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IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER: 2010-CA-01608

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VERONICA BAUMGARDNER McKEE ARRINGTON and  
CHARLIE C. BAUMGARDNER

PLAINTIFFS /  
APPELLANTS /  
CROSS-APPELLEES

VERSUS

WILLIAM E. READY, Trustee

DEFENDANT /  
APPELLEE  
CROSS-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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"The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or refusal."

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FOR PLAINTIFFS / APPELLANTS / CROSS-APPELLEES

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Plaintiffs / Appellants / Cross-appellees

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APPELLEE /  
CROSS-APPELLANT

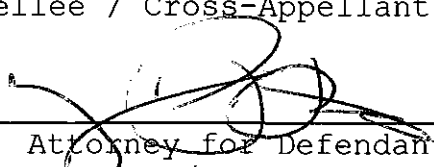
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Respectfully submitted,  
WILLIAM E. READY, SR., Defendant/  
Appellee / Cross-Appellant

BY: \_\_\_\_\_

  
Attorney for Defendant /  
Appellee / Cross-Appellant

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TABLE OF CONTENTS

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ITEM	PAGE
CERTIFICATE OF INTERESTED PERSONS . . . . .	ii
TABLE OF CONTENTS . . . . .	v
TABLE OF AUTHORITIES . . . . .	ix
STATEMENT REGARDING ORAL ARGUMENT . . . . .	xii
<u>Rule 34(a)(3) MRAP</u> . . . . .	xii
STATEMENT OF ISSUES . . . . .	1
STATEMENT OF THE CASE . . . . .	2
A. Nature of the Case . . . . .	2
B. Course of Proceedings Below . . . . .	3
<u>§27-25-23 Mississippi Code 1972</u> . . . . .	13
<u>§27-25-5(h) Mississippi Code 1972</u> . . . . .	13
STATEMENT OF FACTS . . . . .	16
SUMMARY OF THE ARGUMENT . . . . .	24
ARGUMENT . . . . .	25
Standards of Review . . . . .	25
<u>Wright v. O'Daniel</u> , 2009-CA-01531-COA (Miss.App. 3/1/2011) . . . . .	25
<u>Corp. Mgmt. v. Greene County</u> , 23 So.3d 454 (Miss. 2009) . . . . .	25

<u>Biglane v. Under The Hill Corp.</u> , 949 So.2d 9 (Miss. 2007) . . .	25
<u>Aladdin Construction Co. v. John Hancock Life Insurance Co.</u> , 914 So.2d 169(Miss. 2005) . . . . .	25
<u>Derr Plantation, Inc. v. Swarek</u> , 14 So.3d 711 (Miss. 2009) 25, 26	
<u>Issaquena Warren Counties Land Co., LLC v. Blakeney</u> , 996 So.2d 747 (Miss. 2008) . . . . .	25, 26
<u>A.D.R. v. J.L.H.</u> , 994 So.2d 177, 180 (Miss. 2008) . . . . .	26
<u>Andrew Jackson Life Insurance Co. v. Williams</u> , 566 So.2d 1172 (Miss. 1990) . . . . .	26
<u>In the Matter of the Estate of Bodman</u> , 674 So.2d 1245 (Miss. 1996) . . . . .	26
<u>Beamon v. State</u> , 9 So.3d 376 (Miss. 2009) . . . . .	26
<u>Bailey v. Bryant</u> , 734 So.2d 301 (Miss.App. 1999) . . . . .	26
Proposition 1	
THE LEARNED CHANCELLOR CORRECTLY ORDERED SALE OF TIMBER . . .	26
<u>Rule 706 MREvid</u> . . . . .	27
<u>Merriam-Webster's Collegiate Dictionary, 10<sup>th</sup> Ed. (1993)</u> . .	31
Proposition 2	
PLAINTIFFS WERE NOT ENTITLED TO ACCOUNTING . . . . .	32
<u>In re the Jane W. Stubbs-Kelley Trust</u> , 573 So.2d 734 (Miss. 1990) . . . . .	33, 34
<u>Ramage v. Ramage</u> , 322 S.E.2d 22 (S.C.Ct.App. 1984) . . . . .	34
<u>G. Bogert &amp; G. Bogert, The Law of Trusts and Trustees, §50</u> <u>(2nd ed. 1984)</u> . . . . .	34
<u>Beck v. Robinson</u> , 154 So.2d 284 (Miss. 1963) . . . . .	34
<u>Reagh v. Kelley</u> , 89 Cal.Rptr. 425, 10 Cal.App.3d 1082 (1970)	34
<u>Walker v. Cox</u> , 531 So.2d 801 (Miss. 1988) . . . . .	35

Proposition 3	
ESTATE OF EMOGENE BAUMGARDNER RECEIVED ALL THAT WAS DUE . . .	35
<u>Mellon v. Smith's Pecans, Inc.</u> , 2009-CA-00920-COA (Miss.App. 2/8/2011) . . . . .	36
<u>Dampier v. State</u> , 973 So.2d 221, 228 (Miss. 2008) . . . . .	36
CROSS-APPEAL	
Proposition	
THE COURT LACKED SUBJECT MATTER JURISDICTION	
AND PLAINTIFFS LACKED STANDING TO SUE . . . . .	37
<u>In re Jane W. Stubbs-Kelley Trust</u> , 573 So.2d 734	
(Miss. 1990) . . . . .	37, 38
<u>Ellzey v. McCormick</u> , 17 So.3d 583 (Miss. 2009) . . . . .	37
<u>Decell v. Hazlehurst Oil Mill &amp; Fertilizer Co.</u> , 83 Miss. 346,	
35 So. 761 (1904) . . . . .	38
<u>Hood v. Mississippi Department of Wildlife Conservation</u> , 571	
So.2d 263 (Miss. 1990) . . . . .	38
<u>Hunt v. Hunt</u> , 629 So.2d 548 (Miss. 1992) . . . . .	38
<u>Griffith, Mississippi Chancery Practice</u> , 2 <sup>ND</sup> Ed. (1950) \$429	38
<u>Schmidt v. Catholic Diocese of Biloxi</u> , 18 So.3d 814	
(Miss. 2009) . . . . .	40
<u>Kirk v. Pope</u> , 973 So.2d 981 (Miss.2007) . . . . .	40
<u>Pruitt v. Hancock Med. Ctr.</u> , 942 So.2d 797 (Miss.2006) . . .	40
<u>Dunn v. Miss. State Dep't of Health</u> , 708 So.2d 67 (Miss.1998)	40
<u>City of Picayune v. S. Regal Corp.</u> , 916 So.2d 510 (Miss.2005)	40
<u>State of Miss. v. Quitman County</u> , 807 So.2d 401 (Miss.2001) .	40
<u>Hall v. City of Ridgeland</u> , 37 So.3d 25 (Miss. 2010) . . . . .	40
<u>Jones v. Lutzen</u> , 2009-SA-01823-COA (Miss.App. 2/22/2011) . .	40
<u>Black's Law Dictionary 212 (abridged 7<sup>th</sup> ed. 2000)</u> . . . . .	40

<u>Delta Health Group, Inc. v. Estate of Pope</u> , 995 So.2d 123 (Miss. 2008) . . . . .	40
<u>Matter of Estate of Atkins v. Sartin</u> , 422 So.2d 754 (Miss. 1982) . . . . .	41
<u>Hutton v. Gwin</u> , 188 Miss. 763, 195 So. 486 (1940) . . . . .	41
<u>McGavock v. Whitfield</u> , 45 Miss. 452 (1871) . . . . .	41
<u>Martin v. Stevens</u> , 30 Miss. 159 (Miss. 1855) . . . . .	41
CONCLUSION . . . . .	42
CERTIFICATE OF SERVICE . . . . .	43

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TABLE OF AUTHORITIES

---

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AUTHORITY	PAGE
-----------	------

