SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2010-CA-00014

RICHARD E. WILBOURN III, as Co-Trustee and Remainder Beneficiary of the Deanna A. Wilbourn Marital Trust B — **APPELLANT**

V.

DEANNA A. WILBOURN, as Co-Trustee of the Deanna A. Wilbourn Marital Trust B, ELIZABETH W. WILLIAMSON and GARNETT W. HUTTON — **APPELLEES**

APPEAL FROM THE CHANCERY COURT OF LAUDERDALE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

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INTRODUCTION

As is evident from the briefs, this case arises out of a bitter family dispute among members of the family of Richard II over which of them will control the boards of directors of the holding company and its bank. In order to control those boards, Defendants secretly schemed to remove Richard III as a co-trustee of Martial Trust B (the "Trust") as part of a plan: gain control of the substantial shares of stock that the Trust owned in the holding company, vote those shares to try and keep Richard III off the board of the holding company, elect one of Defendants in his place, and use their control of the holding company board to appoint themselves and one of their spouses to various compensated positions within the bank. This suit arises out of Defendants' implementation of their plan.

Instead of focusing on the trust law issues and the legal standards by which to judge whether Richard III performed his duties as co-trustee of the Trust, the chancellor removed Richard III on the grounds of matters that had nothing to do with his duties as co-trustee or with the administration of the Trust. The chancellor fixated on the family dispute, particularly the fight over control of the holding company board; he resorted to extrinsic evidence to determine the settlor's intent, despite unambiguous trust terms; he relied on family business transactions that had nothing to do with the Trust; he created fiduciary duties that Richard III did not have as co-trustee of the Trust, and then found breaches of those duties; and he misstated facts and ignored important facts that absolved Richard III of alleged wrongful acts.

The chancellor's opinion evinces bias and a determination, regardless of the evidence, to remove Richard III as a co-trustee of Marital Trust B and from his roles at the bank, and, effectively, from his membership in the "Wilbourn family." The chancellor's resolve to "throw the book" at Richard III blinded the court to material inconsistencies in the court's reading of the evidence, inconsistencies that the Defendants gladly amplify in their briefs on appeal. However, the record establishes that the chancellor was manifestly wrong in his findings of fact and in his application of the law, fatally undermining his decision to remove Richard III as co-trustee.

One of the most disturbing aspects of the chancellor's opinion is his finding that Defendants did absolutely nothing wrong in their actions against Richard III. That finding required quite a blind eye, because the court had to disregard undisputed evidence of Defendants' numerous secret meetings, phone calls, and emails to plan their removal of Richard III from his positions with the bank and the trusts; their January 9, 2007 demand that he resign as co-trustee of Marital Trust B despite their admissions that Richard III had done nothing wrong as co-trustee; and their completely improper use of the removal provision of the Trust to try to remove Richard III in May 2007—an attempted removal so meritless that the chancellor set it aside on summary judgment.

Perpetuating the chancellor's errors, Defendants continue to understate their true involvement with and agreement to the family transactions on which the chancellor relied to determine that Richard III acted improperly—transactions that had nothing to do with Martial Trust B. The record admittedly presents an unhappy chapter in an ongoing family dispute, with all parties interested in the transactions at issue, and all parties shifting allegiance and position due to dynamics unrelated to the claims at issue. Nonetheless, the record establishes that Richard III should not have been removed as co-trustee of Martial Trust B because he performed his duties as co-trustee. Meanwhile, Defendants, given their improper attempts to remove Richard III, ambushes at Board meetings, refusals to meet with him, and enough culpable behavior to go around, did not meet their own duties. The chancellor's decision to the contrary should be reversed.

ARGUMENT

I. THE CHANCELLOR'S FINDINGS THAT RICHARD III BREACHED HIS CO-TRUSTEE DUTIES UNDER MARITAL TRUST B ARE MANIFESTLY WRONG AND AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Defendants effectively concede—as they must—that the express provisions of Marital Trust B do not provide any support for the chancellor to remove Richard III as co-trustee. The terms of the Trust unavailing, Defendants and the chancellor rely on common law and a series of purported breaches of duties that Richard III was held to owe Defendants as a co-trustee, as a lawyer, and as a son and a sibling. Leaving aside for the moment whether Richard III owed Defendants the non-

trustee duties that the chancellor "assigned" to him, it is undisputed that none of the alleged breaches of those claimed duties occurred in connection with the administration of the Trust, and none endangered the property of the Trust.

A. Common Law Does Not Support the Removal of Richard III for Alleged Breaches of "Duties" That Had Nothing to Do With the Trust.

There is no evidence that Marital Trust B was improperly administered by Richard III, nor is there any evidence of any misconduct or breach by Richard III of his duties as co-trustee. It is undisputed that he did not misappropriate trust funds, he properly accounted for all trust funds and property, he made distributions to Deanna, and he provided requested information on the trust. With the exception of the March 2007 disagreement between Richard III and Deanna, as co-trustees, over voting the Trust's shares, all of the chancellor's reasons and Defendants' arguments for the removal of Richard III as co-trustee are based on matters that had *nothing* to do with the Trust or with Richard III's duties as co-trustee. For example, Defendants, as did the chancellor, rely heavily on Richard III's work performance at the bank, his involvement in unrelated family matters, and his recordings of conversations that had nothing to do with the Trust. In addition, many of Richard III's alleged "breaches" were based on the chancellor's finding that Richard III owed various non-trustee duties to Defendants, such as the duties of a lawyer (even though, *e.g.*, he and Defendants had no attorney-client relationship with respect to the Trust), duties as a son and brother (even though no such duty exists at common law), and duties under a January 1999 agreement between Richard III and his father (even though that agreement terminated with his father's death and was inadmissible parol evidence).

Relying on common law, Defendants argue that a chancellor has the unfettered power to remove a trustee for actions that are unrelated to the administration of the trust. Their contention is not a correct statement of Mississippi law. Although a court certainly has "inherent power to remove a trustee for good cause," that power is not unlimited and it is "incidental to the court's paramount duty to see that trusts are properly executed and the trust estate preserved." *Yeats*, 22 So. 2d at 415. For example, the three Mississippi cases Defendants Williamson and Hutton cite on page 35 of their

trustee duties that the chancellor "assigned" to him, it is undisputed that none of the alleged breaches of those claimed duties occurred in connection with the administration of the Trust, and none endangered the property of the Trust.

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brief in support of their argument all hold that failures by a trustee warranting removal must be *failures in the administration of the trust.* The two cases that address hostility as a ground for removal strongly indicate that ground is even narrower.

The most recent Mississippi Supreme Court case cited by Defendants on this matter is *Walker v. Cox*, 531 So. 2d 801, 804 (Miss. 1988). In *Walker*, the trial court removed a trustee because he had failed to provide an accounting to the successor beneficiary who no longer resided in the jurisdiction and was found to be hostile to the successor beneficiary. *Id.* at 802. The trustee appealed this decision to the Supreme Court even though the trustee did not offer any evidence or even appear at trial.

First, the *Walker* Court reviewed the trial court's ruling that the trustee's location and his failure to give an accounting were proper bases for removal. The Court stated that "absence from the jurisdiction and failure to give an accounting, certainly cast shadows as to the ability of the trustee to perform his duties." *Id.* at 803. While affirming the chancellor's decision, the *Walker* Court found that hostility is a proper basis for removal only when it manifests itself in a trustee's "failure to administer the trust according to its terms." *Walker* at 804. The Supreme Court cited a specific provision in the trust document addressing whether the trust assets should be distributed or conserved. It found that the trustee, "acting contrary to this provision, did not fairly administer the trust *according to its terms.*" *Id.* at 804 (emphasis added). It went on to discuss specific instances of the trustee acting contrary to that provision and then concluded, "the Court ... finds that [the trustee's] *actions* combined to support [the successor beneficiary's] allegation that there was hostility on the part of the trustee toward [the successor beneficiary]." *Id.* (emphasis added). Significantly, *Walker* refutes Defendants' assertion that a basis for removal need not occur in the administration of the trust. Moreover, with respect to Defendants' claim of hostility, *Walker* goes even further, specifically finding that the trustee's hostility manifested itself in the form of a violation of a specific provision in the trust document.

The only other Mississippi Supreme Court case discussed by Defendants to argue that a

trustee can be removed for something unconnected to a trust's administration is *Yeates v. Box*, 198 Miss. 602, 612 22 So. 2d 411 (1945). Williamson & Hutton's brief at 36. Defendants argue that *Yeates* held that a court's power of removal is "as broad and comprehensive as the exigencies of the case may require." Defendants' implication is that a court can remove a trustee for little or no reason. However, not only is this argument completely contrary to the more recent holding in *Walker* (a case which cites and discusses *Yeates*), it quickly falls apart when *Yeates* is properly quoted:

> A court of chancery or its equivalent has inherent power to remove a trustee for good cause, such power being incidental to the court's paramount duty to see that trusts *are properly executed and the trust estate preserved*, and is as broad and comprehensive as the exigencies of the case may require.

22 So. 2d 411, 415 (Miss. 1945) (emphasis added). Thus, the full quote clarifies that only those actions and inactions related to the proper execution of a trust, and preservation of the trust estate, are relevant to the consideration of removing a trustee.

The final Mississippi case relied on by Defendants is *McWilliams v. McWilliams ex rel. Weathersby*, 994 So. 2d 841 (Miss. Ct. App. 2008). In *McWilliams*, the chancellor removed the trustee because he found there was an inherent conflict of interest arising from the trustee's relationship with his formerly incarcerated brother, who was the father of the minor beneficiary of the trust. The trial court had found that when the father sued the trust to dissolve it after his release from prison, the trustee had failed to communicate with the beneficiary about the lawsuit and had failed even to defend the lawsuit, due to the trustee's sibling relationship with the father. *Id.* at 845. In fact, when the beneficiary's mother found out about the father's suit to dissolve the trust, she had to hire separate counsel to argue on behalf of the minor beneficiary that the trust was valid and the trustee actually opposed her effort to uphold the trust. *Id.* at 842. Thus, the trial court "found that during [the father's] attempt to have the trust set aside, [the trustee] took a position adverse to [the minor beneficiary] and, as a result, 'a conflict of interest arose which fostered hostility between [the minor beneficiary] and [the trustee]." *Id.*

McWilliams is consistent with *Walker* and inconsistent with Defendants' improper statement

that common law allows unfettered power to remove a trustee for reasons unrelated to the administration of the trust. While the *McWilliams* trial court held the trustee's actions improper, those actions related directly to the administration of the trust—indeed, whether the trust would even continue to exist. In effect, the trustee's support for his brother's attempt to dissolve the trust was a complete and total failure to administer the specific provisions of the trust. On appeal, the Court of Appeals ruled, "The chancellor's removal power is part of the chancellor's paramount duty to see *that trust estates are preserved and that trusts are properly executed.*" *Id.* at 846 (emphasis added; citation to *Walker* omitted).

Contrary to Defendants' argument, the Mississippi cases they cite all addressed situations in which a trustee was removed for action or inaction that impacted the administration of the trust itself. Moreover, with respect to claims of hostility, those same cases indicate that the alleged hostility must manifest itself as a violation of a specific trust term.

Other jurisdictions have likewise concluded that the removal of a trustee should be based on matters that concern the administration of the trust or that endanger trust property. *See, e.g., Succession of Noe*, 398 So. 2d 1173, 1178 (La. Ct. App. 1981) (refusing to remove a trustee where there was no evidence that the trustee's conduct materially impaired or affected the proper administration of the trust; rather, the claims against the trustee amounted to "nothing more than allegations of social or family animosity and incompatibility"); *Gresham v. Strickland*, 784 So. 2d 578, 581 (Fla. Ct. App. 2001) ("removal of a trustee should be predicated upon a clear showing of abuse or wrongdoing in the actual administration of the trust"); *Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon*, 231 S.W.3d 158 (Mo. Ct. App. 2007) (explaining that because no evidence was presented of misconduct by the trustee relative to the trust or its assets or that called into question the trustee's capacity or fidelity to the trust or its assets, the court erred in removing the trustee).

