2010-CA-01608 T

CERTIFICATE OF INTERESTED PERSONS:

The undersigned counsel for the Appellants, Veronica B. McKee Arrington, and Charlie C. Baumgardner, certifies that the following persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluated possible disqualification or recusal.

1. The Appellant, Veronica B. McKee Arrington, P. O. Box 36186, Birmingham, Alabama, 35236.
2. The Appellant, Charlie C. Baumgardner, P. O. Box 36186 Birmingham, AL 35236.
3. Don O. Rogers, Counsel for the Appellants, P. O. Drawer 1389, Meridian, Mississippi.
4. Joe Clay Hamilton and the Hamilton Law Firm, Counsel for the Appellants, P. O. Box 1511, Meridian, Mississippi.
5. William E. Ready, as trustee of the Baumgardner Marital Deduction Trust and as trustee of the Baumgardner Family Trust, P. O. Drawer 2899, Meridian, Mississippi.
6. Robert D. Jones, as Counsel for William E. Ready, P. O. Box 1205, Meridian, Mississippi.
7. Henry Pate, as Counsel for William E. Ready, 720 Watts Avenue, Pascagoula, Mississippi.

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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.

3. The trial court erred in not requiring the trustee to give an accounting, including failure to require an accounting of the 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.

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.

STATEMENT OF THE CASE (INCLUDING FACTS)

Harold D. Baumgardner (hereinafter 'Harold') owned substantial timberland holdings. His will executed on November 13, 1970, was drafted by Attorney William E. Ready, Sr. (hereinafter 'Ready') of Meridian, Mississippi. [RE 44] A codicil to the will executed on December 27, 1978, also by Ready. [RE 54] After a long illness Harold died January 12, 1979, within a month of the codicil execution. After some bequests of personal property, the Will and Codicil placed all of Harold's property including all of his 1800 acres of timberlands in two trusts.[RE 44, 54]

One trust named the Baumgardner Marital Deduction Trust (hereinafter 'MDT') would contain an amount of assets which would not qualify for the Federal and State estate tax marital deduction. The other trust named the Baumgardner Family Trust (hereinafter 'FT') would contain an amount of asset that would qualify for the estate tax marital deduction. [RE 44, 54] Ready, the drafter of the will and codicil was named the Executor, was charged with selecting what assets would go to which trust, and was named as trustee of both trusts. [RE 59] The life beneficiaries of both trust was be Harold's widow, Emogene Baumgardner.[1] All of the income from the MDT would be paid to Emogene. Distributions of corpus from the MDT were at the discretion of Ready. Distributions of income and corpus from the FT were at the discretion of Ready. The object of both trusts was to support Emogene to the standard of living to which she was

[1] The Family Trust also Harold's mother and mother-in-law as lifetime beneficiaries.

accustomed. The trustee was given broad standard language authority[2]. Both trusts terminated at the Emogene's death. The assets of the MDT were left to Harold and Emogene's children, Veronica B. McKee Arrington and Charlie C. Baumgardner, (hereinafter 'Vi' and 'Charlie', respectively). The assets in the FT, except for the homeplace, were left to five named charities. [RE 54] The homeplace lands were treated differently. [RE 54]

A special provision in the Will provided that irrespective of any other trust provision , if Harold's home and the approximate 600 acres surrounding his home, if not otherwise disposed of, then at Emogene's death, that 600 acres would be equally divided between Vi and Charlie. This 600 acres of land is referred to as the "homeplace" in the will and in the pleadings. [RE 54]

Besides the homeplace lands approximately 711 more acres of timberlands were placed in the FT. The MDT contained approximately 470 acres of timberland. [RE 59]

The provision appointing Ready as Executor and Trustee contained standard language for him "to serve without bond, inventory or accounting." The provisions also limited the fees paid to Ready to those paid to testamentary trustees in Jackson, Mississippi. [RE 44]

Ready managed both trusts from 1979 to Emogene's death in 2004.. Ready would not discuss any of the financial assets or timberlands management of either trust with Vi or Charlie. [RE 40] Due to age and health factors, and when Emogene could no longer handle her own business affairs, Vi initiated proceedings to create a conservatorship for

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[2]Similar powers as contained in the Mississippi Uniform Trustees' Powers Law.

her mother. On August 7, 1996, the Lauderdale County Chancery Court entered its order finding Emogene could no longer handle her affairs and appointed her daughter Vi as conservator of her person and estate. [RE 32]

The Chancery Court authorized Vi to file a Complaint against Ready as trustee of both trusts for an accounting, removal and other relief. The Complaint charges that Ready refused to give an accounting or allow an inspection of the Trusts records; that Ready failed to pay the Emogene the funds required by the trusts; that Ready failed to properly discharge his duties as trustee; and that Ready's hostility with Emogene and Vi defeated the purposes of the trusts requiring his removal as trustee. The Complaint sought an accounting, production of records, removal of Ready as trustee and the appointment of a new trustee, and reimbursement by Ready of the costs of bringing this action. [RE 40]

Honorable Larry Buffington was appointed as special chancellor to hear this matter. After several abbreviated conferences, a couple of limited hearings, and the entry of numerous orders, the Chancellor:

(a) appointed a local lawyer, Edward Kramer as guardian as litem for Emogene [RE 69];

(b) ordered the guardian's report to be given in camera [RE 71];

(c) removed Vi as conservator of the estate of Emogene and appointed Kramer as conservator of Emogene's estate [RE 87];

(d) did not require Ready to respond to any discovery propounded by Vi [RE 17,85];

(e) appointed a forester to examine the timberland and make an in camera report to the court [RE 81];

(f) ordered the sale of substantially all of the trusts' 1800 acres of timber [RE 18];

(g) dissolved the MDT and ordered distribution of its funds to the Conservator; did not enter any special order of disbursement of timber money from the sale of any of the timberland in the FT nor of the homeplace timber money; and ordered Ready to pay $205,000 to the Estate of Emogene as reimbursement for expenses of Emogene.[RE 23]

The evidence that the Chancellor accepted, considered, and relied upon to make these very important decisions, including its order for the sale of substantially all of the timber, to accept the timber bids and to distribute the timber sale money were: (1) the report of the guardian ad litem, and (2) the report of the forester. [RE 18] Both of these reports were provided to the court in camera. The information in both of these reports was ordered not to be given to Vi or Charlie. [RE 71,81] The Guardian's report was filed by the Court after the Court's consideration and after it made its decision to appoint a forester. [RE 74] The report of the forester was never filed or given to Vi or Charlie.

Although the court ordered the sale of the trusts' timber, Ready was never required to account for the money. Out of the $3,070,840.00 gross timber sale money [RE 89], the Conservatorship received $744,467.42[3]. What happened to the rest?

Neither Vi nor Charlie nor the Estate of Emogene Baumgardner received the money from the sale of the homeplace timber [RE 104], although the homeplace lands were specifically bequeathed to Vi and Charlie in Harold's will. [RE 54]

During eight years of the Conservatorship (1996 to 2004), Ready never paid any money to the Conservatorship for the support of Emogene (as was required of him in both

[3] This figure appears in the Conservator's Annual Accounting at page 832, Pleadings Record.

trusts). So in 2010, the Chancellor required Ready to pay $205,000 to Emogene's estate for that "unpaid" support.[RE 15] However, the Court has never required Ready to disburse the homeplace land timber sale money to the remaindermen, Vi and Charlie. [RE 12,15, 23] As directed by Harold's will, Vi and Charlie received the homeplace lands at Emogene's death in 2004 [RE 54], but without $1,017,671.00 worth of timber. An accounting for that homeplace timber money was even required.

SUMMARY OF THE ARGUMENT

Appellants (Vi and Charlie) are the daughter and son of Harold Baumgardner. By will Harold left his estate including over 1800 acres of timberlands in two trusts. The lifetime beneficiary of both trusts were Harold's widow, Emogene, the mother of Vi and Charlie. Harold's lawyer (William E. Ready) drafted the will, was executor of his estate and was the trustee of both trusts. As Emogene aged, Vi sought and was appointed Emogene's conservator. Vi sought information from Ready about the two trusts which were to provide support for Emogene. Ready refused to provide any information.

Vi filed suit against Ready alleging mismanagement of the trusts assets, refusal to provide the intended support for Emogene and hostility of Ready toward Vi and Emogene. The suit sought an accounting from Ready and his removal.

The local chancellors recused themselves because the litigation involved the local attorney, Ready. Larry Buffington as special chancellor, among other actions, appointed a guardian ad litem for Emogene, granting that guardian authority for an informal inspection of the trusts' records, and ordered the guardian's report to be presented to the Court in camera . Then the Court appointed a forester to inspect and report on the timberlands, this report also to be presented to the Court in camera. The Court's orders prohibited the information from the guardian ad litem's report and from the forester's report to be given to Vi or to Charlie or their counsel. Based on those reports the Court ordered Ready to sell substantially all of the timber on the timberlands.

The Court terminated one trust (the MDT) and directed its money, including its

timber sale money to be paid to Emogene's Conservatorship. The Court gave no directions regarding the corpus of the other trust (the FT), nor for the money from the timber sale of the FT lands or from the homeplace lands. The Court never ruled on removal of the trustee and never required the trustee to give any account or report to Vi or Charlie

The Court found that Ready did not pay any support to Emogene during the period of the conservatorship (from 1996-2004) and ordered Ready to pay $205,000 to the conservatorship in 2010.

Ready operated the trust in secret, never disclosing any information to Vi or Charlie, remainder beneficiaries of the MDT and remainder beneficiaries of the homeplace lands in the FT. The Court orders for the sale of the timber, the payment of fees, and the distribution of the timber sale money, were all determined by the Court in chambers, based on reports presented to the Court in camera. Afterwards, the Report of the Guardian Ad Litem was filed with the Clerk, so counsel for Vi and Charlie did eventually obtain that report. However, the forester's report was never made a part of the Court records, and was never relayed to the Vi or Charlie or to their counsel.

The timber sale grossed $3,070,840. Ready paid to the Conservatorship $744,467.42 from the MDT. The balance of the timber sale money is not accounted for, although it was sold at the order of the Court.