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CASES

<u>A.D.R. v. J.L.H.</u> , 994 So.2d 177, 180 (Miss. 2008) . . . . .	26
<u>Aladdin Construction Co. v. John Hancock Life Insurance Co.</u> , 914 So.2d 169 (Miss. 2005) . . . . .	25
<u>Andrew Jackson Life Insurance Co. v. Williams</u> , 566 So.2d 1172 (Miss. 1990) . . . . .	26
<u>Bailey v. Bryant</u> , 734 So.2d 301 (Miss.App. 1999) . . . . .	26
<u>Beamon v. State</u> , 9 So.3d 376 (Miss. 2009) . . . . .	26
<u>Beck v. Robinson</u> , 154 So.2d 284 (Miss. 1963) . . . . .	34
<u>Biglane v. Under The Hill Corp.</u> , 949 So.2d 9 (Miss. 2007) . . . . .	25
<u>City of Picayune v. S. Regal Corp.</u> , 916 So.2d 510 (Miss.2005) . . . . .	40
<u>Corp. Mgmt. v. Greene County</u> , 23 So.3d 454 (Miss. 2009) . . . . .	25
<u>Dampier v. State</u> , 973 So.2d 221, 228 (Miss. 2008) . . . . .	36
<u>Decell v. Hazlehurst Oil Mill &amp; Fertilizer Co.</u> , 83 Miss. 346, 35 So. 761 (1904) . . . . .	38
<u>Delta Health Group, Inc. v. Estate of Pope</u> , 995 So.2d 123 (Miss. 2008) . . . . .	40
<u>Derr Plantation, Inc. v. Swarek</u> , 14 So.3d 711 (Miss. 2009) 25, 26	
<u>Dunn v. Miss. State Dep't of Health</u> , 708 So.2d 67 (Miss.1998) . . . . .	40
<u>Ellzey v. McCormick</u> , 17 So.3d 583 (Miss. 2009) . . . . .	37
<u>Hall v. City of Ridgeland</u> , 37 So.3d 25 (Miss. 2010) . . . . .	40



<u>Hood v. Mississippi Department of Wildlife Conservation</u> , 571 So.2d 263 (Miss. 1990) . . . . .	38
<u>Hunt v. Hunt</u> , 629 So.2d 548 (Miss. 1992) . . . . .	38
<u>Hutton v. Gwin</u> , 188 Miss. 763, 195 So. 486 (1940) . . . . .	41
<u>In the Matter of the Estate of Bodman</u> , 674 So.2d 1245 (Miss. 1996) . . . . .	26
<u>In re the Jane W. Stubbs-Kelley Trust</u> , 573 So.2d 734 (Miss. 1990) . . . . .	33, 34, 37, 38
<u>Issaquena Warren Counties Land Co., LLC v. Blakeney</u> , 996 So.2d 747 (Miss. 2008) . . . . .	25, 26
<u>Jones v. Lutzen</u> , 2009-SA-01823-COA (Miss.App. 2/22/2011) . .	40
<u>Kirk v. Pope</u> , 973 So.2d 981 (Miss.2007) . . . . .	40
<u>Martin v. Stevens</u> , 30 Miss. 159 (Miss. 1855) . . . . .	41
<u>Matter of Estate of Atkins v. Sartin</u> , 422 So.2d 754 (Miss. 1982) . . . . .	41
<u>McGavock v. Whitfield</u> , 45 Miss. 452 (1871) . . . . .	41
<u>Mellon v. Smith's Pecans, Inc.</u> , 2009-CA-00920-COA (Miss.App. 2/8/2011) . . . . .	36
<u>Pruitt v. Hancock Med. Ctr.</u> , 942 So.2d 797 (Miss.2006) . . .	40
<u>Ramage v. Ramage</u> , 322 S.E.2d 22 (S.C.Ct.App. 1984) . . . . .	34
<u>Reagh v. Kelley</u> , 89 Cal.Rptr. 425, 10 Cal.App.3d 1082 (1970) .	34
<u>Schmidt v. Catholic Diocese of Biloxi</u> , 18 So.3d 814 (Miss. 2009) . . . . .	40
<u>State of Miss. v. Quitman County</u> , 807 So.2d 401 (Miss.2001) .	40
<u>Walker v. Cox</u> , 531 So.2d 801 (Miss. 1988) . . . . .	35
<u>Wright v. O'Daniel</u> , 2009-CA-01531-COA (Miss.App. 3/1/2011) .	25

## CONSTITUTIONS

Mississippi

None

United States

None

## STATUTES

Mississippi

§27-25-23 Mississippi Code 1972 . . . . . 13

§27-25-5(h) Mississippi Code 1972 . . . . . 13

United States

None

## TREATISES

Black's Law Dictionary 212 (abridged 7<sup>th</sup> ed. 2000) . . . . . 40

G. Bogert & G. Bogert, The Law of Trusts and Trustees, §50  
(2nd ed. 1984) . . . . . 34

Griffith, Mississippi Chancery Practice, 2<sup>ND</sup> Ed. (1950) §429 . . . . . 38

Merriam-Webster's Collegiate Dictionary, 10<sup>th</sup> Ed. (1993) . . . . . 31

## RULES OF COURT

Rule 34(a)(3) MRAP . . . . . xii

Rule 706 MREvid . . . . . 27

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STATEMENT REGARDING ORAL ARGUMENT

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Pursuant to Rule 34(a)(3) MRAP, Defendant / Appellee / Cross-Appellant respectfully suggests that oral argument will aid the decisional process by providing an opportunity to clarify uncertainty of facts in the record on appeal as well as questions of first impression.

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## STATEMENT OF ISSUES

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Whether Plaintiff residual distributees had standing to demand an accounting of private trusts where (1) distributees are not trust beneficiaries; (2) the private trusts granted broad discretion to and waived bond, inventory, and accounting from the Trustee; (3) there was no showing of Trustee's misconduct; (4) the sole beneficiary and her guardian actually received trust financial information (REx 71-73); and (4) neither the sole beneficiary nor residual charitable distributees complained. The learned Chancellor properly denied Plaintiffs' demand.

Plaintiff residual distributees' remaining contentions concern (1) an Order based upon a Guardian's report (REx 74-80) and an in camera forester's report; (2) an Order approving bids for sale of timber and transfer of Marital Deduction Trust assets from the Trustee to the Guardian (REx 23-31); and (3) the amount of relief granted in the Supplemental Final Judgment (REx. 15-16).

This Honorable Court should affirm the learned Chancellor.

On cross-appeal, whether, without a predicate showing of Defendant Trustee's incompetence or misconduct, the Court had subject matter jurisdiction of Plaintiffs' claim for accounting in a private, discretionary trust that waived bond, inventory, and accounting and vested absolute discretion in the Trustee?

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STATEMENT OF THE CASE

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A.  
NATURE OF THE CASE

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Where the testator / trustor (1) did devise, bequeath, and grant assets in trust to Defendant Trustee and (2) specifically waived accounting and (3) vested total discretion in Defendant Trustee as to disbursements from the Family Trust and (4) most of the residual estate is vested in charitable distributees (not Plaintiffs / Appellants), must the trustee account to Plaintiff residual distributees? Neither the sole lifetime trust beneficiary nor the charitable residual distributees complained.

The learned Chancellor granted no relief.

Plaintiff residual distributees sought to remove Defendant Trustee from office; examine trust records; and appoint a successor trustee. Defendant Trustee denied Plaintiff residual distributees' claims, asserting (1) that Plaintiff residual distributees were not entitled to the requested relief, (2) that Plaintiff residual distributees had no evidence of irregularities in trust administration, and (3) that neither the sole lifetime trust beneficiary nor the charitable residual distributees complained. By agreement, the Court's appointed Guardian Ad Litem / Conservator of the sole lifetime trust beneficiary did examine the Trustee's records and reported to the Court.

Upon Defendant Trustee's agreement so to do, the Chancellor:  
(1) Ordered a timber sale to preserve the capital value of the trusts; (2) that the portion of net proceeds of the court approved timber sale attributable to the testamentary Marital Deduction Trust, together with other assets of the testamentary Marital Deduction Trust, be transferred from Defendant Trustee to the sole trust beneficiary's Guardian Ad Litem / Conservator and (3) that, upon completion of transfer, Defendant Trustee was acquitted (R.779).

After the sole trust beneficiary died, the Court approved the Guardian Ad Litem / Conservator's final accounting and discharged him. The Guardianship / Conservatorship's assets passed to the sole testamentary beneficiary's probate estate.

The Court ordered the testamentary Family Trust to "reimburse unto the conservatorship of Emogene Baumgardner the amount of \$205,000.00" (REx 15, R.1263) in full settlement of the Family Trust's obligations to the sole trust beneficiary.

Plaintiff residual distributees appealed.

This Court should affirm the learned Chancellor.

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B.  
COURSE OF PROCEEDINGS BELOW

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A summation of decades of events follows.

1996

03/28/96 Defendant Trustee and lifetime trust beneficiary Emogene Baumgardner contract with Ralph Morgan and Johnny Ralph Morgan to manage timber assets in the Marital Deduction Trust and the Family Trust (REx.77; (Ex. E. to 1/14/98 Mot. Auth. Inst. Lit. (R.49-54; REx34-39))).

Heretofore, the sole surviving trust beneficiary, Emogene Baumgardner, personally sold pulpwood timber from trust lands and received all timber sale proceeds without passing through either testamentary trust (REx 78). Additionally, Defendant Trustee paid a fixed monthly sum to the sole beneficiary, together with any requested additional funds (REx 78).

Conservatorship Begins

08/01/1996 Plaintiff Veronica Baumgardner McKee filed a Complaint for Letters of Conservatorship (R.8).

08/07/1996 Judgment Appointing a Conservator, civil action number 96-834-S (R.13).

