

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusals:

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2. Willard L. McIlwain, Jr., Esq.
Counsel for Appellant
3. Ruth Ann Brent Provenza (Striebeck)
Appellee
4. Luther P. Crull, Jr., Esq.
Counsel for Appellee
5. Honorable Dorothy W. Colom
Special Chancellor(on Remand)

Respectfully submitted,

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EDITOR'S NOTE

Since this matter, Case No. 2007-TS-01185 (*i.e.* the remand case) has been consolidated with the closed case, Case No. 2004-CA-00507-COA, (*i.e.* the original case) then references herein to documents contained in the "Clerk's Original Papers" will be designated as (Original R.C.P. _____); references to documents contained in the "Clerk's Papers on *Remand*" will be designated as (*Remand* R.C.P. _____); references herein to documents contained in the "Appellant's Record Excerpts" will be designated as (Appellant's R.E. _____); references to pages or testimony from the "Original Trial Record Transcript" will be designated as (Original R.Tr. _____); references to pages or testimony from the "*Remand* Trial Record Transcript" will be designated as (*Remand* R.Tr. _____); references to the original Trial Exhibits will be designated as (Original Trial Exhibit _____); and, references to *Remand* Trial Exhibits will be designated as (*Remand* Trial Exhibit _____).

EDITOR'S SPECIAL NOTE

It is respectfully requested of Appellee's counsel and the Honorable Supreme Court that all references in the Brief's of the parties and any subsequent published decision from this Honorable Court not disclose the actual identity of any clients of the Appellant in the "Bridge matter" because of certain confidentiality agreements which were ordered by the United States District Court for the Eastern District of Oklahoma. Counsel for the Appellant respectfully suggests the clients identified at the remand hearing be identified as follows:

- 1. Tidwell matter - please refer to as Case A;**
- 2. Gillian matter - please refer to as Case B; and,**
- 3. Green matter - please refer to as Case C.**

The appellant and his attorney do not wish to have any public reference to the identity of any client in the "Bridge matter" which could be interpreted as the appellant having violated the confidentiality agreements.

STATEMENT OF ISSUES

(The Appellant is hereinafter referred to as “Bill”, and the Appellee is hereinafter referred to as “Ruth Ann”)

- I. THE CHANCELLOR ERRED IN AWARDING RUTH ANN \$75,000.00 FROM THE ATTORNEY’S FEES BILL EARNED IN THE BRIDGE CASE THREE AND ONE-HALF (3 ½) YEARS AFTER THE PARTIES’ ACTUAL SEPARATION, THREE AND ONE-HALF (3½) YEARS AFTER THE DIVORCE PROCEEDINGS BEGAN IN THIS MATTER, AND SINCE RUTH ANN DID NOT OFFER ANY PROOF OF THE *FERGUSON* FACTORS AS TO THE ACQUISITION OF THESE FEES.**
- II. THE CHANCELLOR ERRED WHEN, AS A SUCCESSOR JUDGE, SHE CHANGED THE ORIGINAL CHANCELLOR’S FINDING THAT RUTH ANN “RENDERED LITTLE ASSISTANCE TO [BILL] IN HIS LAW PRACTICE.”**
- III. THE CHANCELLOR ERRED BY NOT GRANTING BILL’S MOTION FOR REIMBURSEMENT OF ALIMONY AFTER THE COURT OF APPEALS REVERSED AN ERRONEOUS GRANT OF ALIMONY BY THE ORIGINAL TRIAL COURT. (*Issue of First Impression for this Court*).**

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is a domestic relations case before the Court on appeal after a hearing on certain *remand* issues as ordered by the Court of Appeals in the case styled *Striebeck v. Striebeck*, 911 So.2d 628 (Miss.App. 2005).