The timber was sold without allowing input from Vi or Charlie. It is too late to reverse the timber sale. The timber has been cut and the money received by Ready. However, what happened to the timber sale money has never been reported to Vi or

Charlie. To their understanding the disbursements of all of the timber sale money has never been reported to the Court.

As remainder beneficiaries of the FT homeplace lands, Vi and Charlie are entitled to the timber sale money from the FT homeplace lands. That money should not go to the remainder beneficiaries of the FT cash. What was never shown to be a necessary timber cutting from the homeplace lands in 2002, should not act as a transfer of $1,070,671 in assets from one remainder beneficiary to another remainder beneficiary in 2004.

Vi and Charlie are entitled to know of what happened to the timber sale money. If the money was not paid to the proper beneficiary, then Ready should be held accountable and ordered to pay it to the correct party.

The Court ordered all of the funds from the MDT to be paid to the Conservatorship. Since no report of the MDT was ever made, we cannot be sure that all of that trust was paid. The Court did find that Ready had not paid support to Emogene and required a payment of $205,000 from Ready in 2010. The Court also found that Ready did not properly manage the timberlands. The Guardian Ad Litem's Report also criticized Ready for obtaining a loan from the trust funds and criticized him for hiring a timber manager and giving this timber manager the right to buy the timber. In light of these actions, how do we know that Ready paid all that was due from the trusts to the correct party without an accounting? As remainder beneficiaries of the MDT funds, Vi and Charlie are entitled to know what happened to the trusts funds during the trusts administration.

This Court should remand for an accounting from Ready. Then after the accounting is presented and appellants respectfully request that a new special Chancellor be appointed since Chancellor Buffington was defeated in his reelection bid and in view of the expended period of time elapsing since appellants began this process. The special Chancellor should address and correct any improper payments and order all proper payments to be made.. The new Special Chancellor should also require Ready to reimburse Emogene's estate for all of the expenses of care for Emogene during the period of the conservatorship.

ARGUMENT

Issue 1. The trial court erred ordering a report of the Guardian Ad Litem and ordering a report of a forester, allowing the 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.

The only court listing (January 5, 1981) of the assets in the Baumgardner Marital Deduction Trust (hereinafter "MDT") and the Baumgardner Family Trust (hereinafter "FT") is in the original allocation of the assets in the Estate of Harold Baumgardner (Exhibit B to the Complaint, RE 59-66). These allocations made to each Trust by Ready and the value of each asset at that time, according to Ready, were:

Into the MDT:

	Asset Description	Executor's Value
a.	Home and 3.29 acres	$43,000
b.	Dalewood land – 80 acres	$37,000
c.	Lauderdale Springs land – 390 acres	$126,875
d.	Bank stocks	$31,334

Into the FT:

	Asset Description	Executor's Value

a.	Vandevender land – 103 acres	$25,750
b.	Williams land – 80 acres	$16,000
c.	Packey land – 10 acres	$3,850
d.	Tutt land – 120 acres	$27,840
e.	Baumgardner and Crooker land – 78 acres	$21,918
f.	Homeplace land – 592 acres	$193,000
g.	Bozeman land – 40 acres	$9,600
h.	Phillips land – 70 acres	$28,980
i.	Talbert land – 80 acres	$36,120
j.	Warren land – 140 acres	$62,930
k.	various minerals	$268
l.	coal leases	$0
m.	oil and gas leases	$0
n.	hunting club lease	$0
o.	Cash from sale of Viverette land	$22,500

Land was the principal asset placed into each Trust. For that reason alone, the sale of substantially all of the timber growing on the Trust lands is significant and an important financial decision. The decision is important to the life beneficiary -- Emogene Baumgardner. The decision is important to the remainder beneficiaries – Vi and Charlie.

Vi and Charlie are the remainder beneficiaries of all 470 acres of timberland in the MDT. [RE 46] Vi and Charlie are the remainder beneficiaries of 592 of the 1250 acres of

timberland in the FT. [RE 56] Certainly Vi and Charlie have an interest in the sale of timber on the 999 acres which they would "inherit" at their mother's death. At Emogene's death on April 12, 2004, they indeed became the owners of those lands.

The Complaint filed by Vi includes allegations (never heard by the Court) that Ready did not properly manage those timberlands. [RE 36] Those allegations were denied by Ready. However, the Court specifically found in its May 20, 2002 and July 30, 2002, orders that the timber was not being properly managed. [RE 19, 24] The Guardian Ad Litem criticized Ready for granting the timberland manager the option to buy the timberlands. [RE 77-78] Certainly Vi and Charlie are entitled to the specific information about the timber and Ready's handling of it.

The Court's order [RE 18] that substantially all of the timber be cut and sold without a hearing in which Vi or Charlie were allowed to participate is a violation of Rule 43, Mississippi Rules of Civil Procedure and Rules 614(a) and 706(a), Mississippi Rules of Evidence, and a great miscarriage of justice to them. Surely, Vi and Charlie are entitled to the specific information about the timber money received, what expenses and fees were paid from that money, and to whom that money was distributed.