Defendants contend that, where the conduct involves dishonesty, serious misconduct, or hostility created by the trustee which threatens to interfere with administration of the trust, that

conduct does not need to be connected to the trust. However, Defendants do not cite any Mississippi statute or case that actually supports their contention; to the contrary, and as noted above, the cases Defendants rely on undermine their argument. In each of those cases, the trustee engaged in criminal or other serious misconduct. For example, in *Jones v. McGuirt*, 416 So. 2d 970, 971 (Ala. 1982), the court removed a trustee based on an Alabama statute that permitted removal "when from [the trustee's] conduct or character there is reason to believe that the trustee is not a suitable person to have charge and control of the estate." Based on evidence that the trustee had several criminal convictions, had been sentenced to twelve months hard labor, and had failed to pay judgments, the court "reasonably . . . determined that [the trustee] was an unsuitable person to execute the trust, that the estate was in danger, and that intervention was necessary to save the trust property." *Id.* at 971-73 (emphasis added). Similarly, in *In re Rentschler*, 139 A.2d 910 (Pa. 1958), the court removed the trustee on the basis of dishonesty and serious misconduct where he had been convicted of federal crimes for which he was sentenced, and he had been indicted for committing other crimes involving dishonesty in relation to the administration of an estate and its obligations for the payment of federal estate taxes. *Id.* at 916-18 (emphasis added). *See also In re Baird*, 204 P.3d 703 (Mont. 2009) (holding that the failure to file annual accountings did not impair the trust or the settlor's intent, and therefore, removal was not necessary). Clearly, Richard III is not guilty of any criminal conduct or similar dishonesty or misconduct.

Moreover, Defendants cannot meet their own standard. The disagreement that Richard III and Deanna had over how to vote the Trust's shares was *not* a matter of dishonesty, serious misconduct, or hostility by either of them. As co-trustees of equal stature, each of them had the right and discretion to agree or disagree with one another.

As for the recordings, when considered in the context of Deanna's habit and pattern of contradicting herself and not remembering what she or Richard III had said on a given occasion, Richard III's recordings of her October 24, 2006 "ultimatum" and his other discussions with her were not matters of dishonesty, serious misconduct, or hostility. Indeed, both Deanna and Elizabeth

testified that they knew that Richard recorded conversations. RV 50 of 62, pp. 1446-1447 (Elizabeth); RV 47 of 62, pp. 1017-1018 (Deanna).The evidence also establishes that Richard III's involvement in the various family matters on which Defendants rely (the Florida condo, the Providence Trust, the proposed guaranty) had absolutely nothing to do with the Trust and did not involve any dishonesty, serious misconduct or hostility by him. *See* the detailed discussion *infra* pp. 17-25.

1. Richard III's Job Performance at the Bank Is Not a Permissible Ground for Removing Him As Co-Trustee Of Marital Trust B.

The chancellor erred as a matter of law in holding that the controversy over Richard III's job performance at the bank could be used as a basis to remove him as a co-trustee of Marital Trust B, because his work at the bank had nothing to do with Marital Trust B or his co-trustee duties. *See, e.g., Betty G. Weldon Revocable Trust ex rel. Vivion v. Weldon*, 231 S.W.3d 158 (Mo. Ct. App. 2007) (explaining that because no evidence was presented of misconduct by the trustee relative to the trust or its assets or that called into question the trustee's capacity or fidelity to the trust or its assets, the court erred in removing the trustee); *Gresham v. Strickland*, 784 So. 2d 578, 581 (Fla. Ct. App. 2001) ("removal of a trustee should be predicated upon a clear showing of abuse or wrongdoing in the actual administration of the trust").

As the chancellor correctly noted, "[m]uch of the trial in this case focused on Richard III's conduct vis a vis the Bank." RE 2 (Opinion at 63). Approximately eighty percent (80%) of the trial concerned issues, disagreements and disputes over whether one person or the other thought that Richard III did or did not do a good job or bad job at the bank, and did or did not do his work just like his father had. Seeing that so much of the upcoming trial was going to be devoted to matters at the bank, prior to trial Richard III moved the court in limine to exclude as not relevant or admissible any evidence concerning his job performance in his various positions at the bank and the holding company, and his removal from those positions at the January 2007 board meetings. RV 17 of 62, pp. 2419-2424 (motion in limine). The chancellor denied that motion. RE 14 (order).

Indeed, the only connection between the Trust and the bank is that the Trust is the largest

shareholder in the holding company that owns the bank. That does not "merge" Richard III's positions at the bank with his position as co-trustee of the Trust. If anything, the bank and the Trust only appear intertwined because of Defendants' actions. They acted in concert with the bank's CEO, Archie McDonnell, Jr., who as early as February 2006 met with Deanna to complain about Richard III's leadership, and who within months of that meeting was suggesting attorneys to the Defendants, secretly meeting with them, and plotting Richard III's removal from both his bank and trust positions. Defendants, again in concert with McDonnell, had their lawyers draft the January 9, 2007 resignation letter that included Richard III's bank positions and *Marital Trust B*. But Defendants' effort to be rid of Richard III as to all of his positions did not allow the chancellor to reach the conflated conclusion that Richard III's performance at the bank supported his removal as co-trustee. The unambiguous terms of the Trust clearly do *not* condition Richard III's eligibility to serve or his tenure as a co-trustee on whether Richard III holds any position with the bank or the holding company, or on whether someone thinks Richard III does a good job or a bad job in a position that he may hold with either company.

Regardless, the record establishes that the chancellor's findings of fact are manifestly wrong and against the overwhelming weight of the evidence. Defendants' characterization of Richard III's work at the bank as being "disruptive" and having "destructive results" (Williamson & Hutton's brief at pp. 8-13) is yet another example of hyperbole and is contrary to the overwhelming weight of the evidence. The undisputed testimony from every disinterested bank director and officer who testified is that Richard III did not cause any problems at the bank or the holding company. Six of the nine non-party directors and senior (and long-serving) officers of the bank who testified stated that Richard III did a good job at the bank and did not cause any problems. Each of them testified without contradiction that they had *never* heard of or experienced any problems caused by Richard III. *See* RV 49 of 62, p. 1219 (Jim Wilbourn); RV 52 of 62, pp. 1729-1731 (Nunnery); RV 53 of 62, pp. 1919-1911 (Goodman). In addition, there was *no mention* in any minutes of any board or committee of the bank or the holding company, or in the bank's personnel file that contained one

word about Richard III being a problem at the bank. If Richard III's behavior had been so disruptive and destructive, there would logically be at least *one word* about it somewhere in the records of the bank or the holding company—but there was none.

At trial, only McDonnell and two of his proteges (David Barr and Cindy Wilson) testified about what Defendants argued was Richard III's alleged disruptive behavior at the bank.[1] McDonnell and Barr are close personal friends, and both Barr and Wilson owed their advancements within the bank to McDonnell. McDonnell and Barr testified that Richard III's governance style was different from what Richard II's had been, he tried to involve himself in management of the bank, he irritated employees, some employees complained about him, and he did not "honor the line of communication" in talking to employees. *However, McDonnell and Barr both admitted that they did not have first-hand knowledge of Richard III acting improperly toward any bank employee. See, e.g.*, RV 61 of 62, pp. 3015, 3045-3049, 3052 (Barr). The "worst thing" that Cindy Wilson could come up with was that sometimes Richard III would ask her for monthly financial information before she had it ready, and on one occasion in the middle of 2006, Richard III told her that she was "just like [McDonnell], that [she] manipulated the details to fit [her] needs." RV 45 of 62, p. 721 (Wilson).

The problem was that Archie McDonnell, Jr. did not like Richard III and felt threatened by him.[2] From the beginning, McDonnell tried to control what information Richard III received. For example, McDonnell never gave Richard III the items that he had asked for in a November 2004 memo that was an effort by Richard III to start his tenure as Chairman of the holding company as smoothly as possible.

At pages 17-18 of our principal brief, we touched on what occurred at the bank during

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[1] Defendants contend that Jeffrey Smith, Jim Resnick, Virgie Palmer and Penny Ranier had complaints about Richard III, *but Defendants did not call any of them to testify at trial*, instead relying on objectionable hearsay about their alleged complaints. *See* Williamson & Hutton's brief at pp. 12-13. Defendants' failure to call any of them to testify at trial speaks volumes.

[2] In the 1990s, Richard II removed Archie McDonnell, Jr.'s father from his position at the bank after Richard II made a successful tender offer for stock that resulted in Richard II acquiring control of the bank.

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February 2006. Because of Defendants' mistatements and exaggerations about those events, they deserve closer scrutiny which clearly establishes that Richard III did not act improperly at the bank. At the February 2006 meeting of the bank board, the board was scheduled to consider the bank's proposed 2006 budget and the "stakeholders model" (an employee incentive compensation plan) that Archie supported. Richard III had questions about the budget and the model. On February 8, 2006, in advance of that meeting, Richard III asked Cindy Wilson to run an alternative scenario of the stakeholder's model. There was nothing unusual about a request to run an alternative scenario. In the past, both Richard III and Russell Williamson had requested and had received alternative scenarios for the bank's proposed capital plan. RV 3 of 18, p. 429, Exhibit 42 (email dated June 8, 2005); RV 45 of 62, pp. 725-733 (Wilson).

Cindy Wilson told Richard III that she could not prepare the scenario he wanted because she did not have the computer program for the model, and she suggested that he request it from Mike Higgins, a consultant for the Bank who had the program. However, at 4:33 pm on February 8, 2006, Cindy Wilson emailed Higgins with the request that he prepare the alternative scenario that Richard III had requested. Higgins did so and emailed it to Wilson that same day at 11:11 pm. The alternative scenario was titled "Revised for Richard." RV 5 of 18, pp.602-608, Exhibit 94; RV 45 of 62, pp. 722-737 (Wilson). Richard III did not find out that the "Revised for Richard" existed *until discovery in this case*.

After asking Higgins to run the alternative scenario, Wilson had two telephone discussions with McDonnell (who was out of town in New York City), she told him about Richard III's request, and she asked him if she could give the alternative scenario to Richard III, *to which McDonnell said no*:

> A: The first thing I did was e-mail Mike Higgins and ask him to make that change; and then I called Archie, who was out of town–he was in New York–and told him what Richard had asked for. And Archie instructed me not to give Richard any changes to the budget, that they had already discussed the budget, and that if Richard wanted to talk more about it, then they could talk on Monday when he was back in the bank.

* * *

Q: *The only reason you didn't give it [Revised for Richard] to Richard was because Archie McDonnell, Jr. told you not to. Right?*

A: *That's correct.*

RV 45 of 62, pp. 727-728, 733-734 (Wilson) (emphasis added). With regard to what Wilson testified that she told Archie, Archie testified, "I don't recall that," "I don't remember her telling me that," and "I don't recollect that being what she said." RV 42 of 62, p. 223-227 (McDonnell).

Shortly after noon on February 9, 2006, Higgins sent Richard III an email (on which Wilson was blind copied) in which he balked at what he said was Richard III's request to make changes to the program, *a request that Richard III had not made*. Richard III called and left a message with Higgins to explain that he only wanted an alternative scenario. The next day, February 10, 2006, Higgins sent Richard III a *friendly* email in which Higgins purported to give instructions on how Richard III could prepare the requested alternative scenario. *Higgins' email, however, did not mention the fact that Higgins had prepared the "Revised for Richard" alternative scenario on February 8th and had sent it to Wilson.* RV 5 of 18, Exhibit 95.

In response to Higgins' email, Richard III sent an email to Wilson asking her to help and prepare the alternative scenario per Higgins' instructions. Exhibit 95 (email of 5:54 pm). Wilson did not do so, nor did she tell Richard III that she had in hand the "Revised for Richard" alternative scenario. When Archie returned to town, he met with Richard III to discuss the issues that Richard III had with the proposed budget and the stakeholders model. Archie did not tell Richard III that Archie had the "Revised for Richard" alternative scenario. At the February 2006 bank board meeting, Richard III voted in favor of the budget and stakeholders model that Archie proposed.

The events of February 2006 epitomize how McDonnell undermined Richard III at the bank. Clearly, as the chairman of the boards of the holding company and the bank, Richard III had the right to request and receive the information he asked for. McDonnell encouraged Defendants in their

* * *

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Shortly after noon on February 9, 2006, Higgins sent Richard III an email (on which Wilson was blind copied) in which he balked at what he said was Richard III's request to make changes to the program, *a request that Richard III had not made*. Richard III called and left a message with Higgins to explain that he only wanted an alternative scenario. The next day, February 10, 2006, Higgins sent Richard III a *friendly* email in which Higgins purported to give instructions on how Richard III could prepare the requested alternative scenario. *Higgins' email, however, did not mention the fact that Higgins had prepared the "Revised for Richard" alternative scenario on February 8th and had sent it to Wilson.* RV 5 of 18, Exhibit 95.

In response to Higgins' email, Richard III sent an email to Wilson asking her to help and prepare the alternative scenario per Higgins' instructions. Exhibit 95 (email of 5:54 pm). Wilson did not do so, nor did she tell Richard III that she had in hand the "Revised for Richard" alternative scenario. When Archie returned to town, he met with Richard III to discuss the issues that Richard III had with the proposed budget and the stakeholders model. Archie did not tell Richard III that Archie had the "Revised for Richard" alternative scenario. At the February 2006 bank board meeting, Richard III voted in favor of the budget and stakeholders model that Archie proposed.