12/10/1996 Letter and Inspection Report of H. D. Baumgardner Estate from E. Lynn Prine, President, Southern Resource, Inc., (Ex. D to 1/14/98 Mot. Authority to Inst. Litig. (R.49-54, REx34-39))).

1997

03/03/1997      Order of Recusal of Chancellors of Lauderdale  
County (R.28, R.263).  
10/24/1997      Order from Mississippi Supreme Court appointing  
Chancellor J. Larry Buffington (R.30).

1998

Litigation Begins

01/14/1998      Plaintiff Veronica Baumgardner McKee filed Motion  
for Authority to Institute Litigation (R.49-54;  
REx34-39).  
01/14/1998      Judgment Authorizing Litigation (R.55).  
06/30/1998      Defendant Trustee filed Motion to Remove  
Conservator (R.116) and Motion for Summary  
Judgment (R.123) and supporting memorandum (R.127)  
and supporting affidavit.

1999

06/01/1999      First Hearing - Hearing of Defendant Trustee's  
Motion to Remove Conservator; bench ruling  
removing Plaintiff Conservator Veronica B. McKee  
as Conservator of Emogene Baumgardner

2000

02/28/2000      Order Appointing Edward N. Kramer, III, Esq. as  
Guardian Ad Litem for Emogene Baumgardner (R.282).  
09/08/2000      Order clarifying 02/28/2000 Order Appointing



Edward N. Kramer, III, Esq. as Guardian Ad Litem  
for Emogene Baumgardner (R.383).

2001

08/13/2001 By Agreed Order with Defendant Trustee (REx71-73),  
Guardian Ad Litem / Conservator Kramer was given  
free access to

2. The Guardian Ad Litem, with the agreement of but without any waiver by the Trustee, may conduct an informal examination the trust records of the Harold D. Baumgardner Marital Deduction Trust and the Baumgardner Family Trust for the purpose of ascertaining the financial integrity thereof and to evaluate the transactions conducted therein for forming an opinion as to the allegations of the Complaint.

3. The Guardian Ad Litem may carry out the aforesaid examination accompanied by an independent certified public accountant to the chosen by the Guardian Ad Litem for the purpose [**\*REx 72**] of rendering expert advice regarding the Guardian Ad Litem's examination of said records. \* \* \*

[REx 71-72].

and

6. Upon completion of the Guardian Ad Litem's examination of trust records, the Guardian Ad Litem shall submit his report to this Court in camera, specifically enumerating, if any, all deficiencies, conflicts or irregularities therein, and also shall provide a summary analysis of his and the CPA's opinion of the status of the assets of each Trust. [**\*REx73**]

7. In order to maintain the confidentiality of both Trusts and/or both Trustees, as well as to facilitate orderly and timely examination as recited herein, the Guardian Ad Litem, or any others authorized herein, may not disclose any information, matter and/or thing acquired or contained in either Trust, unless and until the Chancellor has authorized disclosure of the content and extent of detail thereof, after prior notice and opportunity for full hearing and appeal rights for the parties herein.

SO ORDERED AND ADJUDGED, this the 1<sup>st</sup> day of Aug,

2001.  
(REx72-73).

12/10/2001 Report and Recommendation of Guardian Ad Litem  
filed (R.404, REx74-80) noting, inter alia, that  
ample provision for widow / lifetime trust  
beneficiary Emogene Baumgardner already existed  
(REx79).

12/17/2001 Order Sua Sponte Appointing Independent Land  
Appraiser (R.412).

2002

01/11/2002 Second Hearing —

- (1) Court GRANTED Plaintiffs' Motion to Amend  
Complaint (T.9).
- (2) Court GRANTED Defendant Trustee's Motion to  
Reconsider 12/17/2001 Order Sua Sponte  
Appointing Independent Land Appraiser to  
require response be returned to the Court in  
camera and to the Guardian Ad Litem (T.9-10,  
39); said appraisal of 1,800± acres in  
Lauderdale and Kemper Counties (T.13) to be  
returned within sixty (60) days (T.14) (i.e.  
March 12, 2002) and Charlie Jones (Forester)  
acknowledged his in camera instructions  
(T.39).
- (3) Court GRANTED Plaintiffs' Ore Tenus Motion to

Appoint Conservator of the Estate (T.15-16)

and

(A) appointed Edward N. Kramer, III, Esq.,  
Conservator of the Estate of Emogene  
Baumgardner (T.20-21) and

(B) *continued* Edward N. Kramer, III, Esq.'s  
appointment as Guardian Ad Litem for  
Emogene Baumgardner (T.15, 20-21)

(4) Court DENIED Defendant Trustee's Ore Tenus  
Motion to Dissolve Lis Pendens (T.18-19)  
until after receipt of Independent Land  
Appraiser's report (T.19, 38);

(5) Court GRANTED Plaintiffs' Ore Tenus Motion to  
File Final Accounting for Plaintiff Veronica  
Baumgardner McKee as Conservator of the  
Estate of Emogene Baumgardner (T.22)

(6) Court ORDERED

(A) Defendant Trustee's June 30, 1998 Motion  
for Summary Judgment held in abeyance  
(T.24);

(B) Defendant Trustee's March 16, 1998  
Motion to Stay Discovery be held in  
abeyance (T.34); and

© Defendant Trustee's March 16, 1998

Motion for Protective Order be held in  
abeyance (T.34)

(D) Plaintiffs' April 21, 1998 Motion to  
Compel Discovery be held in abeyance  
(T.34);

(7) Court GRANTED Defendant Trustee's Ore Tenus  
Motion to require Plaintiffs' counsel to elect  
whether counsel wished to represent Plaintiff  
Veronica Baumgardner McKee, Conservator of  
the Person of Emogene Baumgardner, or to  
represent Edward N. Kramer, III, Esq.,  
Conservator of the Estate of Emogene  
Baumgardner (T.36) and Plaintiffs' counsel  
agreed to notify all parties of counsel's  
decision (T.37)

03/18/2002 Order Appointing Edward Kramer as Conservator of  
Estate of Emogene Baumgardner (R.466).

03/18/2002 Order taking Plaintiffs' 4/21/1998 Motion to  
Compel Discovery; Defendant Trustee's 3/16/1998  
Motion for Protective Order re Discovery; and  
Defendant Trustee's 6/30/1998 Motion for Summary  
Judgment under advisement (R.463).

03/18/2002 Order GRANTING Defendant Trustee's 01/07/2002  
Motion to Reconsider 12/17/2001 Order Sua Sponte

Appointing Independent Land Appraiser to provide for in camera return of land appraisal (R.464).

04/22/2002

Third Hearing (No Court Reporter Available)-

Chancellor J. Larry Buffington; Edward N. Kramer, III, (Conservator of Emogene Baumgardner Estate & Guardian Ad Litem); Don O. Rogers and Joe Clay Hamilton (Plaintiffs' counsel); William E. Ready, Sr., Trustee; Robert D. "Robbie" Jones and Henry P. Pate (Trustee's counsel); and Forester Charlie D. Jones present in Chancery Court. Chancellor Buffington announced

- (1) in camera receipt and review of report of Charlie D. Jones, Registered Forester and conference w/ Conservator re the same
- (2) Forester Jones' report indicated insect (pine borer beetle) infestation of some of the Trusts' timber holdings
- (3) Chancellor suggested immediate sale of timber and Defendant Trustee agreed with the Court
- (4) Chancellor suggested that Forester C. Jones be retained to solicit bids, returnable within 75 days, subject to Trustee's request that Ralph Morgan be given opportunity to meet or exceed selected bids and Defendant

Trustee agreed.

(5) Chancellor conferred with Forester Jones in camera and then announced that Forester Jones agreed to perform the sale for a 3% commission, to which Defendant Trustee agreed.

(6) Selected bid and sale terms to be submitted to Chancellor Buffington within 15 days of selection for Court's approval of sale.

07/03/2002 Order for court ordered Sale of Timber (R.735)

On July 3, 2002, Guardian Ad Litem / Conservator Kramer, Defendant Trustee Ready, and Forester Jones met at the Guardian Ad Litem Kramer's offices (R.742, REx89) to receive and tabulate timber bids. Ralph Morgan then bid \$3,070,840.50 (R.742, REx89) which sum Defendant Trustee accepted and immediately advised all present (including Plaintiffs' counsel) (R.742, REx89; R.779, REx25-26)).

Per Report and Recommendation of Guardian Ad Litem/  
Conservator (R.742), the highest bids made for timber upon:

A. The Marital Deduction Trust Lands . . . . .	\$1,066,985.00;
B. The Family Trust Lands . . . . .	\$ 986,084.25;
C. The Homeplace Lands . . . . .	<u>\$1,017,671.00;</u>
Total of Highest Bids . . . . .	\$3,070,740.25

07/12/02 Guardian Ad Litem / Conservator filed Report and

Recommendation of Guardian Ad Litem / Conservator;  
including timber bid forms and tabulation of same  
(R.742, REx 89-99)).