Yet Vi and Charlie were denied access to the reports that were the basis of the Court's orders to cut and sell the timber. They were denied information about the money and where it went. [RE 17, 71,85] The sequence of Court pleadings and orders showing these gross miscarriages are:

1. On December 13, 2001, the Court's Order relates that the Court has "reviewed the Court file and the Report And Recommendation Of The Guardian Ad

Litem[4] ... and that Charlie D. Jones, Registered Forester, Monticello, Mississippi, be and is hereby appointed as an independent appraiser and is charged and directed to conduct an appraisal of all timberlands of the Baumgardner family and marital deduction trusts...." [RE 81]

2. On March 15, 2002, the Court took under advisement Vi's motion to compel Ready to answer discovery and production requests made and took under advisement Ready's motion for a protective order preventing that discovery from proceeding. [RE 17]

3. On March 15, 2002, the Court ordered the forester's report to be made in camera and kept secret from Vi and Charlie (the Report never made its way to the Clerk's office, or to Vi, Charlie or their counsel; and therefore, it is not in this record). [RE 85]

4. In its Order For Sale of Timber, entered May 20, 2002, the Court said it considered the forester's report (in camera, without Vi, Charlie or their attorneys' present and without a court reporter), and found "that said timberlands are not being managed in a manner maximizing monetary return and growth potential." Then the Court ordered the "timber be promptly sold in a commercially reasonable manner to preserve the capital value of each trust." [RE 18]

5. The Guardian Ad Litem's July 11, 2002, report of the timber sale [RE 89]

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4 The Report And Recommendation Of The Guardian Ad Litem was ordered to be and was submitted to the Court in camera. The Court further forbid a disclosure of the results of the Guardian's examination of the trust records to Vi and Charlie. [RE]The Report was filed by the Chancellor on December 10, 2001, after it was considered and the Chancellor orally stated that he intended to employ a forester to inspect the timberlands. *See the hand filing notation on the top right hand corner of the order.*

includes a tract by tract schedule of the bids received for timber on each tract of land. The total of the tracts highest bids are:

For the tracts in the MDT lands a total of $1,066,985.25;

For the tracts in the FT lands (without the homeplace land tract) a total of $986,084.25;

and for the homeplace lands a total of $1,017,671.00[5].

This report also recommends that the money from the MDT lands be paid to the Conservatorship of Emogene for her support. The report makes no recommendation for distribution of the FT lands money or the homeplace lands money.

6. Vi and Charlie's July 18, 2002, objection to the sale, raised objections to the secrecy of the bid procedure, the refusal to provide any information about the bids, the sale of the MDT lands without requiring this money being used solely for Emogene's care, and any sale of the homeplace lands as unnecessarily robbing Vi and Charlie of the value of their remainder interest (since it would remove all of the timber) in those lands. [RE 100]

7. Ready countered in his response filed July 29, 2002, that the sale should be approved, the MDT should be dissolved and the money from the MDT, including its portion of the timber sale money, should be paid to the Conservatorship. [Pleadings Record at 767]

8. In its July 30, 2002, Order the Court said that on the basis of the Report of

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5 The homeplace lands were placed by Ready into the FT, but the Will of Harold Baumgardner provided that if the homeplace lands were in either trust at the time of Emogene's death, then the homeplace lands would go to Vi and Charlie. [RE]

the Conservator/Guardian Ad Litem and the forester's earlier report, it would accept the timber bids and order a sale. The Court also ordered a proportionate deduction for expenses be made from both trust, it dissolved the MDT, and ordered that the money in the MDT be paid to the Conservatorship. The Court did not address the FT timber sale money, nor the homeplace timber sale money. The Court did retain jurisdiction "to facilitate the purposes and intentions of this Order...." [RE 23]

9. On September 20, 2002, Ready paid to the Conservatorship the sum of $744,467.62. [See the Conservatorship accounting at page 32, Pleadings Record]

The Court's order for the sale of all of the MDT and FT timberlands, including the homeplace lands, was based on the private Report And Recommendation Of The Guardian Ad Litem, presented in camera, and on the undisclosed Report of the forester, Charlie D. Jones, also presented to the Court in camera. [RE 23] Vi and Charlie were not allowed to participate in the Court's consideration of those reports, were never able to rebut the proof received, and were not allowed to cross examine the witnesses who made those reports. Only Ready and the Guardian/Conservator were allowed to be in the Court's chambers when those reports were presented and the Court's opinion expressed.

The Mississippi Legislature has determined that close kin of wards are required to be notified of matters concerning ward's property and may participate in court proceedings regarding those properties. Sections 93-13-251 and 281, Mississippi Code. The Mississippi Rules of Civil Procedure requires hearings to be held in open court. MRCP, Rule 43. Our rules of evidence allow all parties to an action to participate in a hearing by cross examination of witnesses. MRE, Rules 614(a) and 706(a)

The timber sale grossed $1,066,985.25 for the MDT and $986,084.25 for the FT without the homeplace lands. Obviously, there was no need for additional money for Emogene's care. Yet all of the timber was sold including the homeplace timber without any disclosure of anything to Vi and Charlie.