B. PREVIOUS COURSE OF PROCEEDINGS IN THE COURT OF APPEALS

This divorce matter was originally heard by Special Chancellor Donald Patterson on July 30-31, 2003. The original ruling of the Special Chancellor was appealed by both parties. The Court of Appeals issued its' decision on September 13, 2005 in this case styled *William R. Striebeck v. Ruth Ann (Brent) (Provenza) Striebeck*, 911 So.2d 628 (Miss.App.2005). For purposes of briefing in this *remand* matter and for use of the record originally forwarded to the Court on the first appeal, this Court by its' Order dated August 28, 2007 (J.,Easley) granted Bill's Motion to Consolidate the present case (2007-TS-01185) with the closed case (No. 2004-CA-00507-COA).

C. COURSE OF PROCEEDINGS IN TRIAL COURT ON REMAND

The issues to be determined on *remand* were heard by Special Chancellor Dorothy W. Colom on November 29, 2006. The Special Chancellor on *remand* entered her Opinion of the Court on April 26, 2007. Thereafter, Ruth Ann filed her Motion for Reconsideration on May 16, 2007. Bill filed his response and his Counter-Motion for Reconsideration on May 24, 2007. The Special Chancellor filed her Order concerning the Motions to Reconsider on June 12, 2007. Bill timely filed his Notice of Appeal with supersedeas bond on July 11, 2007. This appeal is now before this Court.

STATEMENT OF FACTS

- 1). The original divorce trial in this matter was heard by Special Chancellor Donald Patterson on July 30-31, 2003. The Special Chancellor's original Findings of Fact and Conclusions of Law were filed by the Clerk on September 23, 2003. Thereafter, on December 2, 2003 a Final Judgment of Divorce was entered by the Clerk. Both Bill and Ruth Ann took issue with portions of the original Chancellor's Ruling and appealed. The case was subsequently assigned to the Court of Appeals. The Court of Appeals issued its' decision in the case styled *Striebeck v. Striebeck*, 911 So.2d 628 (Miss.App.2005) and *reversed* and *remanded* certain issues and *affirmed* others.
- 2). The Honorable Dorothy W. Colom, Chancellor of the 14th Chancery Court District, was appointed as the Special Chancellor to preside over the *remand* proceedings by an Order of the Chief Justice of the Supreme Court of Mississippi on March 24, 2006.
- 3). In its' decision in *Striebeck v. Striebeck*, 911 So.2d 628 (Miss.App. 2005), the Court of Appeals identified the issues to be determined on *remand* as follows(quoted verbatim);
 - I. We agree with Ruth Ann's contention that the Chancellor erred in not considering these funds [attorney's fees earned by Bill from the bridge case] as marital property; however, on remand, the chancellor should determine if Bill obtained more of the fee prior to the judgment of divorce. As in *Selman*, ***it is entirely possible that there is no equitable reason for Ruth Ann to share in this fee.*** This is to be decided by the chancellor on remand after an appropriate application of the law as enunciated in *Hemsley* and *Ferguson*.

Striebeck, 911 So.2d at (¶15) 634. (bold italics added for emphasis).
 - II. On appeal, Bill asserts that Ruth Ann's property interest in the Partnership should be included as part of her assets. We

agree. Her interest is an asset which she may sell pursuant to the partnership agreement. As such, the trial court erred in not considering, at a minimum, the present value of Ruth Ann's interest in valuing her assets.... Accordingly, we reverse and remand for a determination of marital property and non-marital property that is consistent with this opinion.

Striebeck, 911 So.2d at (¶20) 634.

III. We have determined that the Chancellor erred in valuing Ruth Ann's net worth. As such, it is entirely possible that the separate assets of the parties will adequately provide for their respective households. We reverse and remand for a consideration of alimony -- if necessary -- after dividing the parties' assets in a manner consistent with this opinion.

Striebeck, 911 So.2d at (¶26) 635.