07/30/02 Court entered its Order to Accept Timber Bids and to  
Transfer Assets of Baumgardner Marital Deduction Trust  
(R.779, REx23-31) providing in part:

AND, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED  
that Edward N. Kramer, III, Esq., Guardian Ad Litem  
[\*REx30] of Emogene Baumgardner and Conservator of the  
Estate of Emogene Baumgardner, be and the same is  
hereby authorized to request the transfer of the assets  
of the Baumgardner Marital Deduction Trust, pursuant to  
Federal Law and Trust document provisions, for Emogene  
Baumgardner and that William E. Ready, Esq., Trustee of  
the Baumgardner Marital Deduction Trust, be and the  
same hereby is authorized to effect the liquidation and  
transfer of assets from the Baumgardner Marital  
Deduction Trust to the Conservatorship of Emogene  
Baumgardner, Edward N. Kramer, III, Esq., Conservator.

AND, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED  
that all such transferred liquid assets shall  
thereafter be held in the Conservatorship of Emogene  
Baumgardner, Edward N. Kramer, III, Esq., Conservator,  
and used for her support, maintenance and requests as  
this Court shall issue further Orders concerning the  
same.

AND, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED  
that, upon completion of the said transfer of assets as  
aforesaid, then the Baumgardner Marital Deduction Trust  
shall stand dissolved.

AND, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED  
that, upon such dissolution of the Baumgardner Marital  
Deduction Trust, William E. Ready, Trustee, and his  
agents, servants, and employees, and all those acting  
in concert with William E. Ready, Trustee, shall stand  
fully and finally acquitted and discharged from all  
further duty, liability, and/or responsibility for the  
said Trust including any assets thereof transferred to  
the Conservatorship of Emogene Baumgardner.  
(emphasis supplied). [7/30/2002 Order, REx 29-30, R.779].

The Conservatorship of Emogene Baumgardner received

\$744,467.62 (Brf.Appel 9, *citing* R.832) as the Conservatorship's portion of the net timber sale proceeds.<sup>1</sup> Per Trust directions, Defendant Trustee executed Deeds (drawn by Plaintiffs' counsel) to the "Home Place" in Plaintiff distributees' favor. Defendant Trustee surrendered all Marital Deduction Trust assets to Guardian Ad Litem / Conservator Edward N. Kramer, III, Esq.

2004

Conservatorship Ends

**04/12/04 *Emogene Baumgardner died*** (Death Certificate).

07/02/04 Plaintiff residual distributees filed a *post-mortem* Motion to Allocate Timber Sale Proceeds, Enforce Mississippi's Best Management Practices, Order Replanting and Spraying, Confirm Ownership of Property, and Order Payment to Remaindermen and Affirmative Matters and Motions (REx 104, R.993).

08/13/04 Order approving final (6<sup>th</sup>) accounting and discharging Guardian Ad Litem / Conservator Edward N. Kramer, III, Esq. (R.1180).

Neither lifetime trust beneficiary Emogene Baumgardner, nor Guardian Ad Litem/Conservator Kramer, nor the residual charitable

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<sup>1</sup> Under §27-25-23 Mississippi Code 1972, severance taxes were due on or before the 15<sup>th</sup> day of the month next succeeding the month of the timber sale (i.e by August 15, 2002). Here "severance" occurred upon execution of the timber deed because the timber deed did "... otherwise separate or produce from the soil or water any timber or timber products." §27-25-5(h) Mississippi Code 1972.



distributees, nor the Court ever alleged any wrongful allocation of net timber sale proceeds.

2008

08/22/08 Fourth Hearing. Responding to Plaintiff Arrington's motion, Defendant Trustee raised lack of Court's jurisdiction, noting expiration of the Supreme Court's appointment of Chancellor because the Conservatorship terminated upon the death of Emogene Baumgardner and because Guardian Ad Litem / Conservator Kramer filed a final accounting of the Conservatorship and had been discharged by the Court.

The Court directed that Plaintiff residual distributees obtain an extension of Chancellor's appointment before Plaintiff residual distributees could be heard.

2009

03/13/09 Fifth Hearing. Oral argument upon the affirmative defenses and motions of Defendant Trustee, to-wit: (1) "Suggestion of Need for Joinder", (2) "Suggestion of Lack of Subject Matter Jurisdiction", (3) "Suggestion of Lack of Standing and/or Capacity, and (4) "Suggestion of Equitable Doctrine of Laches". The Court also heard argument upon Plaintiff Arrington's Motion to Allocate Timber Sale Proceeds, Enforce

Mississippi's Best Management Practices, Order  
Replanting and Spraying, Confirm Ownership of Property,  
and Order Payment to Remaindermen at Affirmative  
Matters and Motions.

The Court ruled (1) that the Court did have  
subject matter jurisdiction, (2) that the Court would  
overrule Defendant's "Suggestion of Lack of Subject  
Matter Jurisdiction" and (3) that the Court would take  
Defendant Trustee's remaining affirmative matters and  
defenses under advisement, together with Plaintiffs'  
Motion to Allocate Timber Sale Proceeds, Enforce  
Mississippi's Best Management Practices, Order  
Replanting and Spraying, Confirm Ownership of Property,  
and Order Payment to Remaindermen and Defendant's  
Response thereto.

06/19/09 The Court entered its Final Judgment (R.1248; REx12-14)  
concluding:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that  
all acts taken by the trustee are approved and ratified  
with the exception of repayment to the estate of funds  
paid from Ms Baumgardner's funds for her needs prior to  
her death and likewise for the replanting and  
reforestation of the lands of [\*REx14] the Estate of  
Baumgardner from Home Place funds. That should the  
parties not be able to agree on the cost incurred that  
they will notify the Court within thirty days of the  
date of this order so that the Court may assess the  
same.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that  
upon completion of the matters addressed in this order  
that the trustee may distribute the remaining [sic] of

the trust funds pursuant to the wishes of Mr. Baumgardner.

SO ORDERED, ADJUDGED AND DECREED, this the 17<sup>th</sup> day of June, 2008 [sic].  
(emphasis supplied). (REx13-14).

2010

09/03/2010 The Court entered its Supplemental Final Judgment  
(R.1263; REx15-16) stating

The Court has reviewed the conservatorship file, as well as the various pleadings in the lawsuit involving the trust, and finds that the trust should reimburse unto the conservatorship of Emogene Baumgardner the amount of \$205,000. That this sum [\*REx16] represents a fair and reasonable amount necessary for the expenses that would have been incurred by the trustee pursuant to the trust.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the previous order entered in this matter shall remain in full force and effect and it shall be supplemented by this order which addresses the issue that the Court left open for resolution by the parties or in the event they were unable to be resolved by the Court.

SO ORDERED, ADJUDGED AND DECREED this the 1<sup>st</sup> day of September, 2010.  
(emphasis supplied). (REx15-16).

9/29/2010 Plaintiff residual distributees filed a Notice of Appeal.

9/30/2010 Defendant Trustee filed a Cross-Notice of Appeal.

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C.  
STATEMENT OF FACTS

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1970

11/13/1970 Harold D. Baumgardner executed his Last Will and Testament (REx44-53).

The November 13, 1970 Last Will and Testament of Harold D.

Baumgardner stated in part:

The trustee of the Harold D. Baumgardner Marital Deduction Trust and the Baumgardner Family Trust is hereby relieved of any obligation or liability to any one for errors of judgment, excluding only those errors which are committed in bad faith.

[\*REx52]

Executor and Trustee

I hereby nominate, constitute and appoint William E. Ready as Executor of this my Last Will and Testament, to serve without bond or accounting.

I hereby name, nominate, constitute and appoint William E. Ready as Trustee of the trusts created in Article II herein, to serve without bond, inventory or accounting. I hereby name, nominate, and constitute William E. Ready as Trustee of the trust created in Article III hereof, to serve without bond, inventory or accounting. In the event of a refusal or resignation in either trust, the named trustee shall name a local bank to serve in his place and stead and with the power of the one resigning, in order to assure longevity and continuity of office.

(emphasis supplied). [H. D. Baumgardner Last Will and Testament p.9; (REx51-52)].

Article II of Harold D. Baumgardner's 11/13/70 Last Will and Testament created a Marital Deduction Trust and stated in part:

Upon the death of my wife, Emogene Baumgardner, the Harold D. Baumgardner Marital Deduction Trust shall terminate, and all of the trust corpus and any income not distributed shall be transferred and conveyed by my trustee to or for the benefit of such person or persons, corporation or corporations, or to the estate of my wife, in such amounts or proportions, and in such lawful interests or estates, whether absolute or in trust, as my wife, by her Last Will and Testament, may appoint. However, in the event she fails to designate a beneficiary of this trust's assets, I give, devise and bequeath said assets to the Baumgardner Family Trust under Article III hereof, for the benefit of my named beneficiaries thereof to be there handled and disposed of as directed hereinafter.