As remainder beneficiaries of the homeplace lands the removal of all of the timber from the lands (which had a high bid of $1,017,671) substantially reduced the value of their remainder interest, within 2 years of the death of Emogene.

Vi and Charlie had no objection and encouraged support of their mother Emogene by the trusts. [RE 101] Ready's lack of support for Emogene was one of the complaints of Vi from the beginning. [RE 41] But there was no need for cutting of the homeplace timber for Emogene. At the same time when the homeplace timber was cut, the Conservator received $744,467.62, for Emogene's support from the MDT. There was also available for the support of Emogene, from the FT timber land sale the gross proceeds of $986,084.25. It cannot be said that the sale of the homeplace land timber was necessary for Emogene's support. All done without any accounting for needs or expenses actually paid.

This Court has consistently held that commercial cutting of timber other than for estovers by the life tenant is waste. Chapman v. Thornhill, 802 So.2d 149 (Miss. App. 2001). Vi and Charlie are entitled to the value of the timber cut and removed from the homeplace. Learned v. Ogden, 32 So.2d 278 (Miss. 1902).

In this case the cutting of timber is not only a waste, it acted as a transfer of assets from one remainder beneficiary of the FT to another remainder beneficiary of the FT. The

terms of the FT provide that the homeplace lands vest in Vi and Charlie at the termination of the trust. All of the other assets (including cash) of the trust vest in the six named charities. By selling the timber when not needed for the life tenant's support, the timber sale and resulting conversion of timber to cash effectively transferred $1,017,671 from Vi and Charlie to the six named charities. This certainly was not the intention of the testator Harold. The Trustee is a fiduciary to all beneficiaries. He may not prefer one over another. The Chancellor should not either.

The Trust provisions and Mississippi law do not give Ready or the Chancellor the absolute right to sell the timber at any time for any reason. The Trust contains no specific provisions for the sale of timber or for the allocation of the money from any timber sale. The powers granted to the trustee are the typical general powers. Even if a trustee is given broad general powers to make investment or allocation decisions for the trust, this does not mean that there are no limits on those powers. The Restatement of the Law, Trusts, Second, section 186, Comment *d* states:

> The existence of powers in the trustee may be gathered not merely from the language in the trust instrument but from the nature of the purposes of the trust. Thus, if land is devised in trust to pay the income accruing therefrom to a beneficiary for life and to convey the land on his death to another beneficiary, the trustee can properly do such acts as are necessary or appropriate to protect and preserve the land, to make it productive, and to transfer it upon the death of the life beneficiary.... If the settlor manifest an intention that certain property shall be retained by the trustee, the trustee cannot properly sell the property even under circumstances where but for such manifestation of intention the trustee would have a power of sale. Thus, where the trustee has power to sell land because such sale is necessary or appropriate to raise money to make payment necessary to carry out the purposes of the trust, such power does not extend to property which by the terms of the trust it appears that the settlor intended should be retained in specie.

A trustee must always act within the purposes of the trust and the intent of the settlor

expressed in the trust. 76 Am Jur, 2d, TRUSTS, section 35. The trustee is not entitled to change the character or form of the trust estate. 76 Am Jur, 2d, TRUSTS, section 446.

In the FT Harold specifically related his desire that the homeplace belong to his two children if it was not needed for the support of Emogene. Money from the homeplace timber sale was never needed for support of Emogene and no money from any of the timber cut in the FT was ever paid by Ready to the Conservator for any reason. Having paid more than $744,000 from the MT timber sale to the Conservator for the support of Emogene, it could not be reasonably anticipated that Emogene would need another One Million Dollars at this time. Emogene was 92 years of age and died two years later, before all of the timber was cut. In this case the Court specifically found that the timber was being cut to preserve "capital" not for the support of Emogene. [RE 19,24]

It is the trustees duty to act impartially for multiple beneficiaries, not preferring one over the other. Restatement of the Law, Trusts, Second, section 232 and 76 Am Jur, 2d, TRUSTS, section 389, which says:

> When there is more than one beneficiary under a trust, the trustee's duty is to deal impartially with the several beneficiaries in administering that trust, doing his or her best for the entire trust as a whole. This duty of impartiality is owed by the trustee as between beneficiaries of present and future interests. Likewise, a trustee acting for more than a single trust owes to each the same extreme loyalty that a trustee acting for a single trust owes to it. *Practice guide:* A trustee may and should apply to a court for an instruction as to a dealing between two trusts that he or she is administering where a question exists as to the fairness of the dealing to either trust.

The changing of trust property from one form (timber on land) into another form (cash), such as may bar one remainderman (the settlor's children) from acquiring the original trust property designated to them (the homeplace with the timber on it), is

certainly preferring one beneficiary (the charities) over another (the settlor's children). The Trustee is not acting impartially when this is done. Such actions may prevent Vi and Charlie from acquiring their originally designated property, the homeplace with timber, but should not prevent them from acquiring its equivalent (the homeplace, with the homeplace timber sale money). 76 Am Jur 2d, TRUSTS, section 446.