The events of February 2006 epitomize how McDonnell undermined Richard III at the bank. Clearly, as the chairman of the boards of the holding company and the bank, Richard III had the right to request and receive the information her asked for. McDonnell encouraged Defendants in their

desire to remove Richard III from his positions for their own interests, and for McDonnell's.[3] Fundamentally, however, the chancellor was manifestly wrong to base his decision to remove Richard III as co-trustee because of how Richard III performed his work at the bank.

2. The Recordings Had Nothing To Do With Marital Trust B and Were Not A Legal Basis For Removal.

Defendants contend that Richard III's removal was proper because he recorded some conversations that he had with his mother and sisters. Those recordings were not illegal, unethical or a breach of any duty that he owed to Defendants, nor are they evidence of hostility created by Richard III. In fact, these recordings were reasonable under the circumstances and do not constitute evidence of dishonesty, serious misconduct, or lying. Under Mississippi law, it was not illegal for Richard III to record any conversation that he had with any of Defendants. *See, e.g., Lee v. Lee*, 798 So. 2d 1284, 1293 (Miss. 2001); *Wright v. Stanley*, 700 So. 2d 274 (Miss. 1997); Miss. Code Ann. § 41-29-535. Moreover, Defendants were not damaged or injured by the recordings, and Richard III never sought to use the recordings against Deanna except in this suit when she denied saying things she indeed had said. In fact, the Defendants' incredulity at trial about the "secret" nature of the recordings is a little disingenuous, given the record.

The first time Richard III recorded a conversation with his mother was in late October 2006, when Deanna read from her written "ultimatum" about his performance at the Bank. The

[3]Elizabeth Williamson testified that she told her sister that McDonnell did not like outside suggestions and was more difficult to work with than he appeared on the surface. RV 50 of 62, p. 1415 (Elilzabeth Williamson). Moreover, if the Wilbourns were divided, McDonnell would have less oversight in his operation of the bank, and his control over bank affairs would be enhanced. As all three Defendants concede, "[Archie] McDonnell, the Bank, the Holding Company, and the Defendants simultaneously relied on Watkins Ludlam's legal advice concerning removal of [Richard III] from his Bank and Holding Company positions." (Elizabeth W. Williamson and Garnett W. Hutton's September 2, 2008 Response to Plaintiff's Motion to Enforce Subpoenas Duces Tecum Served on Archie McDonnell, Jr., at ¶ 16) It was McDonnell who suggested that Deanna, Elizabeth, and Garnett "consult Craig Landrum of Watkins Ludlum related to whether and how to remove Richard, III as Chairman of the Board of Citizens' National Bank and its Holding Company." (Deanna Wilbourn Response to Plaintiff's Motion to Compel Withheld Documents, at ¶ 65) Further, McDonnell testified in his deposition that David Grishman of Watkins Ludlam appeared at the January 9, 2007 CNBC Board Meeting to represent the bank in removing Richard III (May 29, 2008 Deposition of Archie McDonnell, Jr. at 165:19), while Deanna admits in her deposition and pleadings that both Landrum and Grishman served as her lawyers and have continually provided her with legal advice. (April 25, 2008 Deanna Wilbourn Deposition at 167:4; Deanna Wilbourn Response to Plaintiff's Motion to Compel Withheld Documents at ¶ 44). While emphasizing Richard III's "conflicts of interest," the chancellor wholly glossed over those of McDonnell and the Defendants.

conversation had nothing to do with Richard III's administration of the Trust. Prior to that conversation, *Deanna* had herself made recordings and had recommended that her husband do the same. While she says it was done with their knowledge (McDonnell says he does not remember it having been done), Deanna recorded a conversation with McDonnell and Don Rogers after Richard II's death. During a conversation with Richard III on January 2, 2007, which she insisted he record, she also stated that she had told her husband, Richard II, that he should have recorded others secretly, in order to avoid being sued. Deanna also was aware of, and had no problem with, the Inn Serve phone system secretly recording conversations.[4]

Moreover, while Defendants use the words "secret" or "secretly" 72 times in their briefs when referring to the recordings, the actual record indicates that they knew or suspected at the time that Richard III could have been recording conversations. In other words, the secret recordings were not really secret to Defendants. Elizabeth specifically testified that soon after a conversation with Richard III in late October 2006, *before all but two of the recorded conversations occurred,* she "was aware that he was recording conversations with [her]." RV 50 of 62, pp.1446-1447 (Elizabeth). Moreover, Elizabeth knew by November 2006 that Richard III had "a practice of recording conversations" because *her mother told her* he did. *Id.* at 1446; *see* RV 47 of 62, pp. 1017-1018 (Deanna) (admitting that she knew Richard III had recorded his wife around the same time).

Richard III testified that he began recording the conversations with Deanna because she often contradicted herself. At trial, Deanna admitted that she often contradicted herself and that "it would drive me [Deanna] crazy." RV 47 of 62, pp. 1008-1010 (Deanna). In fact, Deanna made several material contradictions that underscored Richard III's reasons for making the recordings in the first

[4]In Exhibit 297 on the transcript titled, "Mother Announces There 'Will be Some Changes' January 2, 2007", there is the following on page two:

> Richard: For instance, did you know that the phone system in Inn Serve is designed so that it records, it has the ability to record every conversation that comes into it? And, in fact, all voice mails are, um, that you leave at Inn Serve...
> Deanna: Are saved?
> Richard: They can, what happens is it converts them to a jpeg file, uh, and it send them to a computer. It can save them indefinitely on computer.
> Deanna: Um-hm. I don't see anything wrong with that. If Daddy had had a recording system at the office he never would have been sued by that Dr. Johnson, because that Dr. Johnson – and then I tried to get him to get one and he never would. (emphasis added).

place. *See* RV 46 of 62, pp. 860-865 (Deanna); RV 47 of 62, pp. 920-922, 945-947, 982-85, 1007-1010, 1014-1016 (Deanna). The recordings were not made for purposes of the Trust, did not affect the administration of the Trust, and did not endanger Trust property.

Defendants argue that Richard III's removal was justified because he recorded Deanna after the late January 2007 settlement meeting with his uncle, his aunt and Deanna at which he said he would not record her again. Richard III made that statement in the context of trying to settle and reconcile matters with Deanna. Deanna, however, had no plans for any reconciliation. After that meeting, Deanna refused to meet with Richard III to discuss how to vote the Trust's shares, she signed the notice of removal on April 10, 2007, which she did not disclose to Richard III until May 10, 2007, and she intentionally withheld from him the co-trustee fee that he was owed for the first quarter of 2007.

The occasions on which Richard III recorded Deanna after January 2007 were reasonable under the circumstances and did not constitute a breach of any duty. During April 2007, Richard III called Deanna's house to speak with his estranged wife, Victoria, to try and find out where his children were.[5] The day he made that call, the chancellor in the divorce case filed by Victoria had ruled that Victoria was *not* to take the children out of town without Richard III's permission. Victoria, however, had taken the children to Meridian without his permission. Richard III wanted his children back. He called Deanna's house to speak with Victoria, and he planned to record his discussion with her. Instead, Deanna answered the phone, and they had a very brief discussion that had *nothing to do with the Trust*.[6] That conversation was supposed to be only about the whereabouts

[5] Richard III and Victoria remain married. While the divorce and custody proceedings were not directly relevant to the family dispute at issue in the present case, the fact that Richard III was dealing with his removal from his bank positions and strife with Defendants and Victoria during late 2006 and early 2007 provides relevant context for his decision to record the conversations at issue.

[6] When Deanna answered Richard III's call to Victoria in April 2007, she immediately became angry and instructed Richard III to record the conversation. Deanna repeatedly hung up on Richard III, only to call him back to berate with him further. The trial court concluded that no one could interpret Deanna's instruction to be taken literally (Opinion pp. 32-33). But if Deanna's instructions were said sarcastically and out of anger, that only demonstrates that Deanna clearly did not consider Richard III to be in a position of trust. The chancellor and Defendants cannot square the animosity and adverse posture of the parties by October 2006 and thereafter with the chancellor's conclusion that Richard III occupied a special position of trust, which he in turn abused by recording her.

of his children and had nothing to do with the Trust. RV 57 of 62, pp. 2433-35, 2446-48, 2457-63 (Richard III).

The only other occasion on which Richard III recorded Deanna after January 2007 was on July 24, 2007. Richard III, Deanna and Garnett had a phone conference that day to discuss financing for the construction of a Homewood Suites hotel, and Richard III recorded that conversation. It is undisputed that *nothing* about that conversation had anything to do with Marital Trust B. Moreover, that conversation occurred at a point in time that was over three months after Defendants moved against Richard III to remove him as co-trustee, and over two months after this suit was filed to set aside Defendants' wrongful notice of removal. *See* Exhibit 297 at REW 001853 et seq. Richard III has never sought to use that conversation against Deanna, even though as an adverse party in the pending litigation, he foresaw a need to memorialize that conversation.

The chancellor also determined that Richard III engaged in professional misconduct by recording these conversations. At the time that he 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 at the time at issue. By October or November 2006, Defendants had hired their attorneys to pursue removal of Richard III from his positions at the holding company, the bank, and the family trusts. In January 2007, they removed Richard III from his positions at the bank. The recordings did not breach the duty of care, duty of loyalty, or duty provided by contract. *Baker Donelson v Seay*, 42 So.3d 474, 486 (Miss. 2010).

The Court has made it very clear that an attorney's surreptitious taping of a conversation does not violate the rules of professional conduct. In *Attorney M. v. Mississippi Bar*, 621 So. 2d 220, 224 (Miss. 1992), the Court stated that "under certain circumstances, an attorney may be justified in making a surreptitious recording in order to protect himself or his client from the effects of future perjured testimony.... The value of secret tape recordings in ferreting out truth is beyond question, and this Court has observed that the admission of such recordings into evidence is sometimes 'fully justified.'" *See also Attorney L.S. v. Mississippi Bar*, 649 So. 2d 810, 814 (Miss. 1995) ("surreptitious taping of telephone conversations do not violate the rules of professional conduct");

Netterville v. Mississippi State Bar, 397 So. 2d 878, 883 (Miss. 1981) (attorney's undisclosed recording was not unethical).

While the chancellor found that Richard III occupied a position of trust with Defendants, that holding simply does not square with the evidence of *their actual relationships* as of October 2006, if not before then. The family members disagreed about a variety of proposed transactions, they threatened legal action, and then followed through, retaining lawyers and filing claims and counterclaims. *Importantly, according to Defendants' testimony, the recordings were not "the reason" for their efforts to remove Richard III from his positions in the bank and as trustee.* RV 50 of 62, p. 1452 (Elizabeth: "No. That [the recordings] wasn't the reason"). Indeed, on and after the morning of January 9, 2007, Defendants openly attacked Richard III in an effort to remove him at the bank and the trust. These facts are irreconcilable with the chancellor's holding that Richard III occupied a position of trust with the Defendants, and that breach of the resultant duties was a ground for his removal. Accordingly, the chancellor's decision was in error.

3. The Unrelated Family Business Transactions Were Not a Legal Basis for Removal.

According to Defendants, Richard III breached his duties that he owed to Deanna as co-trustee and a lawyer because of his involvement in unrelated transactions that were allegedly not in her interest but that benefitted Richard III. *See* Williamson & Hutton's brief at p. 51. Those other matters concerned his involvement in or handling of his mother's purchase of a Florida condominium, a possible suit against the condo association, the establishment of a family limited liability company (Wilbourn Family, LLC), and the creation of a separate trust (the Providence Trust). The chancellor held that in all of those matters Richard III breached duties that he owed one or more of Defendants as an attorney for his mother, as a co-trustee, as a son, and as a brother. The chancellor erred by basing removal on these transactions. Those matters had nothing to do with the Trust or his co-trustee duties, were not done in connection with the Trust, and did not endanger any Trust property. *Moreover, the record establishes that those transactions and the parties' involvement in them was not improper.*

First, Deanna testified that she was *always satisfied* with Richard III's handling of the other family and business matters at issue. RV 46 of 62, pp. 838-839, 842 (Deanna). Nowhere do Defendants explain how Richard III's satisfactory work was professional misconduct or breach of any duty meriting removal as co-trustee. In addition, Defendants completely gloss over their own involvement and self-interest in the family-business dealings that they now seek to use against Richard III to justify removal. In each instance, Defendants benefitted and the whole Wilbourn family collaborated. While Defendants now accuse Richard III of conceiving of each transaction as part of a manipulative plan to extract benefit for himself, the record clearly demonstrates that Deanna, one of her advisors, or one of the other Defendants proposed each of the transactions at issue.