- 4). Prior to the *remand* hearing, Bill filed a Motion to Compel Enforcement of Mandate and for Reimbursement of Alimony Paid. (*Remand* R.C.P. 60-65).
- 5). Prior to the *remand* hearing, the parties stipulated into evidence the trial transcript from the original divorce matter, along with all original trial exhibits.
- 6). At the *remand* hearing on November 29, 2006, Ruth Ann admitted she had absolutely ***nothing*** to do with Bill's participation in the bridge case. (*Remand* R.Tr. 44).
- 7). At the *remand* hearing, Ruth Ann acknowledged her testimony from the original Trial (Original R.Tr. 129) that the marriage between the parties had been over long before their final separation of April 20, 2000. (*Remand* R.Tr. 45-46). She stated the marriage was basically over by the time their daughter was born in 1995. (*Remand* R.Tr. 46). The original Chancellor specifically found that "*the evidence is abundantly clear that this marriage began unraveling in the Spring of 1997 when the marital residence flooded.*"(Original R.C.P. 181). Further, the Court of Appeals in its' published decision specifically pointed out that "Ruth Ann testified that the marriage

had failed prior to the divorce. . .” *Striebeck*, 911 So.2d at (¶11) 633.

- 8). At the *remand* hearing, Bill testified he had been a sole practitioner since 1992.(*Remand* R.Tr. 58). Additionally, Bill’s background experience in the specialized area of maritime/admiralty law was gained prior to the parties’ marriage. In fact it began prior to his entering law school. (*Remand* R.Tr. 59).
- 9). Bill’s testimony at the *remand* hearing was identical to Ruth Ann’s in that she did nothing to assist in his earning the attorney’s fees in the bridge case.(*Remand* R.Tr. 59). In fact, Bill testified that because of the length of time Ruth Ann prolonged the divorce proceedings, including the emotional aspects involved, it was a difficult task because of the complicated nature of the bridge case and his having to deal with the divorce issues during the time he worked on the case.(*Remand* R.Tr. 59).
- 10). During the parties’ marriage, and in addition to depositing funds into the couples joint account for monthly bills, Bill paid many other bills out of his separate account which included but were not limited to sums for substantial repairs on the residence, sums for required *ad valorem* taxes on the residence, sums for the required homeowners and liability insurance, sums for the required annual flood insurance, etc. (*Remand* R.Tr. 61). (*See further*, Original Trial Exhibit D-18, D-19, D-20, D-21, & D-22). These facts were overlooked by the Chancellor on *remand*. The important aspect to this proof was that at the original Trial and at the *remand* hearing Ruth Ann continued to argue it was her income that assisted the parties during the marriage. Forgotten in her argument were all of the additional expenses paid solely by Bill which also assisted the parties during the marriage.

Ruling of Special Chancellor on Remand

- 11). On *remand*, the Chancellor found that during the marriage the parties “acquired the marital home¹, the vehicles, and the [attorney’s] fees from the bridge litigation.” (*Remand* R.C.P. 50).
- 12). Additionally, the Chancellor found that Ruth Ann played a significant part in the growth of Bill’s solo law firm. (*Remand* R.C.P. 51). However, this in direct conflict with the original finding of fact from the original Chancellor who heard the two (2) day divorce trial after which he made a specific finding that “[**Ruth Ann**] **continued her job as a school teacher and rendered little assistance to [Bill] in his law practice.**”(Original R.C.P. 191)(bold added for emphases).
- 13). Considering the previous equitable distribution from the original Chancellor and before determining the equitable distribution, if necessary at all, of Bill’s attorney’s fees in the bridge case, the Chancellor determined Ruth Ann’s net worth to be \$793,876.08 and Bill’s to be \$60,166.96. (*Remand* R.C.P. 53).
- 14). The Chancellor then found Ruth Ann should receive \$75,000.00 from the attorney’s