This is the same reasoning long applied by our courts with regard to the rights of the remainderman of land to obtain the value of timber cut on that land by the tenant in possession. Timber growing on land is a part of the land and the remainderman of the land is entitled to the timber or its value. "...Trees, when felled, or severed from the soil, become personal property, in which the tenant in possession has no interest when cut for profit, and the reversioner may maintain his action for the possession of the property, or for damages therefor, in the same manner and with like effect as if he were the owner of the estate in possession." Learned v. Ogden, 32 So. 278 at 279 (Miss. 1902).

Sections 91-17-21 and 91-17-5(c) of the Mississippi Code do not give the trustee any greater rights to redistribute the trust property among the remainderman beneficiaries. Those Code provisions require the allocation of timber cutting money "in accordance with what is reasonable and equitable in view of the interest of those entitled". This limits the Trustee's discretionary rights to allocate. Allocating 100% of the timber sale funds from the homeplace from principal to income considering the age of Emogene (she died after the timber was sold but before it was cut) is not reasonable or equitable. The effect of such an action is to change the trust beneficiary of nearly one million dollars. The Trustee simply does not have the same personal right to change the trust beneficiaries as the settlor

does. By cutting the timber for a purpose other than support of Emogene, the Court and the Trustee has changed the allocation of the FT funds at the trust termination. Without specific trust provisions instructing the allocation of timber cutting money from the homeplace land, the Mississippi rule requiring the timber funds to follow the land to the land remaindermen should be followed. The homeplace remaindermen, Vi and Charlie are entitled to the timber sale from their lands.

The funds received by Ready for the homeplace timber should be held in trust by him and now that the life tenant is deceased, those funds should be paid to Vi and Charlie. Also an accounting of those funds since the sale of the timber should be required for review and objection by Vi and Charlie to the Court to determine what amount should be properly paid.

3. The trial court erred in not requiring the trustee to give an accounting, including failure to require an accounting of the 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.

Numerous times Vi asked Ready to provide financial information about the receipt and expenditures made from the Trusts. Each time Ready refused. [RE 34, 40] In discovery Vi propounded interrogatories to Ready and made production request of Ready for information about the finances of the Trusts. Each time Ready refused. The trial Court refused to enforce those informational requests. The Chancellor took Vi's Motion To Compel the discovery and Ready's Motion For Protective Order under advisement, never acting on either. [RE 85] The prayer for an accounting in the Complaint was never

granted, nor never directly denied. The several motions filed during the litigation asking the Court to require additional specific information from Ready about the timber sale money and the expenses paid from that money were never granted, nor were they ever directly denied. Ready has been accountable to no one for his handling of the Trusts' property. He was not the owner of the assets. He is the trustee. He held and still holds trust assets as a fiduciary. He should be required to account; ***especially since he was the testator's attorney preparing a will which left millions of dollars to him as a trustee with the broadest of powers, at a time when the testator was in his hospital bed dying of cancer.***

In 1998 Vi filed a Complaint against William E. Ready (hereinafter "Ready"), in his capacity as Trustee of the Baumgardner Marital Deduction Trust and of the Baumgardner Family Trust for an accounting of those trusts and his removal as trustee. [RE 40] Throughout the proceedings , the position of Ready is that no one except the life beneficiary of the two trusts, Emogene (the mother of Vi and Charlie), was entitled to information about the trust activities. The fallacy of Ready's position is that a report to Emogene was of little help. The Court found that at least by August 7, 1996, Emogene "was incapable of handling her own affairs" and created the Conservatorship to manage those affairs. [RE 32] So any report provided only to Emogene would have been practically useless to her.

Vi and Charlie are the only children and closest kin to Emogene. [RE 40] The legislature recognizes the need for family members to be involved in Conservatorship matters. Section 93-13-251 and 281 of the Mississippi Code, require the nearest kin to be

notified and involved in ward's property matters. Besides their inclusion as nearest kin of the Ward, Vi and Charlie are entitled to information because:

a. Vi was appointed as Conservator of the estate of Emogene from August 7, 2002, to November 15, 2002 [RE 32];

b. Vi was appointed as Conservator of the person of Emogene from August 7, 2002, to Emogene's death on April 12, 2004 [RE 32];

c. Vi was appointed as the Executrix of the Estate of Emogene (appointed by the Chancery Court of Lauderdale County, in cause number 04-396-M) [RE 104];

d. Vi and Charlie are the named remainder beneficiaries of the Marital Deduction Trust [RE 44];

e. Vi and Charlie are the named remainder beneficiaries of the "homeplace" lands (approximately 600 acres) in the Baumgardner Family Trust [RE 54];

f. Vi was authorized by the Chancery Court to file the Complaint for an accounting [Clerk's Pleadings Record at 55]; and

g. As an attorney, Ready has an ethical obligation to account to Vi and Charlie for assets due to them and held by him. [RE 83]