In addition, these matters should not have been considered by the chancellor because they were not raised in the pretrial order. It is well settled that "[i]f a claim or issue is omitted from the [pre-trial] order, it is waived, even if it appeared in the complaint." *Rogers v. Rausa*, 871 So. 2d 748, 752 (Miss. Ct. App. 2003) (quoting *Elvis Presley Enterprises, Inc. v. Capece,* 141 F.3d 188, 206 (5th Cir. 1998)). Thus, the chancellor erred by relying on matters that were waived by Defendants. Defendants argue that the evidence regarding unrelated transactions was proper because it concerned Richard III's honesty and integrity as a trustee as well as his alleged creation of hostility. *However, there is no evidence that Richard III engaged in any dishonest or improper conduct with respect to these transactions.*

(a) The Providence Trust

There are no greater misstatements and exaggerations of the facts by the chancellor and Defendants than those that concern the Providence Trust. In the pretrial order in this case, Defendants did not raise any claim or issue concerning Richard III's involvement in the Providence Trust. Moreover, close to the end of the third week of trial, during the cross-examination of Richard III, the chancellor was very dismissive of the relevance of the Providence Trust to the claims, going so far as to state that, *"You probably won't see much in my final opinion about the Providence Trust, but y'all [Defendants] have a right to make a record."* RV 58 of 62, P. 2601 (chancellor). After the

fact, however, the Providence Trust played a very large role in the chancellor's findings and conclusions against Richard III, attributing to him a Machiavellian plan to gain control of all of Deanna's individual shares and the shares owned by the Trust by having all of those shares placed in the Providence Trust that Richard III would in turn control. Opinion at 23-26.

Defendants contend that the evidence establishes that grand scheme by Richard III:

> Richard III arranged to be named co-trustee of the Providence Trust, then obtained Deanna's agreement to transfer her personal Holding Company stock–3,440 shares–into that trust. * * * This enabled Richard III to control the votes of those shares. Richard III also sought to have all of the shares held in Trust B transferred into the Providence Trust. * * * Deanna refused to agree to this additional transfer.
>
> Richard III recommended that his mother establish and fund the Providence Trust, transferring to that trust a large sum of cash and 3,440 shares of Holding Company stock that Deanna owned outright. * * *
>
> Richard III sought to persuade Deanna to transfer all of the 41,910 shares of Holding Company stock in Trust B to the Providence Trust . . . and that would have deprive Deanna of her right to holding company dividends, which were likely to increase in future years.

Williamson & Hutton's brief at 21-22, 51-52.

The proposed transaction to create the Providence Trust was a sophisticated estate planning tool that was intended to avoid estate taxes at Deanna's death that would require having to "sell the family farm" [the shares in Trust B] in order to pay Deanna's estate taxes.[7] Richard II had commonly used estate planning tools to preserve his estate even including substantial outright gifts to his children.[8] As with so many family businesses that have to be sold to pay estate taxes on those very assets, the Wilbourns, in effect, were trying to save the shares of Trust B from death taxes, and

[7] "It was an estate planning tool by my children that had to do with their inheritance and how they would pay Inheritance taxes at the time of my death. It was for that purpose." RV 47 of 62, pp. 903-904 (Deana).

[8] Richard II wrote in the 1999 letter agreement, "for estate planning purposes and because of his love for his children, Richard E. Wilbourn realizing that he wanted to retain stock in the Citizens National Bank of Meridian and that he might dispose of other assets or need them for liquidity, which he did in March of 1998, made substantial gifts of Citizens National Bank of Meridian stock to his children and caused Garnett S. Wilbourn [his mother] to make gifts of said stock to them and arranged for them to purchase additional stock in the Citizens National Bank of Meridian at what he believed to be a very favorable price ..." Exh. 402

effectuate, not frustrate, the intent of Richard II in maintaining control of the Bank he had worked so hard to achieve. Doing nothing would lead to the very result that Richard II did not want: the children would have to sell bank stock to pay estate taxes, losing the Wilbourn family's share of control in the process. In creating the Providence Trust, the Wilbourn family—first Garnett and Elizabeth, then Deanna and Richard III—was actually trying to maintain Wilbourn control of the Bank.

The family, including all the Defendants, was also concerned that appreciation of the stock during Deanna's lifetime would make the situation worse by further increasing tax liability. The Providence Trust was designed to take future appreciation out of Deanna's taxable estate. The whole family agreed to the Providence Trust because it would avoid estate taxes and preserve Wilbourn family control of the bank shares. Although none of those facts were acknowledged, the chancellor, Deanna, Garnett, Elizabeth, and Richard III all were trying to avoid the estate tax problem that would otherwise work to defeat the intent of the settlor of Marital B Trust, Richard II.

The evidence is undisputed and overwhelming that Richard III did *not* originate the idea of creating the"Providence Trust" and transferring to that trust the shares that were owned by Deanna and Trust B. It is undisputed that the idea for the Providence Trust originated from Garnett Hutton's suggestion that she, Elizabeth and Richard III buy life insurance on Deanna so that there would be monies to pay what was anticipated to be an enormous estate tax bill that would be owed at Deanna']s death. *See* RV 57 of 62, pp. 2503-2511 ([Richard III). At Deanna's insistence, her accountant, Mike Crosby, made an estate planning presentation to Deanna, Garnett, Elizabeth and Richard III. Crosby and his associate, Chris Cooley, presented several estate planning options to try and reduce what would be Deanna's taxable estate upon her death. *Id. Nowhere in Defendants' briefs do they mention Crosby's and Cooley's pivotal role.*

One option that Crosby and Cooley presented was to sell all of the shares that were owned individually by Deanna *and the shares owned by Marital Trust B* to a "defective grantor trust," a complicated transaction that would have the effect of, *e.g.*, reducing Deanna's estate taxes, paying

income to Deanna during her lifetime in the form of payments on a note, and maintaining ownership of the shares into future generations without estate taxes being owed. RV 52 of 62, pp. 1655-1664 (Elizabeth); RV 57 of 62, pp. 2503-2511 (Richard III); RV 4 of 18, pp. 593-594 (Exhibit 90, Gina Silvestri's letter). *None of that was Richard III's idea.* Even Elizabeth Williamson admitted it was not her brother's idea:

> Q: But the original proposal from Crosby and Cooley had been to take all of the shares of the [CNB] stock, put them in this defective grantor trust; and it would be a dynasty trust that would continue into the future and it would also save on estate taxes, that was kind of the idea you and Garnett had?
>
> A: Yeah, that was from an estate planning standpoint.
>
> Q: Right. So, that – my point is that the idea for the Providence Trust did not originate with Richard, III, at all, did it?
>
> A: No, no. He was the one who was the kind of the point – the guy that moved forward with it.

RV 52 of 62, pp. 1661-1662 (Elizabeth).

Defendants hired experienced tax attorneys to provide further advice and draft documents. Chris Cooley recommended that Deanna hire Gina Silvestri, a lawyer with Cummings & Lockwood, LLC in West Hartford, Connecticut, as her attorney on the matter, and Deanna did so. RV 52 of 62, pp. 1659-1660 (Elizabeth); RV 57 of 62, pp. 2506-2507 (Richard III).

While their brief never acknowledges it, Elizabeth and Garnett hired their own attorney (Blanchard Tual) to advise them about the matter. RV 52 of 62, pp. 1659-1663 (Elizabeth); RV 54, pp. 2081-2088 (Garnett); RV 57 of 62, p. 2507 (Richard III). With the advice of those attorneys, a defective grantor trust was the option that Deanna and her children chose. Silvestri drafted trust agreement and related documents. Richard III did not draft the transactional documents, but only provided input. RV 58 of 62, p. 2507 (Richard III) ("I had input. I never drafted any language."); RV58 of 62, pp. 2587-2588 (Richard III). Clearly, the Providence Trust was not Richard III's idea.

After discussions among themselves and with Kirk Reasonover (who then served on the bank board), Deanna and all of her children named Richard III as the "family trustee" and Kirk Reasonover as the "independent trustee", both of which positions were required by the trust

documents. RV 52 of 62, pp. 1663-1664 (Elizabeth); RV 53 of 62, pp. 1849-1850 (Reasonover); RV 57, pp. 2507-2508 (Richard III).

There were discussions among the parties, their respective lawyers, Crosby and Cooley about the timing of transferring the shares owned by Deanna and Trust B to the Providence Trust. Elizabeth and Garnett's attorney had concerns about transferring the shares of Trust B prior to the issuance of an IRS "closing letter" to the Estate of Richard II:

> And so, a compromise was what we could do – and this idea came from Mike Crosby or he suggested it – the stock that my mother owned, 3,440 shares, could be put into the Providence Trust. That would be enough to fund it, more or less, for approximately three years. And then, by then we would have a closing letter or we could have transferred the Trust B shares to the Providence Trust.

RV 57 of 62, p. 2510 (Richard III). *All of the parties agreed to Crosby's idea.* Gina Silvestri's letter dated February 2, 2006, to Deanna, Richard III, Elizabeth and Garnett summarized the complicated series of transactions (a gift, a sale and a loan) by which the Providence Trust acquired her 3,440 shares of her stock in the holding company. In that letter, she reviewed the prior discussions about the risks and benefits of transferring Marital Trust B's shares to the Providence Trust:

> During our conference call with Blanchard Tual, we discussed the risks and benefits of transferring Mr. Wilbourn's CNB stock to the Providence Trust by installment sale, either directly or through the hands of Mrs. Wilbourn. Since I do not advise it be transferred directly to the Providence Trust, it was decided that while the Estate is still in administration and not through audit, that it would be best to defer transfers of stock originating in Trust B until administration of the Estate is complete (or at least the audit). However, I informed you that it may be worthwhile to request probate court approval to terminate the Trust and distribute some or even all of the 41,910 shares of CNB stock in Trust B to Mrs. Wilbourn, thereby setting the stage for her eventual sale of that stock to the Providence Trust when administration of Mr. Wilbourn's Estate or the audit are completed.

RV 4 of 18, pp. 593-594, Exhibit 90. Although the plan was to subsequently sell and transfer Trust B's shares to the Providence Trust, that never happened because all of the beneficiaries of Trust B did not agree to do so.[9] RV 58 of 62, p. 2602 (Richard III).

Even then, the record belies the Defendants' hindsight depiction of events in another sense. While the chancellor held that Richard III used the Providence Trust as a way of controlling more

[9] The terms of Trust B allow for a sale of its shares *if* all of the beneficiaries of the income and the principal of the trust agreed. RE 6, Will of Richard II, p. 6, Item V(d).

of the bank stock, Deanna's contemporaneous actions and statements are plainly inconsistent with that interpretation. Admittedly, in November 2006, Deanna took issue with Richard III's service as co-trustee and said she would not transfer the Marital Trust B shares unless he resigned. But she has never, and certainly nowhere in evidence, raised any question about the desirability of the Providence Trust as an estate planning device. For a vehicle supposedly so contrary to Deanna's interests, she never renounced the trust, or expressed misgivings or "buyer's remorse" about its creation or continuation.

To the contrary, Deanna's insistence on Richard III's removal related not to the merits of the Providence Trust but to the family dispute, on which she and Richard III are on opposing sides. This is a far cry from believing that the Providence Trust was against her interests. None of Defendants have ever said that, because Deanna and the rest of the family wanted to establish the Providence Trust.

Clearly, there is *not* substantial evidence to support Defendants' arguments or the chancellor's finding that Richard III's involvement in the creation of the Providence Trust was a breach of any of his fiduciary duties as co-trustee of Trust B. With the advice of the estate tax professionals, *all* of Defendants and Richard III considered estate planning advice for Deanna, and *all* of them agreed to establish the Providence Trust as a means of reducing or eliminating the estate taxes that would otherwise be owed at Deanna's death because of her individual ownership of shares and her beneficial ownership of the shares in Trust B. That entire transaction was conceived and engineered by the tax professionals (Crosby, Cooley, Silvestri and Tual) as a method of saving estate taxes for Deanna, preserving the shares for her children, and providing lifetime income to Deanna.

Neither Richard III nor Deanna, as co-trustees of Trust B, breached any fiduciary duties they had as co-trustees by being involved in the discussions about or the implementation of the Providence Trust. It is also illogical, arbitrary and capricious for the chancellor to conclude that Richard III's involvement breached his Trust B co-trustee duties, but Deanna's involvement did not likewise breach her co-trustee duties. The chancellor's findings and conclusions as to the Providence

Trust are manifestly in error and are not supported by substantial evidence.

(b) The Guaranty That Deanna Wilbourn Was Requested to Sign

The chancellor's holding that a loan guaranty that Richard III and Garnett asked Deanna to sign served as a proper basis for removal as co-trustee is clearly wrong. There was nothing improper about the discussion that Richard III and Garnett had with their mother about the need to provide a guaranty for a construction loan. In late July 2007, Richard III and Garnett had a telephone conversation with Deanna about the family's proposed construction of a Homewood Suites hotel in Daphne, Alabama. Richard III informed Deanna that the family was going to have to provide a guaranty for a $12 million construction loan, and asked whether Deanna wanted to sign the guaranty, or have the children sign it. Although Deanna would not own an interest in the proposed hotel, she had in the past signed a similar guaranty, as had Richard II, and as had Richard II's siblings for their children. Deanna declined to sign the guaranty, so the three children provided it. RV 58 of 62, pp. 2624-2627 (Richard III); RV 55, pp. 2108-2109 (Garnett). The discussion about the guaranty was an unexceptional continuation of a family practice, by the whole family, not a breach of any duty that Richard III owed as co-trustee, or otherwise.