¹This finding that the parties acquired the marital home is erroneous. The Chancellor at the original divorce trial specifically found that “[Bill] owned the house prior to the parties’ marriage. At the time of the marriage he had equity of approximately \$28,000.00.” (Original R.C.P. 228). Additionally, the original Chancellor found that the **gift presumption** applied when Bill conveyed his house to himself and Ruth Ann after the marriage as joint tenants. (Original R.C.P. 229). He then awarded Ruth Ann \$34,055.00 which included one-half (½) of Bill’s equity prior to the marriage, one-half (½) of the equity recognized by the parties during the marriage and before the separation, and one-half (½) of the equity realized during the three and one-half (3 ½) year period after the separation when Bill was paying the mortgage notes alone. Bill went ahead and paid this to Ruth Ann and did not appeal it in the original *Striebeck* case. However, it should be noted that the Supreme Court specifically **overruled** any title or gift presumption in its’ decision in *Pearson v. Pearson*, 761 So.2d 157,163 (¶17)(Miss. 2000). Therefore, this was a generous award to Ruth Ann from the original Chancellor relating to equitable distribution in this matter which should have been recognized and considered by the successor Chancellor on *remand*.

fees in the bridge case, with Bill to be given credit for the alimony previously paid to her (\$28,500.00). (*Remand* R.C.P. 54 and *Remand* Trial Exhibit D-3). Bill was entitled to receive the after tax remainder of the attorney's fees he received prior to the divorce judgment being entered by the clerk.

- 15). Regrettably, the Chancellor did not discuss in her Ruling the tax consequences to which Bill testified he incurred as a result of earning the attorney's fees in the bridge case. The tax consequences were forty-one percent (41%). (*Remand* R.Tr. 58 and *Remand* Trial Exhibit D-3).² Therefore, the sum total of the before tax value of the attorney's fees he earned in the bridge case was \$360,616.41.(Case A (\$39,960.00) + Case B (\$198,156.41) + Case C (\$122,500.00)). With tax consequences of forty-one percent (41%) (\$147,852.72), then the after tax value was \$212,763.69 for the attorney's fees Bill earned in the bridge case before the Final Judgment of Divorce was entered by the Clerk on December 2, 2003.
- 16). Finally, the Chancellor found that after considering the total value of Ruth Ann's estate, an award of alimony was not warranted.(*Remand* R.C.P. 54).
- 17). Though the Chancellor did not assign a value to the estates of Bill and Ruth Ann after her distributing Ruth Ann a portion of the attorney's fees Bill earned in the bridge case, it is easily calculated as follows:

²It is noted that Bill's *Remand* Trial Exhibit D-3 included the attorney's fee from Case A (\$39,960.00 - received August 5, 2003) and the attorney's fees in Case B (\$198,156.44 - received August 8, 2003). This exhibit did not include the attorney's fees in Case C (\$122,000.00) that he testified he received on December 1, 2003.(*Remand* R.Tr. 67), and the Chancellor considered this attorney's fees also in her ruling.

VALUE OF RUTH ANN'S ESTATE

\$793,876.08
\$ 75,000.00³
\$868,876.08

VALUE OF BILL'S ESTATE

\$ 60,166.99
\$137,763.69³
\$197,930.68

- 18). The Chancellor in effect denied Bill's Motion for Reimbursement of Alimony Previously Paid, by giving him credit against the \$75,000.00 award for the alimony he previously paid to Ruth Ann.

³The Chancellor on *remand* after awarding Ruth Ann \$75,000.00 of the attorney's fees Bill earned in the bridge case, then ruled Bill was to be given a credit for any alimony he previously paid to Ruth Ann. (*Remand* R.C.P. 54). This amount was \$28,500.00. (*Remand* Trail Exhibit D-3).

SUMMARY OF THE ARGUMENT

- I. THE CHANCELLOR ERRED IN AWARDING RUTH ANN \$75,000.00 FROM THE ATTORNEY'S FEES BILL EARNED IN THE BRIDGE CASE THREE AND ONE-HALF (3 ½) YEARS AFTER THE PARTIES' ACTUAL SEPARATION, THREE AND ONE-HALF (3½) YEARS AFTER THE DIVORCE PROCEEDINGS BEGAN IN THIS MATTER, AND SINCE RUTH ANN DID NOT OFFER ANY PROOF OF THE *FERGUSON* FACTORS AS TO THE ACQUISITION OF THESE FEES.
- II. THE CHANCELLOR ERRED WHEN, AS A SUCCESSOR JUDGE, SHE CHANGED THE ORIGINAL CHANCELLOR'S FINDING THAT RUTH ANN "RENDERED LITTLE ASSISTANCE TO [BILL] IN HIS LAW PRACTICE."