After 12 years the Honorable Larry Buffington, as special chancellor, did not require Ready, as trustee, to provide any specific financial information to Vi or Charlie, but instead took the following actions:

a. appointed a guardian ad litem for Emogene, allowing that guardian an informal look at the trust records [RE 69];

b. ordered the guardian ad litem to make his report in camera to the Court

prohibiting any specific information to be given to Vi and Charlie [RE 71];

c. refused to compel Ready to provide any discovery information to Vi [RE 17];

d. removed Vi as conservator of the estate of Emogene, leaving Vi as conservator of the person of Emogene [RE 87];

e. named the guardian ad litem to be the conservator of the estate of Emogene [RE 87];

f. appointed a forester to examine the trusts' timberlands and to make an in camera report to the Court, again prohibiting this information to be provided to Vi or Charlie [RE 81, 85];

g. after consultation with the Guardian/Conservator and Ready, ordered Ready to sell substantially all of the timber on the trusts' lands [RE 18];

h. upon receiving the report from the Guardian/Conservator on the sale bids, ordered that the single high bid be accepted and the forester fees be paid out of the sale proceeds [RE 23];

i. except for payment of the forester's commission, failed to specify the amount of other deductions to be made from timber sale money and failed to direct the amount which should have distributed to the parties [RE 23, 12, 15]; and

j. required Ready to pay as reimbursement to Emogene's estate only one-half of the amount which the conservatorship paid for Emongene's support.[RE 12, 15]

Emogene died April 12, 2004. Her estate was opened and Vi appointed as Executrix. All of Emogene's assets passed to her two children, Vi and Charlie. [RE 104] The estate has received the unused balance of the Conservator's funds. By deed from

Ready, Vi and Charlie received the homeplace land, which was in the Family Trust, and received the lands in the Marital Deduction Trusts --- **all without the cut timber.**

What happened to the Trusts' assets between 1981 and 2004? How much did the trusts receive from the timber sale? The total timber sale bids were $3,070,840.50. Yet the conservator's report shows a receipt of only $722,467.62 from Ready. What happened to $2,348,372.88? How much in fees and expenses were paid or received by Ready out of the timber sale money?

In the May 15, 2002, Order For Sale Of Timber, the Court said the "net funds received which are attributable to said 'Marital Deduction Trust' as well as the 'homeplace' property, which is in the 'Family Deduction Trust [sic]', shall be paid over to the Conservator for deposit in the Conservatorship Account for the Estate of Emogene Baumgardner. [RE 18] This language appears to require the net of the $1,066,985.25 bid for the Marital Deduction Trust timber and the net of the $1,017,671.00 bid for the homeplace timber to be paid to the Conservator. [RE18]

Yet, the next order from the Court, the Order To Accept Timber Bids ... only requires the transfer of the Marital Deduction Trust money to the Conservator. This Order does not address the homeplace lands timber money. [RE 23] The subsequent Report of the Conservator addresses only the Marital Deduction Trust assets. The subsequent Objection by Ready only addresses the Marital Deduction Trust. The later accounting by the Conservator shows receipt from the Trustee of only $744,467.62. What happened to the rest of the money? Nothing is ever reported. Even the Court appears confused because in its Final Judgment entered June 19, 2009, the Chancellor calls the "Family

Trust" the "Home Place Trust" and requires Ready to make a disbursement from that to the Estate of Emogene for unpaid support due to Emogene. [RE 12] This suggests that the Chancellor believed Ready was holding and had not disbursed the money from the timber sale of the homeplace lands.

Vi and Charlie's Motion To Allocate Timber Sale Proceeds complains of this obvious shortage, even though the exact amount of the shortage is unknown to them. Their Motion also raises the Court's July 30th Order requiring the allocation of timber sale money by Ready should be ratified. [RE 104] It never was.

An accounting is generally tried in two stages. The first stage concerns whether there is a right to an accounting. If it is determined that a right does exist, then the second stage is the giving of the account. The right to an account can be waived. However, a waiver will not be effective to allow a trustee to violate general equitable principles, and when faced with those allegations Mississippi Courts will require and accounting. See, Note 2 at 735, In re: Stubbs-Kelley Trust 573 So.2d 734 (Miss. 1990) and Lambdin v. Lambdin, 357 So.2d 302 (Miss.1978).

If a proper case for discovery is pled the defendant cannot demand the the Plaintiff first prove the main facts in controversy as a condition to obtaining the discovery information. Garraway v. Retail Credit Company, 141 So.2d 727 (Miss. 1962).

Our discovery rules, 26-37 MRCP apply generally to all actions and are intended to be applied liberally in all proceedings and are confined only by the subject matter of the case. Dawkins v. Redd Pest Control, Inc., 607 So.2d, 1232 at 1235 (Miss. 1992).

In addition to the formal discovery proceedings and a formal accounting being

required, a trustee is required to keep records and make them available for formal inspection by the beneficiary and informally supply the beneficiary with information concerning the trust. 76 AM JUR 2D, Trusts, Section 407 at 397 and RESTATEMENT (SECOND) OF TRUSTS, Section 173 at 378.

Vi and Charlie are entitled to financial information of the Baumgardner Marital Deduction Trust and the Baumgardner Family Trust, including the sale of substantially all of the timber on the Trusts' timber lands.

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.