(c) The Florida Condominium

The chancellor's finding that Deanna's purchase of a Florida condominium was somehow contrived by Richard III to benefit himself at Deanna's expense, and that Richard III could be removed as co-trustee for his involvement, is manifestly wrong. Again, nowhere in the pretrial order is there any mention of the Florida Condominium as a claim or issue. Moreover, it is undisputed that Richard III did *not* conceive of the idea of buying the Florida condominium for his mother. It was Deanna who wanted to buy a three bedroom condo in Florida, and it was Mike Crosby, her CPA, who suggested the idea that she acquire or put the condo in a limited liability company as an estate planning tool. *See* RV 62 of 62, pp. 3228-3229 (Richard III). Crosby's idea was that Deanna could gift interests in the LLC to her children to such an extent that the value of the condo would not be includable in her estate. All three children discussed the plan; Elizabeth and Garnett even had their

own attorney review the proposal. All three children stood to benefit identically. *Id.*

Thus, based on *Crosby's advice*, the Wilbourn Family, LLC was formed to acquire the condo. Richard III performed some legal work for the LLC. However, he never even stayed in the condo, and nothing about the acquisition or use of the condo had anything to do with Marital Trust B. The chancellor was manifestly wrong in finding that there was a breach of any duty that Richard III owed.

B. Richard III Did Not Breach Any Other Duties That He Had As Co-Trustee Of Marital Trust B.

There is no evidence that Richard III breached any duties that he had as co-trustee of Marital Trust B. For example, although Defendants contend that Richard III breached his duty of loyalty, there is no evidence that Richard III disclosed to any third party any confidential information pertaining to the Trust,[10] that he failed to communicate all of the information pertaining to the trust to the beneficiaries, that he engaged in self-dealing with respect to administering the assets of the Trust, or that he had any conflicts of interest. *See* Restatement (Third) of Trusts § 78 (2007).

Likewise, Richard III did not breach any fiduciary duties that he owed as a lawyer. In administering the Trust, Richard III did not act as Deanna's attorney. Their relationship was as co-trustees, not attorney and client. In any event, there is no evidence that he breached any duties that he may have owed as an attorney.[11] Finally, Defendants contend that the chancellor correctly determined that Richard III owed duties to his mother and sisters as a son and a brother. However, the law does not impose any such duty. Indeed, Defendants have not cited any cases that hold that family members owe one another fiduciary duties.

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[10] In comparison, Deanna, without notice before or after, unilaterally directed the Holding Company to change the Trust's address to her own in January 2007.

[11] Before Deanna read Richard III her October 2007 "ultimatum" about his performance at the Bank, she complimented his legal work on his father's estate, for which Deanna served as the Executrix: "There's no way I can thank you enough for what you've done with the Estate. It's been wonderful. I appreciate absolutely everything you've done and how you've, it really gives me a, it really, you know, um, I guess it's second nature to you. And I just want to tell you I will always be indebted to you for that, because you made those meetings work." Exhibit 297 Transcript titled "Ultimatum" Deanna similarly complimented Richard III's other legal work. RV 46 of 62, pp. 838-839 (Deanna). "My son is an excellent lawyer." RV 48 of 62, p. 1050 (Deanna).

1. The Co-Trustees' Disagreement over Voting the Shares Was Not a Breach of Their Duties and Did Not Frustrate Administration of the Trust.

A persistent misstatement by both the chancellor and Defendants is that at the March 2007 meeting of shareholders of the holding company, Richard III "refused" to vote the Trust's shares, and did so in order to be reelected to the board. From that departure point, Defendants contend that Richard III's "refusal" to vote the shares concerns administration of the Trust, defeats Richard II's intent, and constitutes a breach of his duty. However, the overwhelming evidence is that at the March 2007 annual meeting of the shareholders of the holding company, Richard III did not "refuse" to vote the Trust's shares, nor did he ever vow or threaten to "block" the voting of those shares. *See* Richard III's testimony, May 14, 2009, 135:4-14, 164-65; Deanna's testimony, Dec. 19, 2008, 921:8-922:7. Rather, the evidence is that he and his mother had a legitimate disagreement over how the shares were to be voted. Under the terms of the Trust, each of them had the right and discretion to agree or disagree with one another, neither of them was obligated to agree with the other, and neither of them violated any co-trustee duties by disagreeing with the other. In addition, there was no conflict of interest with respect to both Richard III and Deanna wanting to vote the shares for themselves to be director. A trustee should not be removed because of a conflict of interest when the situation involving the conflict was created by the testator. *See, e.g., In re Weiss' Estate*, 227 N.Y.S.2d 378 (N.Y. 1962).

Richard III's refusal simply to do as Deanna wished was a reasonable exercise of trustee discretion. It was certainly not arbitrary or capricious, an abuse of discretion, dishonest or taken in bad faith or under a misunderstanding or mistake. Instead, the evidence shows that well before and continuing to the meeting, he and his mother disagreed about how the shares should be voted, it was a legitimate disagreement, and their disagreement was documented by letters that they exchanged with one another. RE 10 (letters).

Under the provisions of Marital Trust B, for whom the Trust's shares are to be voted is a matter of discretion for the co-trustees; consequently, a court should not interfere unless the exercise of that discretionary power is arbitrary and capricious, is an abuse of discretion, is in bad faith or

dishonest, or is made under a misunderstanding or mistake. *See* Bogert, *The Law of Trusts and Trustees*, § 560 (2d ed. 1980); *In re Revocable Trust of Marta*, 2003 WL 21998375 (Del. Ch. Aug. 14, 2003).

Notwithstanding Deanna's testimony to the contrary, the provisions of Marital Trust B do not make Deanna a "super-trustee" with a "trump card" that she can play to have matters her way.[12] Notably, the provisions of the Trust do not contain a "deadlock provision," which indicates that the co-trustees are free to agree or disagree on Trust matters, including voting the shares. Each co-trustee has the right and discretion to agree or disagree with one another, neither of them is obligated to agree with the other, and neither of them violates any co-trustee duties by disagreeing with the other. Under the law, co-trustees are not required to agree with one another, and the failure to agree should not result in removal unless the trustees' failure to agree significantly impairs the administration of the trust. *See, e.g., In re Charles C. Wells Revocable Trust*, 734 N.W.2d 323 (Neb. Ct. App. 2007) (removing a co-trustee where the trustees' failure to agree significantly impaired the administration of the trust); *In re Rosenfeld*, 2006 WL 3040020 (Pa. Com. Pl. July 31, 2006) (removing a co-trustee where a deadlock impaired the trust); *Broeker v. Ware*, 29 A.2d 591 (Del. 1943) (differences of opinion between the trustees and beneficiaries are not grounds for removal unless they make it impossible for the trustees to perform their duties).

The 2007 disagreement between Richard III and Deanna over how to vote the Trust's shares for directors did not defeat or frustrate the purpose of the Trust. Richard II intended for Richard III and Deanna to administer the Trust. *See* discussion *infra* 29-32. *The overriding purpose of the Trust is to hold the stock for Deanna during her lifetime and distribute the annual income to her, less the trustees' fees.* Defendants did not offer any evidence that the disagreement over voting the shares

[12] Q. [to Deanna] Are you saying that [Richard III] has to agree with how you want to vote the shares? Yes or no?
(interjection of the Court omitted)
No. I do not – well, yes. I think he should, as a trustee, consider that an obligation.
Q. To vote them like you want them voted? Vote the shares like you want them voted?
1A. Not only to vote the shares like I prefer, but for the best interest of the bank and not himself.
RV 47 of 62, pp. 923-925 (Deanna).

for directors has threatened that purpose, or the corpus or value of the stock, or has resulted in any abuse or mismanagement of the Trust. *To the contrary*, it is undisputed that the fact that the Trust's shares were not voted at the March 2007 annual meeting (or at the 2008 and 2009 meetings) did not dissipate or devalue the Trust's shares of stock, did not reduce any dividends paid by the holding company, did not reduce or affect any distributions to the Trust, did not affect the growth of the holding company (or the bank), did not result in the bank losing customers or depositors, and did not result in any reduction of the market value or book value of the shares in the holding company, nor in any write down of any assets of the Trust. The undisputed evidence is that since March 2007, the value of the bank and its shares have substantially appreciated in value. *See* the record citations at p. 29 of our principal brief.

Furthermore, it is also undisputed that the fact that the Trust's shares were not voted at the March 2007 annual meeting (or at the 2008 and 2009 meetings) did not result in any dilution or diminution of power or influence of Richard II's family. To the contrary, since the March 2007 annual meeting, Richard II's family members have continued to control the board of the holding company and have increased the number of positions they hold within the holding company and the bank. *See* the record citations at pp. 29-30 of our principal brief. The provisions of the Trust and the foregoing evidence underscore the manifest error by the chancellor in finding that the disagreement between Richard III and Deanna over voting the shares defeated Richard II's intent and impaired the administration of the Trust to the detriment of the beneficiaries.

Finally, Defendants' theory that Richard III schemed to shelve the Trust's shares because that is the only way that he could guarantee his reelection to the Board is wholly belied by what actually happened. Since the 2007 disagreement over voting the stock, Richard III has been reelected to the board, both when the shares were voted and when they were not voted. RV 62 of 62, pp. 3231-3232 (Richard III).

If the disagreement over how to vote the shares did give rise to any breach of duty, then Deanna's conduct with respect thereto is also relevant. The record shows that Richard III's attempts

to resolve the disagreement were met by hostility from Defendants. For example, Deanna refused to meet with Richard III prior to the deadline to nominate directors to discuss how to vote the shares. RV 47 of 62, pp. 914-917 (Deanna). Indeed, she had *no* intention of compromising. Instead, Deanna demanded that Richard III vote the shares for the revised slate or else. Deanna testified that her co-trustee was required to vote *as she directed.* Id. at 923-925. Deanna, however, had no such authority under the Trust. The evidence also shows that Deanna submitted a signed ballot even though Richard III had refused to sign it. At trial, Deanna testified that she did not intend for her ballot to be counted, but that contradicted her earlier sworn testimony. During an earlier deposition, she testified that she did in fact intend for her signed ballot to be counted. RV 47 of 62 , pp. 981-985 (Deanna). When his mother did not agree with Richard III about how the shares should be voted, the chancellor erred by determining that Richard III breached his duties, while disregarding the necessary conclusion that, by her reciprocal conduct , Deanna breached hers. Richard III's disagreement with his mother about how the shares should be voted was not a proper ground for the chancellor to base his ruling.

2. Any Lack of Cooperation By Defendants Did Not Result in a Failure to Administer the Trust.

To constitute a sufficient ground for removal, there must be a lack of cooperation that substantially impairs the administration of the trust. Other jurisdictions have held that a trustee may not be removed unless the deadlock has materially or substantially impaired the administration of the trust. *See, e.g., Bruce v. Bruce*, 1998 WL 972118, at *2 (Va. Cir. Ct. Feb. 20, 1998) (to justify removal for lack of cooperation, there must be a showing of abuse or mismanagement of the trust, and "[t]he antagonism must militate against profitable management of the estate"); *Succession of Noe*, 398 So. 2d 1173, 1178 (La. Ct. App. 1981) (the court refused to remove a trustee where there was no evidence that the trustee's conduct materially impaired or affected the proper administration of the trust; rather, the claims against the trustee amounted to "nothing more than allegations of social or family animosity and incompatibility"). *Compare Colorado Nat'l Bank v. Cavanaugh*, 597

P.2d 1049 (Colo. Ct. App. 1979) (impairment of the trust where the trustee engaged in a "campaign" of incessant harassing telephone calls, used insulting language, and caused the estate to incur substantial expenses).

Defendants claim that "Richard III's conduct [and lack of cooperation] constituted such a persistent failure to administer the Trust that his removal would best serve the interests of the beneficiaries." *See* Williamson & Hutton's brief at p. 57. This argument is clearly unsupported by the evidence. The only conduct that Defendants point to as evidence of a lack of cooperation is the failure to vote the shares. However, as discussed in detail above, the will does not require the co-trustees to agree on how to vote the shares. The voting of the shares is a discretionary function. Defendants failed to present sufficient evidence to prove that the disagreement over how the shares should be voted for directors has frustrated the purpose of the Trust, has resulted in abuse or mismanagement of the Trust, or has had any negative impact on the profitability of the Trust. As co-trustee, Deanna has the right and discretion to agree or disagree with her co-trustee, and Richard III as co-trustee has no less right and discretion. There is also no evidence that the disagreement has resulted in delays in conducting Trust business or any other negative consequences. Because the deadlock has not substantially impaired the administration of the Trust, the chancellor could not remove Richard III as co-trustee. The decision to do so was in error.