These two issues lead to the same manifest error. Therefore, they will be argued together. The original Chancellor, after two days of trial and after reviewing the evidence and viewing the demeanor of the witnesses, specifically found that Ruth Ann "***rendered little assistance to [Bill] in his law practice.***" (Original R.C.P. 28) (bold italics added for emphasis). On remand, the successor Chancellor found Ruth Ann "played a significant part in the growth of [Bill's] firm." (Remand R.C.P. 51) A successor judge should be precluded from changing a previous judge's finding of fact. See for example, *Love v. Barnett*, 611 So.2d 205, 208 (Miss. 1992) (No additional evidence introduced into the record to warrant the subsequent modification of bench ruling of previous Chancellor by successor Chancellor).

In addition, the Chancellor erred when she awarded Ruth Ann \$75,000.00 from the attorney's fees which Bill earned in the bridge case three and one-half (3½) years after the divorce proceedings began in this matter and some six and one-half (6 ½) years after the original Chancellor found "***the evidence is abundantly clear that this marriage began unraveling in the spring of 1997.***" (Original R.C.P. 18) (bold italics added for emphasis). As the Court of Appeals in *Striebeck v. Striebeck*, 911 So.2d 633 (¶15) (Miss. App. 2005) stated, "*it is entirely possible there is no equitable*

reason for Ruth Ann to share in this fee". The relationship out of which equitable distribution arises had ended long before, and Ruth Ann simply offered no proof as to any of the *Ferguson* factors relating to the acquisition of these attorney's fee by Bill: post separation and post divorce proceedings.

III. THE CHANCELLOR ERRED BY NOT GRANTING BILL'S MOTION FOR REIMBURSEMENT OF ALIMONY AFTER THE COURT OF APPEALS REVERSED AN ERRONEOUS GRANT OF ALIMONY BY THE ORIGINAL TRIAL COURT. (*Issue of First Impression for this Court*).

The *remand* Chancellor committed manifest error and abused her discretion by not granting Bill's Motion for Reimbursement of Alimony after the Court of Appeals reversed an erroneous grant of alimony by the original trial Court. In *Striebeck v. Striebeck*, 911 So.2d 628(Miss.App. 2005), the Court stated "*it is entirely possible that the separate assets of the parties will adequately provide for their respective households.*" *Id* at (¶26) 635(bold italics added for emphasis). Once the Court considers the value of the marital assets actually received by Ruth Ann, and coupled with the correct value of her separate estate, then it becomes inequitable for Bill to not be reimbursed. This is an issue of first impression for this Court. However in *Smith v. Smith*, 928 So.2d 287 (Ala.Civ.App. 2005), our sister state of Alabama ruled that an ex-spouse could be reimbursed for alimony previously paid when the original grant of alimony was reversed by the Appellate Court under the theory of equitable restitution. This Court should adopt a similar approach since it is the equitable approach.

STANDARD OF REVIEW

When reviewing a Chancellor's decision in any particular case, the Court's review may be divided into issues concerning questions of law or questions of fact. *Cummings v. Benderman*, 681 So.2d 97, 100 (Miss. 1996). The standard of review used by this Court when examining a Chancellor's findings of fact is well settled and has been repeated by the Court many times:

It is that where the Chancellor was the trier of facts, his findings of fact on conflicting evidence cannot be disturbed by this Court on appeal unless we can say with reasonable certainty that these findings were manifestly wrong and against the overwhelming weight of the evidence.