(emphasis supplied). (REx.46).

1978

12/27/1978 Harold D. Baumgardner executed the Codicil to the  
11/13/70 Last Will and Testament of Harold D.  
Baumgardner (REx54-58) and providing in part:

II

I hereby change, alter and amend Article III, entitled "Family Trust" of my above referenced Last Will and Testament by striking, terminating and excluding the entire Article and including therein in the place and stead of said excluded Article, the following words so that the said Article III of my said Last Will and Testament shall read as follows:

"All amounts and incomes consigned to and designated, as above required, I hereby give, devise and bequeath to the Trustee hereinafter named in trust.

The Trustee shall, upon receipt of such properties, divide said properties into two equal shares. In dividing the corpus of the trust, the Trustee shall have complete and absolute discretion in determining the class and items [**\*REx55**] of property which is to be designated for each beneficiary, and in valuing said properties for purposes of this division.

The Trustee shall manage, invest and reinvest the trust corpus; collect the income therefrom, and, in the sole and absolute discretion of the Trustee, the said corpus and income of each share of the trust may be:

Distributed in whole or in part to or for the benefit of Mrs. Emma Mae Crooker and Mrs. Amanda Rivers, so long as either shall live, for their welfare, support and maintenance in such amounts as may be deemed advisable, in the discretion of the Trustee;

Distributed in whole or in part, to the extent said Trustee deems advisable in the uncontrolled exercise of his discretion, to my wife, Emogene Baumgardner, but not to exceed that which is necessary for the

maintenance of my said wife's customary standard of living, in any year in which the income from Harold D. Baumgardner Marital Deduction Trust, hereinabove created, and from all other sources is, in the sole judgment and discretion of my said Trustee, insufficient for her said maintenance. I expressly direct that any rules or law which require fairness or impartiality as between my wife and other beneficiaries be disregarded and my Trustee shall exercise the authority herein given to him in the interest of my wife without regard to the interest of others, for so long as my wife shall live. Should any part of the income not be distributed under the foregoing provisions, the part not so distributed shall be added to and become part of the corpus of this trust. (emphasis supplied). [12/27/1978 Harold D. Baumgardner Codicil to the 11/13/70 Last Will and Testament of Harold D. Baumgardner, Paragraph II, pp.1-3; (REx.54-55)].

Harold D. Baumgardner expressly (1) waived all accounting and (2) vested "absolute" discretion in the Trustee. The obligation to support Emogene Baumgardner was determinable with due regard for all sources of her income. There was no obligation that the trusts pay 100% of Mrs. Baumgardner's expenses; only to pay income produced by the Marital Deduction Trust to Sole Lifetime Beneficiary, Emogene Baumgardner.

The Codicil continued:

The corpus of this trust shall be, if not otherwise done pursuant to other provisions of this Will, distributed as follows:

Upon the condition that my wife, Emogene Baumgardner, my mother-in-law, Mrs. Rivers, and my mother, Mrs. Crooker, shall have then died, my home place (the home and acreage adjacent thereto as was occupied by my wife and myself during our lives) shall be equally divided between our children, Veronica C. B. McKee and Charlie C.

Baumgardner, \* \* \*. \* \* \*.

The one condition that is herein provided of the transfer of assets of this trust to our children shall be that the passage of title to the properties, as aforesaid, to each child shall be conditioned upon their keeping their portion of the referenced home place property (600 acres more or less) until they are forty years of age. This is, each child shall retain the property acquired hereunder until his or her fortieth birthday. The balance of the corpus of the trust shall be divided equally among the following: [\*REx57]

The Mental Health Association of Lauderdale County, Mississippi;

The American Red Cross of Lauderdale County, Mississippi;

O. M. S. International, Inc.  
P. O. Box A, Greenwood, Indiana 46142;

St. Labre Indian School, Ashland, Montana 59003;

Piney Woods School, Jackson, Mississippi.

Immediately upon the last distribution above provided, the Harold D. Baumgardner Trust shall terminate and cease to exist, unless previously exhausted or unless terminated under other provisions of this article.

(emphasis supplied). [12/27/1978 Harold D. Baumgardner Codicil to the Last Will and Testament of Harold D. Baumgardner, Paragraph II, pp.1-3; (REx.56-57)].

1979

01/12/1979      **Harold D. Baumgardner died** (Brf.Appl 6) survived by his wife / Sole Surviving Lifetime Trust Beneficiary, Emogene Baumgardner, and his two (2) adopted children (Plaintiff distributees Charlie C. Baumgardner and Veronica Baumgardner McKee Arrington).

02/02/1979      Petition for Probate of Will and Letters  
Testamentary in Estate of Harold D. Baumgardner,  
E-2658 (Ex. A to 1/14/98 Mot. Auth. Inst. Lit.  
(R.49-54; REx34-39)).

02/02/1979      Order of Probate of Will and Letters Testamentary  
Without Bond or Accounting; admitting Harold D.  
Baumgardner's Last Will and Testament and Codicil  
to probate -- Lauderdale County Chancery Court  
civil action number: E-2658, Minute Book 233,  
page 427-428.

1981

01/07/1981      Petition to Close Estate and to Transfer Assets  
in Estate of Harold D. Baumgardner (Ex. B. to  
1/14/98 Mot. Auth. Inst. Lit.(R.49-54; REx34-39)).

02/02/1981      Order Approving and Closing Estate and  
Transferring Assets in Estate of Harold D.  
Baumgardner, E-2658, Minute Book 257, page 438-  
443, Chancery Clerk of Lauderdale County,  
Mississippi (Ex. w/ 1/14/98 Mot. Auth. Inst. Lit.  
(R.49-54; REx34-39)).

06/10/1981(?)    Petition to Amend the Order Approving and Closing  
Estate and Transferring Assets (Ex. w/ 1/14/98  
Mot. Auth. Inst. Lit. (R.49-54; REx34-39)).

06/12/1981      Amendment to Order Approving and Closing Estate



and Transferring Assets in Estate of Harold D. Baumgardner, E-2658, Minute Book 262, page 323-327, Chancery Clerk of Lauderdale County, Mississippi (Ex. w/ 1/14/98 Mot. Auth. Inst. Lit. (R.49-54; REx34-39)).

Upon closing the Estate of Harold D. Baumgardner on June 12, 1981, and in accordance with Harold D. Baumgardner's November 13, 1970 Last Will and Testament and December 27, 1978 codicil thereto, a "Marital Deduction" Trust was established for the benefit of Mrs. Emogene Baumgardner (LW&T pp.1-4 (REx 4-53) as exhibited with Plaintiffs' 1/14/98 Complaint (REx 40-43) and a "Family" Trust (LW&T pp.4-6 (REx 44-53) as exhibited with Plaintiffs' 1/14/98 Complaint (REx 40-43).

On June 12, 1981, the Chancery Court of Lauderdale County, Mississippi entered an Amendment to the Order Approving and Closing Estate and Transferring Assets (Minute Book 262, pp.323-327) providing in pertinent part:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the prior order approving and closing estate and transferring assets is amended to include the recordation of the following provisions of the deceased's Will to exhibit the Trustee's power and authority to, among other things, transfer title to the trust properties:

TRUSTEE'S POWER, ETCETERA [sic]

The Trustee of the Harold D. Baumgardner Deduction Trust and the Baumgardner Family Trust shall take the property herein devised and bequeathed to him without any formality and without the necessity of submitting his acts to the review of any court.

\* \* \*

The trustee of the Harold D. Baumgardner Marital Deduction Trust and the Baumgardner Family Trust is hereby relieved of any obligation or liability to any one for errors of judgment, excluding only those errors which are committed in bad faith."  
(emphasis supplied).

Under the June 12, 1981 Order during administration of the Estate of Harold D. Baumgardner, the Trustee's actions were expressly exempted from "*the necessity of submitting his acts to the review of any court.*"

2004

**04/12/04 Emogene Baumgardner died** (Death Certificate).

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## SUMMARY OF THE ARGUMENT

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The learned Chancellor should be affirmed.

### PROPOSITION 1

On direct appeal, Plaintiff distributees failed to demonstrate Defendant Trustee's alleged misconduct. Absent evidence of misconduct, the learned Chancellor correctly denied Plaintiff distributees' access to private trust books of account in a private trust where the Testator / Grantor (1) repeatedly waived accounting, inventory, and appraisal and (2) vested absolute discretion was in Defendant Trustee.

By agreement, the Court's appointed Guardian / Conservator did examine the Trusts' books of account and rendered a report to the Court. Trust's timber was sold to preserve capital. The Court approved the terms as well as the amount received. The learned Chancellor should be affirmed.