If anything, Defendants' contention that Richard III refused to cooperate applies equally to themselves and the duties *they owed Richard III* as a beneficiary. Before Defendants wrongfully attempted to remove Richard III in April 2007, he was not unfit or unwilling to administer Marital Trust B effectively, and he did not fail to do so. Richard III timely and properly received, deposited and distributed the Trust's income to Deanna, he kept the bank account, books and records of the Trust, and he provided written reports and accountings to the other beneficiaries.

Simply stated, Richard III performed all of his duties as co-trustee. During the trial, each of the Defendants was asked to name anything that Richard III had failed to do properly as of the date when they requested that he resign as co-trustee, and they could not think of *anything*. *See* RV 47

of 62, p. 938 (Deanna); RV 50 of 62, p. 1493 (Elizabeth); RV 54 of 62, p. 1987 (Garnett). When the impasse developed with the voting of the stock, Richard III made a good faith effort to meet with Deanna to see if they could agree on how to vote the shares, but she repeatedly refused to meet because she wanted to vote the shares for only the board-nominated slate. Although Deanna and Richard III had the right to disagree with one another on how the shares should be voted at the 2007 annual meeting, Deanna did not have the right to have Richard III removed because he did not agree with her about how the shares should be voted.

The 2007 disagreement that Richard III and Deanna had on how to vote the shares has *not* had any negative effect on the value of the Trust's assets (the stock), on the income of the Trust, or on the distributions to Deanna as the income beneficiary. The bank has prospered (most dramatically while Richard III was chairman), the stock has increased in market value, the per share distributions by the bank to the Trust have increased and have been uninterrupted, and the payments to Deanna have been timely and properly made. In addition, the 2007 disagreement has also not resulted in any dilution of or diminution in the power of the Wilbourn family at the bank or the holding company. Before the disagreement, there were three members of the Richard II family on the board of the holding company (Deanna, Richard III, Garnett); since then, there have been three members (Deanna, Richard III, Russell). In fact, in the 2007 election of directors there never was any doubt that the Wilbourn family would have three family members on the board. Since then, the Wilbourn family (Deanna, Russell, Elizabeth, Garnett and Richard) actually have *increased* the number of positions that they hold at the holding company and at the bank.

Moreover, the potential for disagreement—which the Defendants now cast as a refusal to cooperate and failure to administer the Trust—remains, even with Richard III ousted. The successor trustee, Elizabeth, will only "cooperate" so long as she does what Deanna instructs her to do. As soon as there is a disagreement between Deanna and Elizabeth, the exact impasse at issue here will return, illustrating that the disagreement about voting the shares is not a ground for removal.

While Richard II clearly understood that his wife and Richard III might not always agree on how to vote the Trust's shares, he did not include a "deadlock" provision or a provision giving one co-trustee more say-so than the other. Nor did he provide that a deadlock or disagreement about how to vote the shares was a breach of duty or a ground for removal. He left his co-trustees with the right, judgment and discretion to agree or not agree. He did, however, include in his will certain circumstances that required a unanimous vote, such as a bank merger. *See* Will at item V(d); *see also* discussion *infra* p. 41. The fact that Deanna and Richard III may not agree on how to vote the shares was clearly a foreseeable circumstance. Despite Defendants' argument to the contrary, there is no evidence that in disagreeing with Deanna about how to vote the shares, Richard III was acting in a manner not contemplated by Richard II. *See* Deanna's brief at p. 48.

Moreover, if the impasse somehow rose to a lack of cooperation that frustrated the administration of the Trust, the chancellor failed to consider possible remedies to dispel the impasse short of removal, the most drastic and overreaching remedy available. Assuming *arguendo* that some relief was warranted, the chancellor could have fashioned a less intrusive remedy that was more consistent with the expressed intent of Richard II. *See also* discussion *infra* pp. 38-43 (discussing Richard II's intent). The chancellor could have broken the deadlock, or ordered Deanna and Richard III to negotiate over a slate of directors in voting the Trust's shares. *See, e.g.*, Restatement (Third) of Trusts § 37 (2003) (explaining that a court may grant more limited relief than removal such as, for example, appointing a trustee ad litem to handle a specific transaction); *In re Baird*, 204 P.3d 703 (Mont. 2009) (not every breach of trust requires removal of a trustee). Going straight for removal of a co-trustee based on grounds not provided by the settlor of the Trust, and under conditions easily envisioned by Richard II, was error.

3. It Was Manifest Error for the Chancellor to Allow Evidence of the Parties' Settlement Negotiations, Offers and Counter-Offers.

In his opinion, the chancellor cited and relied on evidence from the parties' settlement negotiations, offers and counter-offers that occurred during late January and early February 2007, to support several of his findings and conclusions that Richard III attempted to use his position as

co-trustee of Trust B to obtain personal benefits. Opinion at 32, 37, 67; RE 9 (settlement letters). At trial, the chancellor allowed (over objection) the introduction of the settlement offers and counter-offers that the parties exchanged, and testimony relating to those offers. His opinion, however, did not mention the Rule 408 issue of whether he should have allowed evidence from those settlement negotiations.

Defendants contend that evidence of those settlement negotiations was admissible for two reasons. First, they argue that those settlement negotiations did "not concern the claims at issue *in this action*, which concern Richard III's removal as co-trustee of Trust B." Second, they argue that the purpose of the evidence was "to show that Plaintiff *sought to regain* his bank and holding company positions, and that his attempt to do so was accompanied by self-dealing breaches of fiduciary duty." Williamson & Hutton's brief at 49-50; Deanna's brief at 69-70.

Defendants' principal argument is that evidence from the settlement negotiations was admissible under Rule 408 because those negotiations did not concern the "claims at issue in this action." That argument, however, does not hold up under the facts or Rule 408. As of the dates of those letters, there clearly *were* disputes, controversies, claims and threatened legal action between Richard III and Defendants arising out of the events of January 9, 2007, the day when Defendants requested that Richard III resign from all of his positions with the bank, the holding company, the Providence Trust *and Martial Trust B.* On January 9, one of Defendants' attorneys (David Grishman) met with Richard III in advance of the meeting of the board of the holding company, and on behalf of Defendants asked him to resign from positions that included co-trustee of Trust B, and presented him with and asked him to sign a "Notice of Resignation" that provided for Richard III to resign from various positions *that included co-trustee of Marital Trust B.* RE 8 (Exh. 205) (Notice of Resignation). Mr. Grishman told Richard III "that if I didn't sign the letter, *my family was seriously considering litigation against me.*" RV 57 of 62, pp. 2469-2470 (Richard III) (emphasis added).

The events of early January 2007 left Richard III wondering, among other things, whether Defendants would try something else to try and remove him as co-trustee of Marital Trust B. Additionally, by the end of January 2007, it was apparent that Richard III and Deanna were not in agreement on for whom the shares of Trust B should be voted at the upcoming March 2007 annual meeting of shareholders. At that point in time, it was abundantly clear that there were disputes, controversies, claims and threatened legal action between the parties.

On January 30, 2007, Richard III opened settlement negotiations when he sent Defendants and Archie McDonnell, Jr. what was clearly labeled as a settlement offer to settle "the disputes between us" and avoid "many options for legal recourse," a clear reference to bringing claims in one or more lawsuits. Indeed, that two-page letter uses the words "settlement offer," "settle," "settlement," and "settlement terms" six times. *See* RE 9 (Exhibit 545). The disputes that Richard III proposed to settle *included any issues over Deanna or Richard III continuing to serve as co-trustee of Marital Trust B.* RE 9, items 9 & 15.

Defendants did *not* respond to that settlement offer with any accusation that Richard III was improperly trying to use Trust B property to settle his own personal claims. Instead, Deanna and McDonnell responded on February 2, 2007 with a counter-offer under which they proposed to have the board and nominating committee place Richard III on the board-approved slate (in place of Garnett), authorize his former salary through March 6, 2007, and transfer title of an automobile to him. RE 9 (Exh. 549). Ultimately, those settlement negotiations did not resolve the disputes and claims, but they clearly included and involved Richard III's role as co-trustee of Marital Trust B.

Defendants' second argument for admissibility of the settlement negotiations is unsupported by any legal authority, and does not withstand scrutiny. Given that one of the many disputes concerned Defendants' request that Richard III resign as co-trustee of Martial Trust B, and their threat to sue him if he did not, there was nothing wrong with Richard III trying to resolve the dispute over his continued service as co-trustee of Marital Trust B along with the other disputes that had arisen at the same time.

The chancellor clearly erred by admitting and relying on evidence from those settlement negotiations. Rule 408 of the Mississippi Rules of Evidence declares inadmissible evidence of offers to settle a claim that was disputed, and expressly states that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible." This suit did not have to be pending in order for those settlement negotiations to have the protection of Rule 408 because the record clearly establishes that one of the disputes that was sought to be settled by the settlement negotiations *was whether Richard III would remain a co-trustee of Martial Trust B*, which is "the" central dispute and claim in this suit. The rule does recognize that there can be exceptions "when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." However, none of those exceptions applies to allow evidence of the settlement negotiations at issue. *Compare Smith v. Payne*, 839 So. 2d 482 (Miss. 2002) (settlement agreement admissible because it included an agreement by one defendant to testify for the other); *Sports Page, Inc. v. Punzo*, 900 So.2d 1193 (Miss. Ct. App. 2004) (judge properly excluded evidence of a check allegedly offered to settle the case because, even though it was offered for the purpose of showing bad faith, the check could have borne on more substantive issues such as the alleged invalidity of the plaintiff's claim, which violated Rule 408).

4. Richard III Did Not Create the Hostility Between Him and Defendants.

The overwhelming weight of the evidence establishes that Richard III did not create the hostility at issue. Under Mississippi law, a chancery court may remove a trustee *if* there is mutual hostility between the trustee and the beneficiary *and* "hostility of the trustee toward the [beneficiary] could defeat the purpose of the trust." *Walker v. Cox*, 531 So. 2d 801, 804 (Miss. 1988). *See also* cases cited in Richard III's first brief at 59-60. A trustee will not be removed on the basis of hostility where the hostility was created by a beneficiary in order to effectuate the removal of the trustee. *See McWilliams v. McWilliams*, 994 So. 2d 841, 849 (Miss. Ct. App. 2008) ("Where evidence shows that a . . . beneficiary creates hostility as a part of a greater goal to have a trustee removed, that . . .

beneficiary will be sorely disappointed"). *See also* 2 Scott, *Trusts* § 107, at 109-110 (4th ed. 1987) ("The mere fact that there is. . . . friction or hostility [between the trustee and beneficiaries] is not necessarily a sufficient ground for removal, [because] otherwise the beneficiaries could by quarrelling with the trustee force him out").

(a) The Record Conclusively Establishes That Defendants Created the Hostility.

The chancellor erred by allowing Defendants to profit and benefit from their own hostile acts toward Richard III. By removing Richard III because of the hostility thatDefendants have toward him, the chancellor effectively *rewarded* Defendants for having provoked a fight with Richard III so that they could claim that he was hostile to them, and then use his alleged hostility to further their efforts to remove him as co-trustee and gain control of the shares owned by the Trust. In addition, Defendants created the idea that Richard III was hostile to them was Defendants' after-the-fact creation.

The evidence overwhelmingly establishes that Defendants banded together and attacked Richard III at the bank and the holding company to remove him from his board-elected offices. Frustrated that the shareholders reelected Richard III as a director of the holding company, Defendants then attacked him as co-trustee of Marital Trust B so that they could get control the Trust's shares of stock and vote those shares to keep Richard III from being reelected to the holding company board. Defendants' control of the holding company board would in turn allow them to control the bank board, allowing them to benefit by keeping and/or appointing themselves as directors of the bank and to various important committees within the bank, and to install Elizabeth's husband (Russell) as chairman of the holding company and the bank (positions that had been held by Richard III since November 2004), as well as executive vice-president exercising day-to-day management duties. Removing Richard III as co-trustee of the Trust would allow Elizabeth Williamson to take control of the bank account and records of the Trust, and receive the co-trustee's fee that is provided for in the Trust (3% of the income of the trust).

Throughout all of those events, Defendants never once alleged that Richard III was hostile to them. Their complaints about Richard III concerned how he performed his work at the bank—he upset McDonnell and some of McDonnell's inner circle, and he did his job differently than his father. At trial, Defendants admitted that on January 9, 2007, the day that their lawyer asked Richard III to resign as co-trustee of Marital Trust B, they did not claim that Richard III had done anything wrong as co-trustee, nor did they claim at the time that he was hostile to them. Not even in Defendants' April 2007 notice of removal or in their original answers in this suit did Defendants allege that Richard III was hostile to them or that he should be removed because of hostility.

