 14, 2006, Richard met with his mother in the Wilbourn and Rogers Conference Room, but there is no tape of the conversation - only his memo created after the fact. Although Richard III knew that there was going to be a meeting, he did not tape the conversation. According to his memo, Deanna told Richard III

- (a) she wanted him to resign from the Providence Trust
- (b) she would not fund the Providence Trust with the 41,910 shares of Bank stock in Marital Trust B.



(c) she did not trust him,

(d) although Richard III told her that the Providence Trust was a Defective Grantor Trust, and she could have no role in the voting of the stock [at that point her personal shares were in the Providence Trust] she still wanted him to resign as Co-Trustee of the Providence Trust [Ex. 508, 11-15-06 REWIII Memo To Providence Trust File] (Vol. 14 of 18 Ex at 2010-11) (R.E. 23).

Thus at the November 14, 2006, meeting, Richard III learned for the first time that his mother would not agree to transfer his father's 41,910 shares in Marital Trust B to the Providence Trust. [Richard III, Tr. Aug. 19, 2009] (Vol. 59 of 62 Tr. at 2792). Until that point, Richard III had counted on their transfer. Having been thwarted in his effort to control the voting of the Bank shares owned by both his mother and father, it is apparent that Richard III began his taping in earnest - not to have a record of what he and his mother discussed, as if he were taking notes [Richard III, Tr. Aug. 19, 2009] (Vol. 59 of 62 Tr at 2800) - but in order to vilify his mother.

Richard III testified that sometimes, while taping his mother, he would step away from where she was and summarize on tape what he considered important in the conversations. [Richard III, Tr. Aug. 19, 2009] (Vol. 59 of 62 Tr at 2816-17). On December 4, 2006, his next visit to his mother's home, Richard III taped Deanna for nearly three hours in her kitchen, dining room and living room. The conversation included Richard III's whining that he did not get sufficient deference for being at the Bank [Ex. 509, 2058]; disagreements between himself, Archie and Elizabeth; [Ex. 509, 2058]; things that Deanna had heard about happenings at the Bank [Ex. 509, 2060-62]; Richard III's complaints about some of the things happening at the Bank [Ex. 509, 2061]; Deanna's reiteration of her October 24, 2006 request that Richard III resign as Co-Trustee of

Providence Trust [Ex. 509, 2021] and Deanna's statement that she had lost faith in him. [Ex. 509, 2021] [Ex. 297, Ex. 509 Transcript of Dec. 4, 2006 Secret Recording](Vol. 9 of 18 Ex at 1233, 1270, 1272-73; Vol. 14 of 18 Ex at 2021, 2058, 2060-61) (R.E. 21, 21(b))

When Richard III summarized the important portions of the conversation by making comments to the tape out of Deanna's hearing, however, he wanted to be sure that the tape had recorded his mother saying "Sh\*\*,"

Richard Wilbourn: [inaudible] .. step back here. I don't know how much of this was on tape. The word she used a second ago was "shit." That's the second time she used it. And, it's very hard hearing that. So I walked away. Smoothly. I didn't run away. I didn't storm away. I haven't stamped any feet or slammed any doors. I just calmly walked away. I need to add that Mother's been drinking. She has had at least one very full glass of Chardonnay, and you can smell the wine on her breath, just when she talks.

[Ex. 297; Ex. 509 Transcript of Dec. 4, 2006 Secret Recording](Vol. 9 of 18 Ex at 1253; Vol. 14 of 18 Ex at 2041) (R.E. 21, 21(b)). At the end of the evening Richard III summarized the importance of the three-hour conversation as follows

Richard Wilbourn: It is 10:15 on Monday night. The highlights of this tape may include things like Mother cursing twice. She was drunk. She talks all over the world all over the waterfront about things, and they don't make sense a lot of times. She is very uninformed. There is a bylaw that very clearly defines the role of the Chairman. That, of course, she says is "irrelevant." She doesn't realize that Chairmen of banks our size get paid much bigger salaries than I'm getting paid. Several other interesting features to the conversation. Good night.