### PROPOSITION 2

On cross-appeal, the learned Chancellor erred in denying Defendant Trustees' Motion to Dismiss for lack of subject matter jurisdiction and/or standing. This Honorable Court should dismiss this appeal for lack of subject matter jurisdiction and/or lack of Plaintiff distributees' standing to sue.

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ARGUMENT

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Standards of Review

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Review of Chancery Findings

In Wright v. O'Daniel, 2009-CA-01531-COA (Miss.App. 3/1/2011) the Court Appeals summarized the Standard of Review from Chancery Court as:

¶14. A Mississippi appellate court employs a limited standard of review on appeals from chancery court. Corp. Mgmt. v. Greene County, 23 So. 3d 454, 459 (¶11) (Miss. 2009). As such, we "will not disturb the factual findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous[, ] or applied an erroneous legal standard." Id. (quoting Biglane v. Under The Hill Corp., 949 So. 2d 9, 13-14 (¶17) (Miss. 2007)). However, questions of law are reviewed de novo. Id.

Review of Questions of Fact

The Supreme Court does not sit to redetermine questions of fact. Aladdin Construction Co. v. John Hancock Life Insurance Co., 914 So.2d 169, 174 (¶8) (Miss. 2005).

Review of Questions of Law

Questions of law are reviewed under a de novo standard of review. Derr Plantation, Inc. v. Swarek, 14 So.3d 711, 715 (¶8) (Miss. 2009); Issaquena Warren Counties Land Co., LLC v. Blakeney, 996 So.2d 747, 749 (¶5) (Miss. 2008).

Legal conclusions are reviewed under a de novo standard of

review. A.D.R. v. J.L.H., 994 So.2d 177, 180(¶9) (Miss. 2008); Andrew Jackson Life Insurance Co. v. Williams, 566 So.2d 1172, 1183-1184 (Miss. 1990).

Breach of a fiduciary duty is a question of law. In the Matter of the Estate of Bodman, 674 So.2d 1245, 1248 (Miss. 1996).

#### Review of Jurisdictional Questions

Jurisdictional questions are subject to de novo review. Derr Plantation, Inc. v. Swarek, 14 So.3d 711, 715 (¶8) (Miss. 2009); Issaquena Warren Counties Land Co., LLC v. Blakeney, 996 So.2d 747, 749 (¶5) (Miss. 2008).

#### Arguments of Counsel in Briefs

Arguments of counsel, however "helpful", are not evidence. Beamon v. State, 9 So.3d 376, 379 (¶10) (Miss. 2009); Bailey v. Bryant, 734 So.2d 301, 305 (¶¶21-22) (Miss.App. 1999).

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### PROPOSITION 1 THE LEARNED CHANCELLOR CORRECTLY ORDERED SALE OF TIMBER

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Plaintiffs combined two issues in Plaintiffs' first argument (Brf.Appl 15):

Issue 1. The trial court erred ordering a report of the Guardian Ad Litem and ordering a report of a forester, allowing Defendant Trustee access to those reports, denying Appellants access to those reports and using those reports as evidence and as the basis of its Order For Sale of Timber.

Issue 2. The trial court erred by entering its Order For Sale Of Timber, its Order to Accept Timber Bids And to Transfer Assets of Baumgardner Marital Deduction Trust, and its Final Judgment.

Defendant Trustee did not deny the sole Trust beneficiary (Emogene Baumgardner) and/or the Trust beneficiary's Guardian Ad Litem / Conservator examination of trust records (8/13/2001 Agreed Order (REx71-73)).

Contrary to Plaintiffs' allegations, the December 10, 2001 Report and Recommendation of Guardian Ad Litem appears in the Record on Appeal (REx74-80).

#### Court Appointed Expert

Facing allegations of mismanagement of the trusts' timber, the Chancellor properly appointed an independent expert (Order Sua Sponte for Appointment of Independent Appraiser (R.412, REx81-82)). Rule 706 MREvid.

No one questioned the qualifications of the selected forestry expert, Charlie D. Jones, Registered Forester. There is no evidence that Forester Jones' erred. No one deposed Forester Jones. Forester Jones was present at the April 22, 2002 hearing where the Chancellor determined to sell the timber and Defendant Trustee agreed with the Chancellor. Plaintiffs chose not to examine Forester Jones. Plaintiff residual distributees have not demonstrated any prejudice.

#### Residual Estate Distribution

Under the terms of the Codicil, the devise or bequest to

Plaintiff residual distributees was contingent, inchoate, executory, and unmatured when testator Harold D. Baumgardner died and would remain so until after the death of the sole surviving testamentary beneficiary, Emogene Baumgardner.

As Harold D. Baumgardner's December 27, 1978 Codicil made clear, Plaintiff distributees' residual testamentary interests were contingent upon (1) the prior deaths of all named lifetime beneficiaries; (2) the existence of unexpended Trust assets after these beneficiaries died; and (3) Plaintiffs' obligation to retain possession of the home place until attaining age 40 (REx.56). Plaintiffs' residual interest is provided in the Codicil to H. D. Baumgardner's will as quoted above. Upon information and belief, Plaintiffs inherited from Emogene Baumgardner (not appearing in the record on appeal). Plaintiffs have not shown prejudice to the residual estate.

#### Alleged Mismanagement

Plaintiffs misrepresent the Court's findings. Plaintiffs assert ". . . the Court specifically found in its May 20, 2002 and July 30, 2002, orders that the timber was not being properly managed. [RE19,24]." (Brf.Appl. 17). The Court made no such findings. Based on Forester Jones warning of future harm, the learned Chancellor and Defendant Trustee agreed to a timber sale.

The Order for Sale of Timber filed May 20, 2002 actually stated

3.

A. The Court has determined that prudent management of the said Trust assets dictates that the said timber be promptly sold in a commercially reasonable manner to preserve the capital value of each Trust.

B. Upon April 22, 2002 consultations of Court and counsel, the Trustee of the Baumgardner Trust and the Conservator of the Estate of Emogene Baumgardner both agreed with the findings of peril [insect infestation] to Trust timber assets and that the said timber should be sold.

(5/20/2002 Order for Sale of Timber, ¶3., REx.19).

Similarly, the July 30, 2002 Order to Accept Timber Bids and To Transfer Assets of Baumgardner Marital Deduction Trust (REx23-31) *actually* stated:

3.

On April 22, 2002, this Court, after conference with all counsel of record, did then Find, order, and adjudge:

- A. THAT the Report of Charlie D. Jones, Mississippi Registered Forester, was received by this Court and by Edward N. Kramer, III, Esq., Guardian Ad Litem of Emogene Baumgardner and Conservator of the Estate of Emogene Baumgardner as directed in this Court's March 18, 2002 Order;
- B. THAT the said Report demonstrated that some of the timber assets of the Baumgardner Marital Deduction Trust and that some the timber assets of the Baumgardner Family Trust were then subject to insect infestation, which if unchecked would culminate in great loss;
- C. THAT prudent management of the said Trusts assets dictated that the said timber be promptly sold in a commercially reasonable manner to preserve the capital value of each Trust; [**\*REx25**]
- D. THAT, upon April 22, 2002 consultation, both the Conservator of the Estate of Emogene Baumgardner and the Trustee of the Baumgardner Trusts agreed with the peril to the Trust's timber assets and that the said Timber should be sold;
- E. THAT Charlie D. Jones, Registered Forester, was knowledgeable in timber sales, such as the proposed sale;
- F. THAT, upon April 22, 2002 consultation and at the request of the Trustee for the Baumgardner Trusts and the Conservator of the Estate of Emogene Baumgardner agreed that Charlie D. Jones, Registered Forester, would be a suitable person for the Trustee to utilize in soliciting bids for the said



timber, to compile and tabulate the said bids and to submit the tabulated and compiled bids to the Trustee of the Baumgardner Trusts and to the Guardian Ad Litem and Conservator of the Estate of Emogene Baumgardner.

- G. THAT the Forester should advertise said sale pursuant to usual and customary business practices in the industry and require a maximum of three (3) years for the successful bidder to cut, remove, and restore the premises.  
(7/30/2002 Order to Accept Timber Bids and To Transfer Assets of Baumgardner Marital Deduction Trust ¶3, REx 24-25).

The Court made no finding of mismanagement.

#### Plaintiffs Participation at Hearings

Plaintiffs allege that Plaintiffs were excluded from participating in a hearing to sell timber (Brf. Appl 17). Plaintiffs err. On April 22, 2002, no court reporter was available to take testimony (7/30/2002 Order to Accept Timber Bids, p.2, footnote 2, REx 24). Plaintiff Charlie Baumgardner was not present at this hearing or at any other hearing. The Court conferred with counsel (including Plaintiffs' counsel). There is no evidence of prejudice to Plaintiffs or suggestion thereof, and no violation of any rule of procedure or evidence.