Travis v. Hartford Accident & Indemnity Co., 630 So.2d 337, 338 (Miss. 1993) (Court quoting *Richardson v. Riley*, 355 So.2d 667, 668 (Miss. 1978)).

Stated another way:

This Court can always review a Chancellor's findings of fact but . . . will not disturb the factual findings of a Chancellor when supported by substantial evidence unless the Court can say with reasonable certainty that the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard.

Cummings, 681 So.2d at 100 (Miss. 1996).

Manifest error has been defined by Court as error that is "unmistakable, clear, plain, or indisputable". *Magee v. Magee*, 661 So.2d 1117, 1129 (Miss. 1995) (Court citing *Brennan v. Brennan*, 638 So.2d 1320, 1323, (Miss. 1994) which quoted BLACK'S LAW DICTIONARY, p. 963 (6th ed. 1990)). When there is substantial evidence to support the Chancellor's findings, the Court will not disturb the Chancellor's conclusions. However, the Court "will not hesitate to reverse if the Chancellor's decision is manifestly wrong, or [if] the Court applied an erroneous legal standard..." *Mississippi Dept. of Environmental Quality v. Wings*, 653 So.2d 266, 274 (Miss. 1995) (Court quoting *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993) and *Smith v.*

Smith, 607 So.2d 122, 126 (Miss. 1992)).

In reviewing errors of law, this Court proceeds *de novo*. *Cummings v. Benderman*, 681 So.2d 97, 100 (Miss. 1996) (Court citing *Bilbo v. Thigpen*, 647 So.2d 678, 688 (Miss. 1994)). The Court will reverse “for erroneous interpretations or applications of the law”. *Pannell v. Guess*, 671 So.2d 1310, 1313 (Miss. 1996)(Court citing *Bank of Mississippi v. Hollingsworth*, 609 So.2d 422, 424 (Miss. 1992)).

ARGUMENT

- I. THE CHANCELLOR ERRED IN AWARDING RUTH ANN \$75,000.00 FROM THE ATTORNEY'S FEES BILL EARNED IN THE BRIDGE CASE THREE AND ONE-HALF (3 ½) YEARS AFTER THE PARTIES' ACTUAL SEPARATION, THREE AND ONE-HALF (3½) YEARS AFTER THE DIVORCE PROCEEDINGS BEGAN IN THIS MATTER, AND SINCE RUTH ANN DID NOT OFFER ANY PROOF OF THE *FERGUSON* FACTORS AS TO THE ACQUISITION OF THESE FEES.
- II. THE CHANCELLOR ERRED WHEN, AS A SUCCESSOR JUDGE, SHE CHANGED THE ORIGINAL CHANCELLOR'S FINDING THAT RUTH ANN "RENDERED LITTLE ASSISTANCE TO [BILL] IN HIS LAW PRACTICE."

In her ruling on *remand*, the Chancellor found the following values of the parties' assets prior to considering the attorney's fees Bill earned (and received) post separation, but before the divorce judgment was entered by the Clerk :

Ruth Ann

Retirement	\$ 39,534.00
IRA	\$ 525.00
Brokerage Account	\$ 91,270.00
Checking and Silver	\$ 5,234.00
Furniture, jewelry, etc.	\$ 21,905.00
Ford Bronco	\$ 2,500.00
Lea Brent Family Trust	\$611,087.21
Equity in marital home	\$ 34,055.00
1999 Tahoe	<u>\$ 8,500.00</u>

Ruth Ann's Sub-Total \$814,610.21

Less liabilities \$ 20,734.13

Ruth Ann's Net Worth \$793,876.08

Bill

IRA	\$17,820.69
Personal checking and saving	\$ 814.51
Guns, furniture, etc.	\$20,700.00
Law practice equipment	\$ 4,320.00

Business account	\$11,854.24
Litigation expense account	\$23,053.66
Law Firm CD	\$ 6,000.00
Law Firm Investment account	\$16,157.05
2002 Tahoe	\$26,359.00
Equity in marital home	\$34,055.00
 Bill's Sub-Total	 <u>\$161,134.15</u>
 Less liabilities	 <u>\$ 100,967.19</u>
 Bill's Net Worth	 \$ 60,166.96

(*Remand* R.C.P 52-53; Appellant's R.E.10-11). The majority of funds in Ruth Ann's retirement account, the household furniture, the Ford Bronco, the 1999 Tahoe, and the equity in the marital home were all marital assets which Bill either stipulated she could have before the original divorce trial, or as in the case of the equity in the marital home, the distribution of which was awarded to her by the original Chancellor.