[Ex. 297, Ex. 509 Transcript Of Dec. 4, 2006 Secret Recording](Vol 9 of 18 Ex at 1273-74; Vol. 14 of 18 Ex at 2061-62) (R.E. 21, 21(b)). Richard III thus concluded that the important part of the conversation was that Deanna had been drinking, and that she was very uninformed because she did not know that chairmen of the boards at other banks made much more in salaries than Richard III did. [Ex. 509, 2061-62] (R.E. 21(b))<sup>28</sup>.

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<sup>28</sup> Although Richard III claimed that Deanna was drunk in his first "aside," he nonetheless continued to tape her for another 75 minutes. [Ex. 297, Ex. 509 Transcript of Dec. 4, 2006 Secret Recording](Vol 9 of 18 Ex at 1253-74; Vol. 14 of 18 Ex at 2061-62) (R.E. 21, 21(b)).

Unlike the summary that Richard III made of his November, 14, 2006 conversation with his mother (Ex. 508 11/15/2006 REW III Memo to Providence Trust File)(Vol. 14 of 18 at 2010-11) (R.E. 23), the tape summary that Richard III gave for the three-hour conversation does not help Richard III remember something that his mother said in order to prevent misunderstandings.

In the face of a mother who was trying to impart to Richard III the history of how Richard II started his business and hers and Richard II's humble beginnings, [Ex. 509] (Vol. 14 of 18 Ex at 2023-2031) (R.E. 21(b)), the Chancellor was entitled to find that Richard III was more interested in getting dirt that he could use in an adversary situation with his mother. A review of the audio tape of the excerpts above reveal a black heart - a man with unclean hands when it comes to his relationship with his family and particularly with his mother.

The transcript of that portion of the secret tape is cited above at Ex. 297 and Ex. 509, and the audio of the quoted language is on the disk as CNB Chair Conf w Mother 12-4 at 1:41:36 - 1:42:38 and 02:57:01 – to the end of the conversation. [Ex. 297 Audio Disk] (R.E. 34) The Court can hear for itself the deceit displayed by Richard III on the secret recordings, which deceit was similarly displayed at trial.

The Chancellor found that the taping of the December 4, 2006 conversation and the other twenty-three conversations<sup>29</sup> [Ex. 297 Richard III Secret Recordings] (Vol. 8 of 18 Ex at 1162-1200; Vol. 9 of 18 Ex at 1201-1350; Vol. 10 of 18 Ex at 1351-1439) (R.E. 21) was

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<sup>29</sup> Likewise Richard III's ludicrous claim, [Richard III, Tr. Aug. 19, 2009](Vol. 58 of 62 Tr at 2696-2700; Vol. 59 of 62 Tr at 2701-05] that his mother asked him to tape her can be readily discounted, as the Chancellor did [Opinion at 32-33](Vol. 38 of 40 CP at 5651-52) (REWIII R.E. 2), by listening to the audio on Ex. 297](Vol. 10 of 18 Ex. at 1418)("Richard. this, this is beyond the pail. This is sad. You are breaking my heart: You are breaking my heart. I never believed that I would have anyone in this - and you're probably recording me, punch that button and record it. Be sure and do that, because you've got to get some help.") The audio is on the disk for Ex. 297 T-C with Mother II at 00:00 - 001.40. (R.E. 34).

deceitful and dishonest and that the taping was not for the purpose of allowing Richard III to remember something important that his mother told him but so that he could obtain information to make her look bad or to use in litigation or to use to commit her. [Opinion at 31, 58](Vol. 38 of 40 CP at 5650, 5677) (REWIII R.E. 2). The record supports that interpretation.

**E. The Challenged Evidence Was Appropriately Considered**

A chancellor has great leeway in determining which evidence to admit. See *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 34 (Miss. 2003) (standard for reviewing trial court's admission or suppression of evidence, including expert testimony, is abuse of discretion, and trial judge's discretion in such matters is great). Though Richard III claims that the Chancellor relied on evidence he should not have, Richard III did not object to the admission of certain of the evidence, and he in fact relied on the same evidence to support certain of his own assertions.