The evidence does not establish that Richard III engaged in hostility toward Defendants concerning Marital Trust B or otherwise. While he rightfully responded to Defendants' attacks on him, he never refused to talk with Defendants, he never refused to make a payment that the Trust owed to the beneficiary (Deanna), and he never refused to provide information on the Trust. He filed this suit in response to Defendants' wrongful purported removal of him as co-trustee, *a claim on which Richard III won summary judgment.*

The fact that Defendants no longer "like" Richard III, or that they are resentful of him, does not amount to hostility by Richard III toward Defendants. "The fact that some of the trust beneficiaries are unhappy with a particular person as trustee is of no importance; without a demonstration that the trust corpus is in danger of dissipation, mere displeasure of a beneficiary is an insufficient reason for removing a testamentary trustee." 76 Am. Jur. 2d *Trusts* § 234 (2007). In any event, whatever personal issues Defendants have with Richard III never prevented him as co-trustee from properly administering the Trust, nor has it defeated the purpose of the Trust.

(b) There Is No Evidence That the Hostility Created by Defendants Will Defeat the Purposes of the Trust.

Here, the hostility created by Defendants has not defeated the purpose of the Trust, or any provision of the Trust, and therefore, does not constitute a sufficient basis for removal. *Walker*, 531 So. 2d at 804 ("hostility of the trustee toward the [beneficiary] could defeat the purpose of the trust").

See also Restatement (Third) of Trusts § 37 cmt. e (2003) (stating that friction between the trustee with a co-trustee or with some of the beneficiaries is not a sufficient ground for removing the trustee unless it interferes with the proper administration of the trust). It is undisputed that Richard III efficiently and timely performed his co-trustee duties, including making income distributions to Deanna, and providing accountings of the Trust's property. The only "wrong" he is alleged to have committed is not agreeing with his mother as to how she wanted to vote the Trust's shares at the March 2007 meeting. Defendants claim that Richard III will never vote the shares for any of Defendants, and that they will never vote the shares for him, which, they argue, means the shares will never be voted, thereby undermining Richard II's intent of maintaining Wilbourn family control of the Bank. *See* Williamson & Hutton's brief at p. 55. The argument is sheer speculation and conjecture. Richard III never refused to vote the Trust's shares, and he did not state that he would vote shares for anyone other than members of the Wilbourn family. *See* RV 59 of 62, pp. 2766-2769 (Richard III).

II. RICHARD III HAS NOT THWARTED HIS FATHER'S INTENT

As noted earlier, Defendants concede that the express provisions of the Trust did not provide any ground on which to remove Richard III as co-trustee. Consequently, Defendants argue that Richard III should be removed so that his father's intent is not undermined. *See* Williamson & Hutton's brief at p. 58. Deanna goes so far as to argue that Richard III attempted to "thwart" his father's "plan", but she does not explain how that is so. Deanna's brief at pp. 40-41. Defendants arguments are riddled with sheer speculation about what Richard III's father would have done or would have wanted. For example, Elizabeth and Garnett speculate that their father would not have wanted a deadlock, and Deanna speculates that her husband would have wanted the shares to have been voted for two McDonnells and three Wilbourns. *See* Williamson & Hutton's brief at 58-59; Deanna's brief at p. 50. Such speculation as to what Richard III's father would have wanted is just that, and is not admissible because Richard II's intent is clearly and fully evidenced by the provisions of the Trust.

Richard II clearly intended for his son to serve as co-trustee and be removed "if and only if [he] shall become incompetent, unable to serve or grossly mismanages the Trust." Will, Item V, Paragraph (g). The provisions of the Trust are not ambiguous, and no party to this suit has ever claimed that they are. In the absence of an ambiguity, the chancellor is "limited to the 'four corners' of the will" in determining the testator's intent and parol evidence is inadmissible. *Estate of Blount v. Papps*, 611 So. 2d 862, 866 (Miss. 1992) (emphasis added). *See also In re Roland*, 920 So. 2d 539, 541-42 (Miss. Ct. App. 2006). Consequently, the chancellor committed reversible error by looking beyond the express terms of the will to determine Richard II's intent.

One of the clearest examples of error by the chancellor, and a key factor in his ruling, is the chancellor's admission of and reliance on a January 1999 letter agreement between Richard II and Richard III, an agreement to which Defendants were not parties. RE 4 (Memorandum of Agreement). That letter predates the existence of the holding company, so it only refers to the bank. In that agreement, Richard II recites several conditions relating to Richard III's initial election to the bank board. The chancellor extrapolated from that letter—unrelated to Richard II's will, wherein the terms of Marital Trust B are set forth—all sorts of inferences about Richard II's intent with regard to both the Trust and the bank. However, the terms of the January 1999 agreement clearly contradict the chancellor's and Defendants' hindsight divination of Richard II's intent.

That 1999 agreement provides for Richard III to serve as a director unless his father (*not* anyone else) requests his resignation -- something his father *never* requested. Furthermore, the 1999 agreement provides that after Richard II's death, another Wilbourn family member should serve as a director "along with Richard E. Wilbourn III." In addition, the agreement states that Richard III has a duty and obligation as a director to represent the best interest of the stockholders and to act prudently and independently on their behalf in all matters, and that the agreement is not intended to require that Richard III agree with Richard II or vote as Richard II might vote, rather he should vote his conscience and best judgment and in complete fulfillment of his obligation as a director, so long as he serves in that capacity.

Contrary to the chancellor's findings, the January 1999 agreement makes it clear that Richard II viewed the McDonnells circumspectly, not as the "partnership" that Defendants now tout. For example, in the January 1999 agreement, Richard II states that he repeatedly and secretly met with lawyers and bank consultants about the bank, and that he resented the McDonnells having denied him access to information he had requested about the bank, including a list of shareholders. Inexplicably, the chancellor held that it was improper for Richard III to do what his father had done (*e.g.*, meeting with bank consultants and requesting financial information from Archie McDonnell, Jr.).[13] Regardless, the January 1999 agreement between Richard III and his father was not admissible and should not have been relied on by the chancellor to divine Richard II's intent.

Consequently, the disagreement between Richard III and Deanna about how to vote the Trust's shares is not a ground for removing Richard III as co-trustee because Richard II did not include a "deadlock" provision or a provision that gave one co-trustee more say-so that the other co-trustee. Nor did he provide that a deadlock or disagreement on how to vote the shares was a breach of duty or a ground for removal. The absence of such a provision addressing this situation is compelling proof that Richard II, a lawyer who clearly understood that his wife and Richard III might not always agree on how to vote the Trust's shares, did not intend for the co-trustees to be *required* to agree with one another.

Richard II did explicitly address in his will the specific situations that concerned him, namely a bank sale or merger that would dilute the family's controlling interest in the bank. Item V(d) of the Richard II's will provides that the co-trustees shall not "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 bank] or would lead to the sale or exchange of the stock *unless all of the beneficiaries (income and principal) agree in writing.*" RE 6 (Item V(d) of

[13] For instance, the chancellor was unconcerned that Archie, McDonnell, Jr. refused and even concealed from Richard III the existence of the "Revised for Richard" budget scenario. The court also seemed unmoved by the fact that Richard III was not merely making his requests for information for himself. Not only is he the Holding company's second largest shareholder (Trust B is the largest), at the time he served as chairman and secretary of the Bank board, chairman of the Holding Company, general counsel, chairman of the Compensation committee, Trust committee member and Loan committee member.

the Will) (emphasis added). The will does not address what happens when there is disagreement over the voting of the shares. *See* 76 Am. Jur. 2d Trusts § 229 ("In this regard, courts will ordinarily not remove a trustee appointed by the settlor for grounds existing at the time of the trust's creation and known to the settlor, even though the court would not have appointed such person trustee.").

The absence of a provision on deadlock, or on how to vote the shares in any other context, can only be viewed as a considered decision by Richard II to give the co-trustees the right and discretion to agree or disagree with one another. With no provision in Richard II's will about a requirement to vote the shares, or about breaking a deadlock between the trustees, the chancellor erred by reading one into existence nevertheless. Because the Trust is not ambiguous, the chancellor is "*limited to the 'four corners' of the will*" in determining the testator's intent, and parol evidence is inadmissible. *Estate of Blount v. Papps*, 611 So. 2d 862, 866 (Miss. 1992) (emphasis added). *See also In re Roland*, 920 So. 2d 539, 541-42 (Miss. Ct. App. 2006). Although he addressed other situations requiring unanimous agreement, Richard III did not address this possibility, and his intent was clearly and completely evidenced by the terms of his will. To justify its ruling, the chancellor went well beyond what could be read into Richard II's intent, and to do so was error.

Similar the facts in the present case, in *In re Trust of Rosenfeld*, 2004 WL 3186283 (Pa. Com. Pl. May 19, 2004), a trustee sought judicial relief to break a deadlock among the trustees to attain a diversification of its assets. In refusing to remove the trustee or break the deadlock, the court explained that the trust agreement did not provide a provision to break a deadlock, and the settlor "certainly knew that in designating an even number of trustees, a deadlock or tie vote was a distinct possibility." *Id.* at 5. Not only did the settlor provide no mechanism to break such a tie vote, "he also expressly included a provision that certain actions could only be taken by a majority vote." *Id.* Thus, the court concluded that the trust instrument read as a whole, therefore, evidenced the settlor's intent to allow no action to occur in tie vote or deadlock situations. *Id.*

A related example of post-hoc rationalization by Defendants is at page 13-14 of Williamson & Hutton's brief, which quotes the chancellor's finding that Richard II was concerned about

preserving "Wilbourns and McDonnells working together." That sentiment is nowhere expressed in Richard II's will. To the contrary, it is somewhat at odds with the paramount idea of the Wilbourn family having control of the bank. If anything, the McDonnell/Wilbourn "partnership" that the chancellor emphasized is not supported by any statement or document prepared by Richard II, and is *refuted* by the 1999 agreement.

Similarly, the chancellor and Defendants both place inordinate emphasis on the idea that Richard III subverted Richard II's intent by defeating the influence of the "Wilbourn Family" over the bank. However, like its reading of the terms of Richard II's will, the chancellor's definition of "Wilbourn Family control" is one of situational convenience, contorted to justify removing Richard III as trustee.

The chancellor had no basis for defining "Wilbourn family control" as he did. Richard III *is a Wilbourn*, meaning that to the extent the family disagreed among themselves about which of them should be on the bank or holding company boards, in the end, any combination of them would constitute continuing Wilbourn control over the bank. The chancellor's ruling effectively reads Richard III out of the family and interposes a definition of "Wilbourn family control" that is nowhere supported by Richard II's intent or express wishes.

In straying from the clear terms of Richard II's will, the court ignored not only Richard III but also Richard II's siblings, Jim Wilbourn and Margaret Wilbourn Vise. Both of them own considerable stock positions in the Holding Company and continue to support Richard III for Board membership. Indeed, Jim has continued to nominate Richard III for the holding company board. Under the chancellor's reading of the record, only certain Wilbourns qualify for maintaining "Wilbourn Family control" of the bank. The McDonnells somehow qualify, too, for a "working partnership" that, despite all evidence to the contrary, Richard II wanted nonetheless to ensconce and continue. It was error for the chancellor to restrict Richard II's clearly expressed intent by picking sides, choosing the "true" Wilbourns with no basis for doing so, and excluding Richard III and others.

III. JURISDICTION AND VENUE

Both jurisdiction and venue were proper in Madison County, and the choice of venue in this case rests with Richard III, the plaintiff below. The transfer of the case to Lauderdale County was reversible error, and should this case be remanded, the case should be heard in Madison County.

All parties agree that jurisdiction in this case is determined by Miss. Code. Ann. § 91-9-211. Defendants wrongly contend, however, that jurisdiction in this case is only proper in Lauderdale County, the county in which the will creating the Marital Trust B was probated. *See* Williamson & Hutton's brief at 60; Deanna's brief at 73. They misconstrue the scope of the first sentence of § 91-9-211, which applies only to proceedings to "settle the accounts of a trustee who *may resign* and to appoint a successor." That provision is inapplicable in this case. This action concerns the improper and ineffective removal of a trustee, not the resignation of a trustee.

Instead, jurisdiction here is governed by the latter portion of § 91-9-211, which provides that "[i]n all other cases,"—referring to cases other than ones brought pursuant to the resignation of a trustee—"jurisdiction is vested in the chancery court of the county of the residence of the individual trustee, or one of them." In fact, the residence of the purported co-trustees was the sole basis upon which the Madison County Chancellor originally transferred the case to Lauderdale County. RV 6 of 62, pp. 825-828 (order). She did so because she erroneously concluded that Richard III had already been removed as co-trustee by Defendants' notice of removal, the very point of law disputed in the case. Indeed, the Lauderdale County Chancellor eventually held that the Notice of Removal was improper and ineffective in removing Richard III as co-trustee, demonstrating the error underlying the Madison Chancellor's transfer of venue. Because Richard III, as co-trustee, resides in Madison County, jurisdiction is proper in Madison County Chancery Court. RV 6 of 62 pp. 825-828 (order).