The Court's Final Judgment entered June 17, 2009, is confusing in its specifics. The trial court calls the Family Trust, which contained the Homeplace lands, the "Home Place Trust". [RE 13] However, the Court does recognize that the purpose of both the MDT and the FT were first to provide the necessary funds for living expenses of Emogene Baumgardner. [RE 13]

The Annual Accountings for the entire period of the Conservatorship show no contribution by Ready from either of these trusts for the very large medical and related expenses incurred by Emogene. [See the annual accountings in the Pleadings Record at pages 32, 213, 284, 471, 796, 1018, and 1210] The lack of contributions from the trusts required the expenditure of Emogene's personal funds for her care. The trial court was of

the opinion that the trust should have been contributing to Emogene's expenses. Besides self dealing, and failure to properly manage the timberlands, this was an original complaint raised by Vi in the initial Complaint filed. [RE 40]

The trial court believed that the parties could agree to those sums and requested they do so. [RE 12] The parties could not. Both asked the Court for a more specific ruling. [RE 15] So the Court entered it Supplemental Final Judgment determining that the sum of $205,000 should be paid by Ready to the Conservatorship to reimburse it for Emogene's personal funds used and for the loss of earning income which could have been made if the personal funds had not been used. Unfortunately, the Court gave no specific findings of how it arrived at this total [RE 15]

Rule 52(a) MRCP and Rule 5.02 Uniform Rules of Chancery seem to require something more specific fromthe trial court. Appellants requested this assistance from the Court in their Motion To Reconsider [RE 113]

A review of the accountings which were approved by the Court show that the spending of the Conservatorship money from the period from October 20, 1997 to June 30, 2004, for the care of Emogene was $429,045.24. [See the annual accountings in the Pleadings Record at pages 32, 213, 284, 471, 796, 1018, and 1210]. This is without any replacement for loss of possible earned income over that same 12 year period. At the U.S. Treasury 6 month bill rates in effect the loss of income would be $104,653.81 to January 1, 2010.

The entire amount spent $429,045.24 and the loss income on that amount for the 12 year period should be reimbursed by Ready to the Baumgardner estate.

CONCLUSION

This Court cannot allow a Trustee to act without any oversight or accountability to remainder beneficiaries of the trust.

This Court cannot allow a Chancellor to receive written reports of a guardian ad litem and a court appointed expert, not allow all of the parties to the litigation access to those written reports, conduct a hearing using that evidence and not allow all parties to participate in that hearing, then use the written reports as the basis of order to sell timber on 1800 acres of land. This Court cannot allow a Chancellor to order the distribution of more than 3 million dollars from the sale of that timber based on in camera documents never provided to all of the parties. This Court cannot allow the clear cutting of timber from land not needed for the life tenant, especially when the conversion from timber to cash acts as a transfer of that asset from one remainderman to another remainderman. Yet this is what happened in this case.

After twelve (12) years [6] of appellant's attempts to get information from trusts in which they are the remainder beneficiaries, the chancellor in his order not only refused to

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[6] The delay was not due to lack of diligence by the appellants. Respectfully appellants would point out that it was extremely difficult to get hearing dates and on two occasions hearings were set and the parties appeared but the Chancellor did not appear and on one of those occasions the Court Administrator located the Chancellor about an hour after the time for the hearing and he was on his way to a football game at Ole Miss. This necessitated the long delay in obtaining another hearing date.

require the trustee to provide any information, he made no ruling at all and ignored other issues. The Appellants still do not know what happened to the trust assets or if they received everything to which they are entitled. The harm may be irreparable. Neither of the parties could interpret the first order issued by the Court after a writ of mandamus was filed. The second and final order is simply empty of any of the issues raised and left the parties perplexed as to what it actually means, if anything.

This Court should order that the timber sale from the homeplace lands are due to Vi and Charlie, who are devisees of the homeplace lands. Ready should be required to pay that sum, $1,017,671 to Vi and Charlie.

An accounting from the Trustee should be required. Then based on the accounting a proper judgment for all of the assets in the Marital Deduction Trust which were not paid to the Conservatorship be ordered to be paid to the Estate of Emogene Baumgardner. Then based on an accounting a proper judgment for support of Emogene during the time of the Conservatorship should be entered. Then based on the accounting such further relief should be granted to the Appellants for their attorney fees and costs in prosecuting this action and appeal should be granted.

CERTIFICATE OF SERVICE

The undersigned attorney for the Appellants does certify that he has this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief Of Appellant to Chancellor Larry Buffington, P. O. Box 924, Collins, MS 39428; William E. Ready, P. O. Drawer 2899, Meridian, MS 39302; Robert D. Jones, P. O. Box 1205, Meridian, MS 39302; and Henry Pate, 712 Watts Avenue, Pascagoula, MS 39567.

This the 18th day of February, 2011.

Joe Clay Hamilton

CERTIFICATE OF MAILING

Pursuant to Rule 25 (a) of the Mississippi Rules of Appellate Procedure, I hereby certify that I have personally caused to be mailed one original and three copies of the Appellant's Brief via first-class U. S. Mail, postage prepaid, addressed to the Clerk of the Supreme Court of the State of Mississippi on this 18th day of February,

Joe Clay Hamilton