Richard III challenges as irrelevant or improper the Chancellor's reliance on evidence related to the January 1999 Agreement between Richard II and Richard III [Richard III Brief at 29, 41-42]; Richard III's actions as Chairman of the Boards of the Bank and Holding Company [Richard III Brief at 49-51]; Richard III's communications with Deanna and Archie Jr. between January and March 2007 [Richard III Brief at 26, 49]; Richard III's involvement with other family and business matters including his actions related to the Providence Trust. [Richard III Brief at 51-56]. These topics are relevant to at least eighteen issues of Fact on the Pretrial Order - seven of Richard III's issues and eleven of Deanna, Elizabeth and Garnett's issues. [Pretrial Order at 9(b)](Vol 33 of 40 CP at 4928-4931) (REWIII R.E. 17).

**1. The January 1999 Agreement Between Richard II and Richard III Provides Basis for Determining Reasonableness of Discretionary Actions**

Richard III did not object to the admission of the January 1999 Agreement, [Ex. 402, January 1999 Agreement](Vol. 41 of 62 Ex. at 1628-38) (REVIII R.E. 4); [Elizabeth, Tr. May 7, 2009](Vol. 51 of 62 at 1571-72), nor to its discussion by Elizabeth and Garnett, and failure to object at trial precludes raising the issue on appeal. See *Common v. Common*, 42 So. 3d 59, 62 (Miss. Ct. App. 2010). The attorney must make a contemporaneous objection to preserve the matter for appeal. See *Haggerty v. Foster*, 838 So. 2d 948, 954 (Miss. 2002). As this Court stated in another context when the complainant himself introduces what he later claims is admissible evidence, his adversary “may proceed to question further in the matter.” *Butler v. State*, 16 So. 3d 751, 754-755 (Miss. Ct. App. 2009). Richard III at trial did not claim that Richard II’s intent for the 41,910 shares could not be considered. Moreover, the January 1999 Agreement merely confirmed the multiple pages of testimony related to Richard II’s vision for the Bank and for the use of the 41,910 Bank shares. [See, e.g., Elizabeth, Tr. May 7, 2009] (Vol. 51 of 62 Tr at 1644-1646); [Garnett, Tr. May 12, 2009] (Vol 54 of 62 at 1979, 2022-23).

The January 1999 Agreement was relevant, broadly speaking, because Richard II’s 41,910 shares of Bank stock were the sole asset of Marital Trust B. Richard II’s January 1999 Agreement provided discrete evidence of why the Bank shares were important and why Richard II accumulated them – to control and influence the actions of Citizens National Bank through their vote alone, without having to rely on non-family votes, to elect three Wilbourn family members to the Holding Company Board.

The Agreement provides a context through which the Chancellor could determine whether Richard III or Deanna abused the sole discretionary duty of Marital Trust B – to

vote the 41,910 Bank shares - and whether Deanna, Elizabeth and Garnett had a legitimate basis to believe Richard III was violating Richard II's intent for the shares by refusing to vote them at the March 6, 2007, shareholder meeting and seeking to use the shares to elect non-Wilbourn Family members to the Holding Company Board.

The January 1999 Agreement [Ex. 402](Vol. 11 of 18 Ex at 1628-38) (REVIII R.E. 4) and the June 8, 1999 Strategic Plan [Ex. 2, Ex. 404](Vol. 1 of 18 Ex at 22-28; Vol. 12 of 18 Ex at 1660-66) (REVIII R.E. 5) and the testimony of Elizabeth and Garnett, among others, provided the following background against which the Chancellor could judge whether Richard III or Deanna breached their discretionary duty to vote the 41,910 shares of Bank stock which Richard II had accumulated over a period of twenty-five years.

(a) Marital Trust B was to use Richard II's Bank stock for the continuation of the plans that Richard II put in place beginning in 1999 when he gained a majority of the Bank stock and, with Archie Jr., created a strategic plan to keep Citizens National Bank in the community, independent and prosperous.