Defendants also confuse the provisions of the general venue statute, Miss. Code Ann. § 11-5-1, in arguing that the only proper venue in this case is a county in which a defendant resides. *See* Williamson & Hutton's brief at 61; Deanna's brief at 73. That section first provides that "suits

respecting real or personal property may be brought in the chancery court of the county in which the property, or some portion thereof, may be." Miss. Code Ann. § 11-5-1. Yet Defendants neglect this clear provision, instead focusing on the final catch-all provision of the statute: "all cases *not otherwise provided* may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be found." Miss. Code Ann. § 11-5-1 (emphasis added). This provision is inapplicable, as the statute already provides that venue is proper in the county in which disputed property is located. *Guice v. Mississippi Life Ins. Co.*, 836 So. 2d 756, 759-760 (Miss. 2003).

In *Guice*, the Mississippi Supreme Court decisively interpreted § 11-5-1, holding that its provisions were not ambiguous, and that a plain reading mandates that where "items of personal property . . . are the subject of [a] lawsuit," venue is proper "in the county where the property is located." *Id.* at 759. In that case, defendant sought transfer of a chancery action to his home county based on the catch-all provision of § 11-5-1, contending that plaintiff's insurance fraud claim was an action *in personam* rather than *in rem*. *Id.* at 758. After finding that the dispute did respect personal property, the Court held that the case involved "one of the categories otherwise provided for" in the statute, negating the provision of § 11-5-1 allowing for venue in the county where a resident defendant resides. *Id.* at 759-60. Here, the personal property which constitutes the Marital Trust B *res,* the holding company stock certificates, has at all relevant times been located in Madison County. Thus, even apart from one of the rightful co-trustees, Richard III, residing in Madison County, Madison County is the proper venue under § 11-5-1. RV 3 of 62, pp. 320-350 (Richard III's response).

Even if § 11-5-1 allows a choice between the county where the property is located or the county where a defendant is located, the choice between proper, competing venues rests with the plaintiff, not the defendant. *Id.* at 759; *Herring Gas Company, Inc. v. Newton*, 941 So. 2d 839, 841 (Miss. App. 2006). Defendants incorrectly contend that absent waiver, the only permissible venue ever is one in which a defendant resides. If this principle were to operate as Defendants claim it

does, not only would it completely frustrate a plaintiff's choice between two proper venues, it would effectively nullify the preceding provisions of § 11-5-1. Further, if a defendant always has the right to demand venue in his or her home county, that almost certainly would have been the basis upon which the Madison County chancellor transferred the case originally. Of course, that was not her basis.

In fact, Defendants' cited authority for their position, *Ross v. Ross*, refers to "a defendant sued alone *in personam*" and adopts the principle that "[s]uits *wholly in personam* must be filed in the county where one of the necessary parties defendant resides." (emphasis added) 208 So. 2d 194, 195 (Miss. 1968). At the least, this proceeding is an in rem proceeding. It certainly is not one that is *wholly* in personam. 76 Am. Jur. 2d Trusts § 603 ("A proceeding for the removal of a trustee may be regarded as one in rem."). Furthermore, the Mississippi Supreme Court in *Guice* held the distinction between in rem and in personam cases to be irrelevant to its application of § 11-5-1, but rather that "[t]he central issue is whether the suit is one 'respecting personal property.'" *Guice*, 836 So. 2d at 760.

The Madison County chancellor's decision to transfer the case to Lauderdale County was based on an incorrect application of the venue statutes, and constituted a clear abuse of discretion. Both jurisdiction and venue are proper in Madison County Chancery Court, and the choice between permissible venues lies with the plaintiff in this case, not with the defendants. It was error in this case to deny Richard III his choice of an otherwise proper venue. The judgment of the Chancery Court of Lauderdale County should be vacated, and this case should be remanded to Madison County Chancery Court.

IV. DEFENDANTS SHOULD BE DISQUALIFIED TO SERVE AS CO-TRUSTEES

The chancellor erred by dismissing Richard III's claim to disqualify Defendants from serving as co-trustees based on *their* breaches of duty, their hostility, and their involvement in improperly trying to remove Richard III from both Bank positions and as co-trustee of Marital Trust B.

A Rule 41(b) involuntary dismissal must be denied if "the judge would be obliged to find for the plaintiff if the plaintiff's evidence were all the evidence offered in the case." *Alexander v. Brown*, 793 So. 2d 601, 603 (Miss. 2001). When reviewing a chancellor's disposition of a Rule 41(b) motion, this Court applies the substantial evidence/manifest error standards. *Id.* As discussed in Richard III's primary brief, and as discussed above, Richard III offered more than enough evidence to support each element of his claims, but the chancellor disregarded that evidence in its eagerness to rule against him.

Specifically, Richard III seeks to have Deanna removed as co-trustee due to her breaches of trust, particularly with regard to her expressed intention to "make the [Trust shares] mine"—her clear belief that she was a "super trustee" who had veto power and the right to dictate how the shares were voted. In her brief, Deanna does not address Richard III's contention that the chancellor should not have dismissed Richard III's claims in this regard. Neither does she account for her statements under oath that demonstrate that she viewed the Trust's assets as hers, and that her co-trustee (Richard III, but the same would apply to any successor) owed an obligation to do what Deanna said to do. Given her actions and statements regarding the Trust's assets, the disagreement over how to vote the Trust shares in 2007, and her attempt to remove Richard III as co-trustee on the ground that he was "incompetent" (even though she thought he was competent enough for her to try to vote for him as a director of the holding company during the same time frame), the record demonstrates that the chancellor erred in granting Defendants' Rule 41(b) motion to dismiss Richard III's claims.

Similarly, while Elizabeth and Garnett contend in their brief that the chancellor's grant of the Rule 41(b) motion was supported by the record, they cannot square their position with the fact that the same grounds they contend merited Richard III's removal *applied to them too*. They were involved in—indeed, in some cases each of them spearheaded—the same family transactions and decisions which they argue in hindsight should disqualify Richard III as a co-trustee. Their actions were also motivated, not by the interests of the income beneficiary, Deanna, but by self-interest and hostility toward Richard III.

Elizabeth and Garnett, like Deanna, signed the improper April 2007 Notice of Removal, which alleged that Richard III was incompetent to serve as co-trustee—even though they, like Deanna, did not believe Richard III to be incompetent at the time. *See* Garnett's depo., 166-167; Elizabeth's depo., 167. Beyond the chancellor's inexplicable conclusion that this patently false assertion in the Notice of Removal was evidence of Defendants' *good faith*, Richard III's sisters also indisputably shared the concerns that Richard III had about their mother's mental capacity and state of mind, at least through mid-2006. Elizabeth's testimony is clearly in line with Richard III's about her concerns about Deanna:

> A: Her memory, her ability to state what she was intending to say, her overall well-being. . . . her lack of memory and ability to remember things for short term . . . .
>
> Q: Was that the only problem you considered she had mentally or state of mind?
>
> A: No.
>
> Q: What other problems?
>
> A: Just getting everything done. She was easily confused. She was highly distractable, had a difficult time staying focused, very defensive, very easily upset. She was having a hard time—very-very hard time. And she was very difficult to get along with . . . .
>
> Q: Have you ever made the statement that your mother has dementia or suffers from dementia? Have you said that?
>
> A: If I said that, it was when I was concerned because of her memory problems. But she does not suffer from dementia. In dealing with all this grief, there was a time I was concerned about that, yes.
>
> Q: Did you ever make the statement to [Richard III] that she—mother seems like she's got dementia or something to that effect?
>
> A: Probably, I did. Because I trusted him and I was conferring with him in—with the—with her best interest at heart.

In another exchange, Elizabeth testified that she believed at the time that Deanna "had no business" serving on the Bank Holding Company board, or on the Inn Serve board, and "probably"

shared that belief with Richard III and Garnett. *Id.* at 32-33, 42. Elizabeth went on to discuss her mother's frequent auto accidents after Richard II's death, stating that for a time, she tried not to let her own children ride in the car with Deanna. *Id.* at 44-45. Elizabeth also testified that, at the time, she was concerned that Deanna had a drinking problem because of the all the stress she was under. *Id.* at 45-47. Right after Defendants effectuated their plan to remove Richard III from his Bank positions and have him resign from other positions, including co-trustee of Marital Trust B, their worry about Deanna's competency is clearly evidenced by an email Elizabeth's husband Russell circulated:

> What is our plan of action if [Richard III] claims that [Deanna] is "incompetent" and that she should be removed as co-trustee of the marital trust?

Despite expressing concerns about Deanna, Elizabeth was just as interested in the same transactions and decisions involving her mother as Richard III. Garnett was too, even though she also testified about Deanna's short-term memory loss, her difficulty in being able to focus, and the difficulty the children had in trying to talk to her ("she was very defensive and very hard to talk to"). Garnett stated that her mother was for a time only "focused on the turmoil." *Id.* at 27. Garnett also testified about the auto accidents she had. *Id.* at 32. Garnett shared her concerns with both Elizabeth and Richard III, and stated that they were "very exasperated and frustrated" in dealing with their mother. *Id.* at 31.

His sisters' testimony in this action makes Defendants' assertions that Richard III took advantage of his mother's mental state duplicitous at best. All three of them were to have the same ownership interest in the LLC created to own the Florida condo and in the Providence Trust. Yet the chancellor wholly excused Elizabeth and Garnett's conduct, dismissing Richard III's claims, even while relying on the same conduct by Richard III as a ground for his removal. The chancellor's disregard of the evidence Richard III presented in support of his claims against his sisters, as with his claims against Deanna, was error.

V. RICHARD III IS ENTITLED TO THE TRUSTEE FEE

Defendants contend that Richard III did not perform work as a co-trustee after April 10, 2007, the date on which Defendants claim to have removed him when they signed their Notice of Removal. *See* Williamson & Hutton's brief at p. 63. However, the chancellor set aside that removal attempt as void, and Richard III continued to be a co-trustee until the chancellor removed him in January 2010. Given those facts, Richard III was entitled to the co-trustee fee that is provided for in the Trust, an amount that is not less than three percent (3%) of the income of the Trust. *See* RE 6 (Item V(b)-(c)). The chancellor's ruling denying Richard III's claim to recover the unpaid co-trustee's fee is manifestly wrong, arbitrary and capricious.

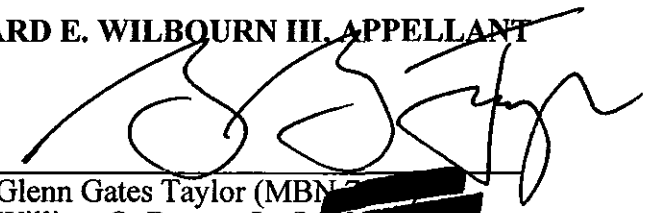
The chancellor set aside Defendants' Notice of Removal as improper and invalid, but then denied Richard III the co-trustee fee that he was entitled to receive until the chancellor removed him in January 2010. On November 21, 2007, it entered an order effectively enjoining the co-trustees from doing anything with the Trust except for making regular distributions to Deanna. The evidence established that after the notice of removal was signed on April 10, 2007, Defendants took control of the books, records, and bank account of Marital Trust B, they refused to provide Richard III with any accounting, and they refused to pay Richard III the co-trustee fees that he was owed. By the end of the third quarter of 2008, Richard III was owed co-trustee fees of $90,663.88 plus interest thereon. RE 18, Exhibit 320.

CONCLUSION

The Court should reverse the chancellor's removal of Richard III, reinstate Richard III as co-trustee of Marital Trust B, return the administration of the Trust to Richard III, and remand this case to the Madison County Chancery Court for the calculation and entry of judgment on all of the co-trustee's fee that is owed to Richard III, and for further proceedings as to whether Deanna, Elizabeth and Garnett should be disqualified to serve as co-trustees.

Respectfully submitted, this the 11th day of August, 2011.

RICHARD E. WILBOURN III, APPELLANT

By: 

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CERTIFICATE OF SERVICE

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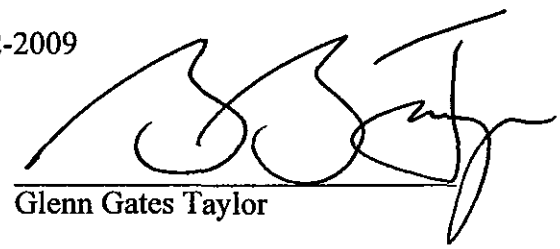

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