#### Cutting Timber

Plaintiffs initiated the Complaint against Defendant Trustee, claiming a failure to maximize returns (although Plaintiffs' expert (E. Lynn Prine, President, Southern Resource, Inc.) acknowledged that Mrs. Baumgardner prevented the use of "best practices"). Plaintiffs' expert suggested cutting the timber. Court Appointed Forester Jones recommended cutting the timber. The Court followed expert advice. Plaintiffs should be

estopped to now claim "But there was no need for cutting of the homeplace timber for Emogene." (Brf. Appl. 21).

Plaintiffs wrongfully claim to be remaindermen (Brf. Appl. 21). Plaintiffs are / were not remaindermen. A remainder is

" . . . an interest or estate in property that follows and is dependent on the termination of a prior intervening possessory estate created at the same time by the same interest."

Merriam-Webster's Collegiate Dictionary, 10<sup>th</sup> Ed. (1993) p.988.

Harold D. Baumgardner did "give, devise, and bequeath" all of the Trusts' assets to Defendant Trustee (Codicil). Defendant Trustee held possessory interest. Defendant Trustee was not a "life tenant trustee" as Plaintiffs suggest (Brf. Appl. 21). Defendant Trustee held legal title with full power to dispose of trust assets. No "remainder" was created in Defendant Trustee.

Plaintiffs are residual distributees of part of the residual estate, if the estate was not exhausted. Plaintiffs' allegation of "waste" (Brf. Appl. 21) is erroneous. The uncontradicted evidence showed the necessity of cutting the timber. Plaintiffs claim for "the value of the timber cut and removed" is unfounded because Defendant Trustee owned the timber, in trust for lifetime trust beneficiaries (not Plaintiffs residual distributees).

#### Plaintiffs Lost Nothing

Plaintiffs alternate between blaming the Court for misapplication of timber sale proceeds (Brf. Appl 21-22) to blaming Defendant Trustee (Brf. Appl 22-23), claiming a loss

exceeding a million dollars (Brf.Appl.22). Plaintiffs never explain the calculation of the claimed loss nor support Plaintiffs' right to timber sale proceeds. Again, Plaintiffs were not remaindermen. The Baumgardner Last Will and Testament granted no remainder.

Plaintiffs speculate that greater income could have been realized, but Plaintiffs' expert (E. Lynn Prine, President, Southern Resource, Inc.) acknowledged that the sole surviving trust beneficiary did not favor prescribed measures to maximize timber income. There is no evidence that Defendant Trustee or the Court destroyed timber or ignored expert advice. There is no evidence that Defendant Trustee or the Court wasted, converted, or misapplied any trust assets. Plaintiffs damage claim is unsupported.

The learned Chancellor should be affirmed.

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PROPOSITION 2  
PLAINTIFFS WERE NOT ENTITLED TO ACCOUNTING

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Plaintiffs third (3<sup>rd</sup>) issue in Plaintiffs' second argument (Brf.Appl 25) is:

Issue 3. The trial court erred in not requiring the trustee to give an accounting including failure to require an accounting of receipts, expenditures, and distributions of the money from the Court ordered timber sale and not ordering the trustee to pay specific amounts of sale proceeds to the proper

parties.

Plaintiff residual distributees complain because Defendant Trustee refused to disclose the confidential finances of private trusts created by Harold D. Baumgardner's Last Will and Testament as modified by Codicil. No Plaintiff was a beneficiary of either trust. Plaintiffs' rambling diatribe notwithstanding (Brf Appl 25-31), Plaintiffs cite no authority supporting Plaintiffs' demand.

Pursuant to direction of the said instruments, Defendant Trustee Ready denied Plaintiff residual distributees' demands for inventory and/or accounting. Harold D. Baumgardner's Last Will and Testament expressly waived accounting (see above). In re the Jane W. Stubbs-Kelley Trust, 573 So.2d 734, 735 (Miss. 1990).

There is a duty to account to a trust beneficiary (here Emogene Baumgardner). Consider In Re Jane W. Stubbs-Kelley Trust, 573 So.2d 734 (Miss. 1990), wherein trust beneficiaries (not residual distributees) alleged that the trustee's refusal to render an accounting to the trust beneficiaries was a breach of the trustee's fiduciary duty [573 So.2d at 735]. On appeal, the Mississippi Supreme Court stated:

"The trust was established on October 1, 1982. A document titled "Trust Agreement", dated October 1, 1982 was recorded in the Chancery Court of Adams County October 7, 1982. Another document dated September 30, 1982, but signed on October 1, waived the right to any past, present or future accounting. This document was never recorded.

After a hearing, the Chancellor ordered that Wood

owed no duty to render an accounting, finding that the settlor waived that duty in the writing dated September 30, 1982. The Chancellor held that this unrecorded document was incorporated into the trust as a matter of law. We affirm.

The writing used to create a trust may consist of several documents. Ramage v. Ramage, 322 S.E.2d 22 (S.C.Ct.App. 1984); See also, G. Bogert & G. Bogert, The Law of Trusts and Trustees, §50 (2nd ed. 1984). Even though they have different dates the two writings were executed on the same day. When property was transferred to the trust it came into existence as a trust and the September 30 and October 1 instruments, together, made up its written form. Furthermore, the September 30 document expressly refers to the other instrument. As such, the September 30 document waiving any right to an accounting is part of the trust and serves as a specific expression of the settlor's intent to waive any right to an accounting. Beck v. Robinson, 154 So.2d 284 (Miss. 1963); Reagh v. Kelley, 89 Cal.Rptr. 425, 10 Cal.App.3d 1082 (1970). The September 30 paper being part of the writing creating the trust, it is clear that no accounting is required. Essentially this was the Chancellor's holding and, as it is supported by the evidence, we cannot say that it was manifestly in error.

AFFIRMED."

(emphasis supplied). [573 So.2d 735-736].

There is no evidence that Defendant Trustee ever denied any lifetime trust beneficiary (Emogene Baumgardner) or lifetime trust beneficiary's guardian / conservator (Edward N. Kramer, III, Esq.) the right to examine and inquire into trust affairs. As in Stubbs-Kelly above, the Will clearly waived accountings and was such waiver was part of H. D. Baumgardner's intent. Plaintiff residual distributees were only entitled to the unexpended residue of the Marital Deduction Trust and specific land if the land remained a trust asset. Clearly, the unexpended residue of the Family Trust belongs to the designated charities.

Defendant Trustee owed no duty to account to Plaintiff residual distributees.

The present case also contrasts with Walker v. Cox, 531 So.2d 801, 804 (Miss. 1988), wherein a successor income trust beneficiary sued for accounting of trust and removal of the trustee due to proven antagonism ("hostility") between the trustee and trust beneficiary. On appeal, the Supreme Court noted the question of first impression held that hostility between trustee and trust beneficiary could frustrate the trust's purpose even without a showing of trustee's maladministration [531 So.2d at 804].

There was no evidence of hostility between Defendant Trustee and sole lifetime trust beneficiary Emogene Baumgardner and/or lifetime trust beneficiary's Guardian Ad Litem / Conservator. Plaintiff residual distributees' demand for accounting to residual distributees was unfounded in fact or in law. The Chancellor correctly refused Plaintiffs' demand.

No The learned Chancellor should be affirmed.

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PROPOSITION 3  
ESTATE OF EMOGENE BAUMGARDNER RECEIVED ALL THAT WAS DUE

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Plaintiffs fourth (4<sup>th</sup>) issue in Plaintiffs' second argument (Brf.Appl 31) is:

Issue 4. The trial court erred in not requiring the trustee to fully reimburse the estate of Emogene Baumgardner for all of the moneys that the Conservatorship paid for her support plus a reasonable interest rate on those funds.

Notwithstanding Plaintiffs' claim, Plaintiffs cite no authority for this novel proposition. In Mellon v. Smith's Pecans, Inc., 2009-CA-00920-COA (Miss.App. 2/8/2011) the Court noted:

¶23. \* \* \*. "[The failure to cite authority in support of an argument eliminates our obligation to review the issue." Dampier v. State, 973 So.2d 221, 228 (¶20) (Miss. 2008).

As in Mellon, supra, this Court has no obligation to review this issue.

Without citing authority, Plaintiffs demand retroactive accounting to 1997, i.e. a time beyond any applicable limitation of action period. Plaintiffs then attempt to bootstrap claimed losses with additional interest (Brf Appl 32).

By Court Order, Guardian Ad Litem / Conservator Edward N. Kramer, Esq. received all Marital Deduction Trust assets. The Guardian Ad Litem / Conservator accounted for assets received, which accountings were approved.

Equally clearly, the Family Trust was a supplemental fund if, after due consideration of all of Sole Lifetime Trust Beneficiary Emogene Baumgardner's resources, Defendant Trustee determined that the Beneficiary needed additional funds. There was no evidence that the Family Trust had any obligation to bear

100% of the Beneficiary's expenses.