(b) Richard II entrusted Deana and Richard III to carry out his plan for the Bank through the use of the influence of those 41,910 shares when he placed them as Co-Trustees of Marital Trust B

(c) The 41,910 shares of Bank stock, when combined with the stock of his wife, his children and his children-in-law, most of which had been gifts from him, his wife and his mother Garnett Sturdivant Wilbourn, represented

- (i) the ability to influence and control the major decisions in the Bank,
- (ii) the ability to elect three of the five members of the Holding Company whose membership elected the Bank's directors and appointed the President and CEO of the Bank.
- (iii) the ability to influence the future path of the Bank,

- (iv) Richard II's ability unilaterally to control those decisions without having to depend on the shares of anyone else outside his immediate family.

In determining whether Richard III reasonably exercised his Co-Trustee discretion by refusing to vote the shares of Marital Trust B for Archie Sr., Archie Jr., Deanna, Richard III and Russell Williamson, the Chancellor heard testimony and reviewed the documents which would best provide Richard II's intent for the Bank stock and concluded that Richard III's sole discretionary duty, that of voting the shares of Marital Trust B, was unreasonably withheld. See *Gulf Nat'l Bank v. Sturtevant*, 511 So. 2d 936, 938 (Miss. 1987) (testimony related to settlor in determining whether trustees abused discretionary duty).

The Chancellor was required to determine the intent at the time that the duty was created, and the documents created at the same time as was the Richard II Will were relevant to whether Richard III fulfilled the discretionary duty reasonably.

Richard III contends that the Court could not go outside the four corners of the Richard II Will in order to determine the Settlor's intent for Marital Trust B. [Richard III Brief at 41-42] As the discussion above reveals, however, the January 1999 Agreement pertains to Richard II's intent for use of the assets of Marital Trust B, and when determining whether a trustee has exercised his discretionary function reasonably, here the use of those assets, a court is required to consider all of the circumstances and to determine whether the trustee acted in conformity with the settlor's intent.<sup>30</sup>

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<sup>30</sup> Since Richard III was attempting to remove Deanna as co-trustee, she was entitled to present the basis on which she wanted to vote the Marital Trust B shares as Richard II wished them to be voted.

**2. Richard III's Actions as Chairman of the Boards of the Bank and Holding Company Provide the Context for Deanna, Elizabeth and Garnett's Removal of Richard III as Co-Trustee Under the Will**

Richard III's tumultuous service as Chairman of the Boards of the Bank and Holding Company Board provide the background of why Deanna, Elizabeth and Garnett sought to thwart Richard III's efforts to use the 41,910 shares of Bank stock in Marital Trust B to have himself and his friends, rather than three Wilbourn Family members, elected to the Holding Company Board and why they sought to remove him as Co-Trustee under the Will when he sought to use the shares for his own benefit to take over the Bank and Holding Company.

Richard III's actions as Chairman of the Bank and of the Holding Company and his removal are included in the formal Notice of Removal presented to Richard III in May 2007. See April 10, 2007 Notice of Removal XIII ("Richard E. Wilbourn, III, was removed as Chairman of the Board of Citizens National Banc Corp. and as authorized voting representative of Citizens National Banc Corp. because he created recurring and significant conflict within the bank.")<sup>31</sup> Richard III, moreover, claimed that the April 10,

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<sup>31</sup> Notice of Removal XIII.

"Because the stock of Citizens National Banc Corp. is the sole asset of the Marital Trust B, it is essential that the stock of Citizens National Banc Corp. remain strong and viable. Citizens National Banc Corp. is the sole shareholder of Citizens National Bank of Meridian. Actions which impede the ability of management of the Citizens National Bank of Meridian to execute the business decisions as determined by the board of directors have the potential for weakening the value of the stock. Richard E. Wilbourn, III, was removed as Chairman of the Board of Citizens National Banc Corp. and as authorized voting representative of Citizens National Banc Corp. because he created recurring and significant conflict within the bank. In taking these actions, the Board of the Citizens National Banc Corp. determined that Richard E. Wilbourn, III's philosophy and management style are detrimental to, and interfere with the ability of the Bank's officials and employees to run, the Citizens National Bank of Meridian and Citizens National Banc Corp. Richard E. Wilbourn, III's insistence on retaining a position through which he can interfere with the running of the Bank before he will allow the shares of the Marital B Trust to be voted, further indicates that Richard E. Wilbourn, III, is unsuited to be Co-Trustee of the Marital Trust B, and he lacks the skills and aptitude to continue in that role without potentially damaging the value of the stock of Citizens National Banc Corp. and therefore the value of the Marital



