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December 3, 2008

*Via LexisNexis File & Serve
and First Class Mail*

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Moore & Rutt, P.A.
122 West Market Street
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Georgetown, DE 19947-0554

Mr. David J. Gilmore
7447 Rivershore Drive
Seaford, DE 19973

Re: Gilmore v. Gilmore
C.A. No. 1821-VCN
Date Submitted: June 12, 2008

Dear Mr. Gilmore and Mr. Rutt:

This matter involves a dispute between brothers generally regarding the handling of their now deceased parents' assets, most of which were held in the George R. Gilmore and Elizabeth F. Gilmore Unified Revocable Trust (the "Trust"). Plaintiff Paul Reid Gilmore alleges that Defendant David James Gilmore breached his fiduciary duties.

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The Plaintiff moved for summary judgment. Consistent with his pattern of failing to comply with deadlines established by the Court and its Rules, the Defendant failed to file a proper response. The Court heard argument on the motion for summary judgment on May 12, 2008. Instead of ruling on the motion, the Court gave the Defendant until June 9, 2008, to file a proper response.¹ Not only did the Defendant fail to meet that deadline, but he also has not yet filed an appropriate response to the motion for summary judgment. Thus, as the Defendant was warned at argument, the Court now turns to consider the Plaintiff's motion without the benefit of any cognizable response from the Defendant.²

Summary judgment, under Court of Chancery Rule 56, is appropriate if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.³ This matter is appropriate for partial disposition through summary judgment, even after allowing the Defendant the benefit of all reasonable inferences in his favor and viewing the evidence in the light most favorable to him.

¹ Guidance to retain an attorney was also given.

² Indeed, most of the "facts" which inform the Court's decision are based upon Defendant's failure to respond to Plaintiff's requests for admission under Court of Chancery Rule 36. See *Burns v. Marinis*, 2006 WL 651353, at *2 (Del. Ch. Mar. 1, 2006).

³ *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002).

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From the undisputed record before the Court, the Plaintiff and the Defendant are co-trustees of the Trust, a trust established by their parents. Both parents are now deceased, and the two brothers are the two major beneficiaries of the Trust.⁴ The Defendant, in breach of his fiduciary duty and without any just cause, wrote, either to his benefit or to the benefit of Land Access Mgmt., Inc., an entity controlled by him, checks totaling \$273,000. These checks were drawn on a Merrill Lynch account established for the Trust. The Defendant is liable to the Trust in that amount, together with interest at the legal rate.

The Defendant (at times with a former spouse) owned a one-half interest in residential real estate located in Seaford, Delaware (the "Property"). The other one-half interest was owned by the parents of Plaintiff and Defendant. All expenses associated with the Property, including mortgage payments, taxes, and maintenance costs have been paid from the Trust for years. The Defendant now claims to be the sole owner of the Property. To the extent that those payments from the Trust benefited the Defendant's interest in the Property, his disbursement of such sums

⁴ Some of the claims asserted by the Plaintiff may more accurately belong to the mother's estate and not to the Trust. The claims specifically addressed in this letter opinion belong to the Trust.

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from the Trust was in breach of his fiduciary duties. The Defendant is liable to the Trust for such amount. The amount, however, is unknown. Accordingly, the Defendant shall account to the Trust and the Plaintiff, within sixty days of the date of this letter opinion, for all expenditures from the Trust made with respect to the Property on his behalf.

The Defendant also took funds from the Trust, in breach of his fiduciary duty and without just cause, to purchase for himself a pickup truck. The amount of such expenditure is also unknown. Within sixty days, the Defendant shall file an accounting evidencing the amount of such expenditure. The Defendant is liable to the Trust for that amount.

The Defendant's continuing and material failure to comply with his fiduciary duty justifies his removal as co-trustee of the Trust. Persistent wrongful conduct by a trustee constitutes grounds for removal.⁵

The Plaintiff has moved for imposition of a resulting trust and a constructive trust on the Property. He has also applied for an award of attorney's fees. Ruling on those applications is deferred pending further proceedings in this matter.

⁵ See *Massey v. Stout*, 4 Del. Ch. 274, 1871 WL 2090 (Del. Ch. 1871).

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Accordingly, for the foregoing reasons, Defendant David James Gilmore is hereby removed as co-trustee of the Trust. Judgment in favor of the Trust and against Defendant David James Gilmore is hereby entered in the amount of \$273,000, together with interest at the legal rate.⁶ Judgment is further entered against Defendant David James Gilmore declaring that he owes the Trust the appropriate sums for expenses, mortgage payments, and taxes made with respect to his share of the Property and, also, the amount taken from the Trust to purchase his pickup truck. To establish the amount of such obligations, Defendant David James Gilmore shall provide a full and complete accounting of all such expenditures within sixty days of the date hereof.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

⁶ The terms of judgment may be revised to prescribe the proper rate of interest, which is not evidenced by the record, and to establish the date from which the interest obligation commences.