There was no evidence that the Sole Lifetime Trust Beneficiary ever suffered a lack of anything (before or after Guardianship). Plaintiffs' claim is unsupported.

The learned Chancellor should be affirmed.

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CROSS-APPEAL

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PROPOSITION  
THE COURT LACKED SUBJECT MATTER JURISDICTION  
AND PLAINTIFFS LACKED STANDING TO SUE

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Jurisdiction

This action is not an action in an ongoing estate, but rather an action in a private trust. Where, as here, a private trust establishes the Trustee's duties and obligations, including specific waivers of inventory, accounting, appraisal, etc., the Chancellor has no subject matter jurisdiction concerning the specifically waived matters.

The only exception arises in cases of demonstrated fraud or other misbehavior. In re Jane W. Stubbs-Kelley Trust, 573 So.2d 734, 735-736 (Miss. 1990) [trust setting]; Ellzey v. McCormick, 17 So.3d 583, 591 (Miss. 2009) [estate setting]. Only after predicate proof of Trustee's misbehavior, may the Court require accounting, inventory, appraisal, etc. to remedy the misbehavior.



Decell v. Hazlehurst Oil Mill & Fertilizer Co., 83 Miss. 346, 35 So. 761 (1904). Plaintiffs never proved misbehavior and, therefore, the learned Chancellor had no subject matter jurisdiction.

The burden of proving subject matter jurisdiction rested upon the party invoking the Court's jurisdiction (Plaintiffs). Hood v. Mississippi Department of Wildlife Conservation, 571 So.2d 263, 266 (Miss. 1990); Hunt v. Hunt, 629 So.2d 548, 551 (Miss. 1992) [subject matter jurisdiction deals with the power and authority of a court to consider a case; subject matter jurisdiction may not be waived and may be asserted at any stage of the proceeding or even collaterally].

Vituperative allegations aside, Plaintiffs' claims constituted a forbidden "fishing bill" over which the Chancery Court lacked jurisdiction. Griffith, Mississippi Chancery Practice, 2d Ed. (1950) §429 at p.425.

Plaintiffs sought to evade the trusts' terms waiving accountings (disclosures) to anyone, including Plaintiff residual distributees. Where, as here, the trust instrument specifically and unambiguously waived accounting, then Defendant Trustee may not be called to account except upon predicate proof of mismanagement, incompetence, or fraud. No such proof appeared. In re Jane W. Stubbs-Kelley Trust, 573 So.2d 734, 735-736 (Miss. 1990) [trustee's declaratory judgment action that trustee owed no

duty of accounting to beneficiaries of trust]. Moreover, the Guardian / Conservator examined Defendant Trustee's records and reported to the Court. There was no evidence that the sole beneficiary (or Guardian / Conservator) was denied access to the Trusts' books of account. Plaintiff distributees are miffed that the Chancellor chose not to publish the Conservator's findings. Wounded pride is not a cause of action.

#### Timber Sale

Upon receipt of expert advice (including Plaintiffs' own expert), the learned Chancellor and Defendant Trustee agreed to sell the timber to preserve the trusts' capital. The learned Chancellor appointed a Guardian / Conservator to protect Mrs. Baumgardner's interests and to receive Mrs. Baumgardner's share of the timber sale proceeds. The Court and the Guardian / Conservator approved the distribution of the sale proceeds. The Guardian / Conservator actually examined the Trust records and reported to the Court. Upon E. Baumgardner's death, the Conservatorship necessarily dissolved and the remaining Conservatorship assets passed to her estate.

#### Standing

Plaintiff residual distributees objected to the terms of the private testamentary trusts. Although, the Chancellor did not grant the relief, the Court erred in failing to grant Defendant's motion to dismiss for lack of jurisdiction and lack of standing.

In Schmidt v. Catholic Diocese of Biloxi, 18 So.3d 814

(Miss. 2009), the Supreme Court said:

¶32. Standing is an aspect of subject matter jurisdiction. Kirk v. Pope, 973 So.2d 981, 990 (Miss.2007) (citations omitted). **A lack of standing "robs the court of jurisdiction to hear the case."** Pruitt v. Hancock Med. Ctr., 942 So.2d 797, 801 (Miss.2006) (citations omitted).

¶33. "Mississippi's standing requirements are quite liberal." Dunn v. Miss. State Dep't of Health, 708 So.2d 67, 70 (Miss.1998). The general standing rule has been stated as follows: "Mississippi parties have standing to sue 'when they assert a colorable (footnote omitted) interest in the subject [\*827] matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law.'" City of Picayune v. S. Regal Corp., 916 So.2d 510, 525 (Miss.2005) (quoting State of Miss. v. Quitman County, 807 So.2d 401 (Miss.2001)). **The "individual's legal interest or entitlement to assert a claim ... must be grounded in some legal right recognized by law, whether by statute or by common law."** City of Picayune v. S. Regal Corp., 916 So.2d [510] at 526. \* \* \*.

(**emphasis** supplied, [bracketed] citation supplied).  
[18 So.3d at 826-827].

See also: Hall v. City of Ridgeland, 37 So.3d 25,33 (¶23) (Miss. 2010); Jones v. Lutzen, 2009-SA-01823-COA (Miss.App. 2/22/2011).

"Colorable," when used to describe a claim or action, means "appearing to be true, valid, or right." Black's Law Dictionary 212 (abridged 7<sup>th</sup> ed. 2000).

Standing "is to be determined as of the commencement of suit." Delta Health Group, Inc. v. Estate of Pope, 995 So.2d 123, 126 (Miss. 2008).

When this action was filed, Plaintiff residual distributees

When this action was filed, Plaintiff residual distributees had no "colorable interest" in the Trusts. Sole beneficiary Emogene Baumgardner had the exclusive right to demand accounting (Plaintiffs' primary demand), i.e. a right personal to Emogene Baumgardner and, by substitution, the Guardian / Conservator. The instruments creating the Marital Deduction Trust and the Family Trust expressly waived accounting to anyone, including Plaintiffs. Plaintiff residual distributees had no "legal right recognized by law" to the demanded relief, only a right to a contingent remainder, but no more than that. Plaintiff residual Distributees had no standing because Plaintiff residual distributees were not beneficiaries of either Trust.

Moreover, Plaintiffs could not exercise purely personal elective right (accounting) of a ward (Emogene Baumgardner). Matter of Estate of Atkins v. Sartin, 422 So.2d 754, 756-757 (Miss. 1982) [conservator's right to withdraw funds from a joint bank account of the ward without court order and before the ward's death; HELD: must secure court order]; Hutton v. Gwin, 188 Miss. 763, 195 So. 486 (1940) [attorney's fees in management of statutory estates are not a charge on the estate itself, but are personal obligations of the administrator or executor or guardian]; McGavock v. Whitfield, 45 Miss. 452 (1871) [guardian can not bind wards's estate by incurring obligation of suretyship for another]; Martin v. Stevens, 30 Miss. 159 (Miss.

1855) [guardian could not assert personal defense available to ward].

Defendant Trustee objected to jurisdiction, alleging that Plaintiffs lacked standing (Defendant Trustee's Response (R.100); Defendant Trustee's Motion for Summary Judgment (R.123) and supporting memorandum (R.127)). The learned Chancellor took all objections under advisement (R.463-464), but refused to rule. As a result this litigation ensued at the needless expense and potential prejudice of the Residual Charitable Distributees and Defendant Trustee.

The learned Chancellor erred in failing to grant Defendant Trustee's Motion to Dismiss and/or Summary Judgment. This Honorable Court should dismiss Plaintiff residual distributees' appeal for lack of standing or, alternatively, for lack of subject matter jurisdiction.

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#### CONCLUSION

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This Honorable Court should affirm the learned Chancellor's decisions, but find that the Chancery Court lacked jurisdiction because Plaintiff residual distributees lacked standing to sue.


Respectfully submitted,

Respectfully submitted,

Respectfully submitted,

WILLIAM E. READY, SR., Defendant  
/ Appellee / Cross-Appellant

BY: \_\_\_\_\_

  
Attorney for Defendant /  
Appellee / Cross-Appellant

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CERTIFICATE OF SERVICE


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The undersigned hereby certifies that the undersigned has  
this day caused to be hand delivered or mailed, postage prepaid  
and firmly affixed thereto, a true and correct copy of the  
foregoing writing to the following:

Chancery Court Trial Judge

HON. J. LARRY BUFFINGTON, Chancellor  
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13<sup>th</sup> Judicial District  
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SO CERTIFIED, this the 17<sup>th</sup> day of APRIL, 2011.

Respectfully submitted,  
WILLIAM E. READY, SR., Defendant  
/ Appellee / Cross-Appellant

BY: \_\_\_\_\_

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