2007 Notice of Removal was sufficient evidence of Deanna, Elizabeth and Garnett's breach of fiduciary duties. Consequently, the April 10, 2007, Notice of Removal was the subject of five issues in the Pretrial Order related to whether Deanna, Elizabeth and Garnett breached fiduciary duties by its creation. [Pretrial Order at 9(b), Plaintiff's Issues 2-5; ¶5, 6 Defendants' Issues](Vol 33 of 40 CP at 4928, 4930) (REVIII R.E. 17)

Since the financial security of the Bank was essential to Deanna's financial well being [Richard III, Tr. May 15, 2009](Vol. 58 of 62 Tr at 2580), actions which threatened the ability of the Bank's management team to run the Bank efficiently and effectively, threatened Deanna's welfare as well as the future value of Richard III, Elizabeth and Garnett's inheritance. The evidence related to Richard III's actions at the Bank thus provided the legitimate basis and motive to Deanna, Elizabeth and Garnett's actions to remove Richard III as Co-Trustee of Marital Trust B under the Richard II Will and supported the Chancellor's finding that Deanna, Elizabeth and Garnett did not have improper motives in removing Richard III as Co-Trustee of Marital Trust B through the April 2007 Notice of Removal. [Opinion at 68-69](Vol 38 of 40 CP at 5687-88) (REVIII R.E. 2). The evidence was relevant to issues in the Pretrial Order and was appropriately considered.

**3. Richard III's January – March 2007 Communications with Deanna and Archie Jr. Are Not Settlement Negotiations In This Case**

The January 2007 – March 2007 communications between Richard III and Deanna and Archie Jr. followed Richard III's removal as Chairman of the Boards of the Bank and Holding Company and provide evidence that Deanna and Archie Jr. were attempting to work with Richard III to have the 41,910 Bank shares voted at the March

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Trust B of which Deanna A. Wilbourn is the sole beneficiary." [Ex. 566 4-10-07 Notice of Removal](Vol. 16 of 18 Ex at 2321-28) (REVIII R.E. 11).

2007 Holding Company Shareholder meeting. Richard III claims that the communications are precluded under Rule 408 of the Mississippi Rules of Evidence. [Richard III Brief at 49].

The challenged January 30, 2007, letter from Richard III announced that he would not allow the 41,910 Bank shares in Marital Trust B to be voted, and with those shares not being voted, he would be elected to the Holding Company Board through the vote of his own shares and those of his uncle Jim Wilbourn's families. [Ex. 545, 1-30-07 Richard III letter to Archie Jr and Deanna](Vol. 16 of 18 at 2258A -2259) (R.E. 24).

The January 30, 2007, letter was not a settlement letter related to Richard's lawsuit against Deanna, Elizabeth and Garnett. The January 30, 2007, letter was part of Richard III's effort to resolve his potential "legal recourse" for "the way in which removal actions against me occurred, the communications made to me shortly before the January 9, 2007 holding company meeting, certain communications by you to others about me, and other things." [Ex. 545, 1-30-07 Richard III letter to Archie Jr and Deanna](Vol. 16 of 18 at 2258A -2259) (R.E. 24).

The subject of the letter was the "disputes between us" (Richard III, Archie, Jr. and Deanna) as of January 30, 2007. The disputes referenced in the January 30, 2007 letter are not the subject of this litigation. [Ex. 545, 1-30-07 Richard III letter to Archie Jr and Deanna](Vol. 16 of 18 at 2258A -2259) (R.E. 24).

The substance of what is precluded, when MRE 408 applies, is a communication related to "(1) the furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount." Mississippi Rule of Evidence 408. See Comment to M.R.E. 408 ("Rule 408 *only* excludes offers

when the purpose is proving the validity or invalidity of the claim or amount. Therefore, an offer for another purpose may well be admissible at trial")(Emphasis added)

According to Richard III's January 30, 2007, letter, the actions that "create[d] many options for legal recourse," were the "removal actions taken against me on January 9, 2007" which Richard III deemed to not be justified. [Ex. 545, 1-30-07 Richard III letter to Archie Jr. and Deanna](Vol. 16 of 18 at 2258A -2259) (R.E. 24). Whether Richard III's removal as Chairman of the Bank and Holding Company Boards was justified is not the subject of this litigation. Richard III was not asking the Chancellor to determine whether his removal from the Bank and Holding Company Boards was justified. Moreover, Deanna, Elizabeth and Garnett are not seeking to use the communications to prove the validity of the January 9, 2007 actions.

Deanna, Elizabeth and Garnett were entitled to show that the communications between Richard III, Archie Jr. and themselves regarding Richard III's plans for the voting of the 41,910 shares indicated that Richard III wanted to use those shares for his own benefit, to have himself reinstated to his former Bank positions, and not for the benefit of the life beneficiary and other remainder beneficiaries of Marital Trust B. That evidence supports the Chancellor's finding that Deanna, Elizabeth and Garnett did not have an improper motive in attempting to remove Richard III as Co-Trustee of Marital Trust B through the April 10, 2007, Notice of Removal which Richard III claims was a breach of their fiduciary duties, and that Richard III in fact breached his own fiduciary duties by preventing the voting of the shares in order to have himself elected to the Holding Company Board. The evidence was not precluded under M.R.E. 408, and the Chancellor appropriately considered it.

**4. Richard III's Action Related to The Providence Trust Is But One Indicia of Richard III's Breach of His Fiduciary Co-Trustee Duties**

Richard III says the Chancellor could not consider his actions in attempting to move the 41,910 Bank shares from Marital Trust B to the Providence Trust over which he had virtually sole control because

In the pretrial order,... Defendants did not assert any claims that Richard III breached any duties in his handling or involvement in other family and business matters that did not pertain to Marital Trust B or the bank.

[Richard III Brief Issue 2 at 4, 51].

As discussed in more detail earlier, Richard III's actions related to the Providence Trust breached his Co-Trustee duties related to Marital Trust B. By attempting to transfer the sole asset of Marital Trust B to the Providence Trust over which he had sole control, Richard III violated his duty to administer Marital Trust B according to its terms. Such action violated specific written instructions under the Richard II Will at Items V (b) and (f)(Net income was to go solely to Deanna during her lifetime and Bank shares were to be distributed equally to Richard, III, Elizabeth and Garnett at Deanna's death)

The pre-trial issues before the Chancellor, moreover, included whether Richard III performed his duties and responsibilities as Co-Trustee of Marital Trust B (Richard III first issue of fact); whether as Co-Trustee, Richard III breached the fiduciary duties he owed the Marital Trust B beneficiaries (Deanna, Elizabeth and Garnett Issue of Fact 1) and whether Richard III's actions merited his removal (Deanna, Elizabeth, and Garnett Issue of Law 1) [Pretrial Order at 9(b) and 9(c)](Vol. 33 of 40 CP at 4928, 4930, 4932) (REWIII R.E. 17).

Finally, Richard III himself introduced the Providence Trust documents themselves (Ex. 67, 12-30-05 Wilbourn Family Providence Trust](Vol 41 of 62 Tr at 85-86), and it is patently absurd for Richard III to claim that the Chancellor could not consider

his actions in attempting to move the Marital Trust B shares to the Providence Trust when his own attorney spent at least 75 pages of testimony asking each of the four primary *defense* witnesses about the Providence Trust and then failed to object when defense counsel cross examined on those same issues.<sup>32</sup> Only after he had asked Archie Jr, Deanna, Elizabeth, Kirk Reasonover, Garnett and Richard III about the Providence Trust, did Richard III's attorney object to the cross examination related to the voting of the shares of stock in the Providence Trust and whether Richard III could be removed as the Family Trustee of the Providence Trust. (Richard III, Tr. May 15, 2009)(Vol 58 of 62 Tr. at 2600) . The Chancellor appropriately overruled the objection on the ground that Richard III's attorney had quizzed all of the witnesses, including Richard III, about the Providence Trust, and the Defendants were entitled to "go into it" also. (Richard III, Tr. May 15, 2009)(Vol 58 of 62 Tr. at 2601). This Court has held that an attorney may not "open the door" and then complain when the opposition elicits additional testimony on the same topic. *Davis v. State*, 472 So. 2d 428, 432 (Miss. 1985); see *Sharp v. State*, 1998 Miss. App. LEXIS 521 at 31 (Miss. Ct. App. 1998) ("attorney may not complain on appeal of an error which he invited at trial.")

Richard III's actions related to the Providence Trust provided evidence of the breach of his fiduciary duties as Co-Trustee of Marital Trust B and were appropriately considered.

#### **F. Richard III's New Venue Request Is Forum Shopping**

Richard III now claims that he does not like the venue that Lauderdale County Chancery Court provides. Richard III initially objected to jurisdiction in Lauderdale County by filing an Interlocutory Appeal of the Madison County Chancery Court

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<sup>32</sup> A table with the referenced pages of testimony is included in the Record Excerpts as R.E. 36.

Decision Transferring Venue on November 26, 2007. See *Richard E. Wilbourn, III v. Deanna A. Wilbourn*, Supreme Court Docket 2007-M-02086-SCT. He dropped the appeal following the Chancellor's November 28, 2007, ruling on Richard III's Motion in Limine. (Vol. 6 of 40 CP 836 – 841). Richard III now claims that same Chancellor “inject[ed]... local prejudice - the court effectively picking sides in a hometown, bitter family dispute.” [Richard III Brief at 71] Lauderdale County Chancery Court is the only venue in which to resolve the request that Richard III made - to appoint a successor trustee for a trust established by a will probated in Lauderdale County Chancery Court, see Miss. Code Ann. § 91-9-211 and Elizabeth and Garnett Appellee Brief at 57-59, which Deanna adopts herein, - and this blatant forum shopping should be rejected out of hand.

### **CONCLUSION**

Under this Court's law on the review of a chancellor's ruling, the Lauderdale Chancellor's decision to remove Richard III as Co-Trustee of Marital Trust B must be upheld because 1). removal of a trust's trustee is within a chancellor's discretion; 2) the bases for removal that the Chancellor considered are bases allowed by law; and 3) the Chancellor appropriately weighed the record evidence and applied the law to the record facts.

The issue is not whether the Chancellor could have interpreted the facts and the law as Richard III here urges. The issue is whether the record evidence supports the Chancellor's factual findings and whether a trustee can be removed for the reasons given by this Chancellor. Clearly a trustee can be removed for using the trust assets to benefit himself at the expense of the beneficiaries of the trust; for causing hostility that prevents the co-trustee and beneficiaries from trusting him and precludes their ability to work with him to carry out the discretionary duties of the trust; for attempting to violate

specific instructions of the trust; and for exercising the discretionary duties of the trust unreasonably. A trustee can likewise be removed for a serious breach of trust and for dishonest actions, whether related to the trust itself, towards his beneficiaries.

The Chancellor removed Richard III for each of these reasons as well as three others, and all of the bases are supported both by law and the record. Accordingly the Chancellor's decision must be upheld. And since Richard III performed no duties as Co-Trustee from May 2007 forward, he was not entitled to an additional fee. See Elizabeth and Garnett Appellee Brief at 60-61, which Deanna adopts herein.

This the 9<sup>th</sup> day of June, 2011.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Kathryn H. Hester, attorney for Appellee Deanna A. Wilbourn, do hereby certify that I have this day filed, by hand delivery, the original and four copies of the Brief of Appellee Deanna A. Wilbourn with the Clerk of this Court and have mailed, via United States mail, postage prepaid, a true and correct copy of the Brief of Appellee Deanna A. Wilbourn to the following:

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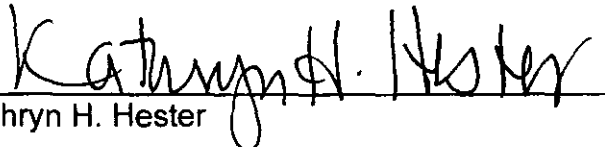
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