At the *remand* hearing, and in regards to what she did or didn't do to assist Bill in earning the attorney's fees in the bridge case according to the *Ferguson* factors, Ruth Ann testified as follows:

- Q. And you had absolutely nothing to do with this bridge case that's the subject of this litigation?
- A. That's correct.
- Q. During that period of time, you never worked in his office?
- A. During that period of time.
- Q. Following your separation from Bill, you never set foot in his office, did you?
- A. No.
- Q. Now, you had testified at the first trial that you had, prior to the separation in April, 2000, that you and Bill had been constructively separated for a great deal of time before that?

A. Yes.

(Remand R.Tr.44).

After hearing this testimony on *remand*, the Chancellor then committed error by changing the original Chancellor's specific finding of fact. The original Chancellor, after two (2) days of trial and after he reviewed the evidence and demeanor of the witnesses who testified, specifically found that Ruth Ann "***rendered little assistance to [Bill] in his law practice***". (Original R.C.P.28; Appellant's R.E. 35)(bold italics added for emphasis). The *remand* Chancellor changed this by finding that Ruth Ann "played a significant part in the growth of [Bill's] firm. A successor Judge should be precluded from changing a previous Judge's finding of fact. *See for example, Love v. Barnett*, 611 So.2d 205, 208(Miss.1992)(No additional evidence introduced into the record to warrant the subsequent modification of bench ruling by previous Chancellor by successor Chancellor). Indeed, this original finding of fact by the original Chancellor was not appealed by Ruth Ann. What the successor Chancellor did is something this Court cannot even do and that is to reverse a finding of fact when there is substantial evidence in the record justifying it. *Jones v. McQuage*, 932 So.2d 846, 848 (¶7)(Miss.App. 2007). Therefore, the successor Chancellor should not be allowed to change a previous finding of fact in the same case by a different Chancellor which was not appealed. The original Chancellor's finding that Ruth Ann "***rendered little assistance to [Bill] in his law practice***" was specifically found after she saw the witnesses testify and he observed the witnesses manner and demeanor. "He was there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable." *Bellais v. Bellais*, 931 So.2d 665, 670 (¶26)(Miss.App.2006)(Court citing *Culbreath v. Johnson*, 427 So.2d 705, 708(Miss.1983)). The successor Chancellor in this case on *remand* simply committed manifest error and abused her discretion when she changed the original

Chancellor's specific finding of fact.

After changing the original Chancellor's finding of fact, the *remand* Chancellor then awarded Ruth Ann \$75,000.00 from the attorney's fees which Bill earned three and one-half (3½) years after the divorce proceedings began and some six and one-half (6½) years after the marriage relationship had ended(as found by the original Chancellor). However, a careful review of the record simply indicates there is no justifiable or equitable reason for the Chancellor to make this award to Ruth Ann, nor did Ruth Ann offer any additional proof of the *Ferguson* factors relating to the acquisition of these attorney's fees. *Selman v. Selman*, 722 So.2d 547, 553(¶25)(Miss.1998). The Court of Appeals stated the obvious from its' review of the original record; "[I]t is *entirely possibly that there is no equitable reason for Ruth Ann to share in this fee*". *Striebeck v. Striebeck*, 911 So.2d 628, 633(¶15)(Miss.App.2005). Ruth Ann simply failed to submit any proof which would justify an award to her consistent with the *Ferguson* factors relating to the acquisition of this asset: nor could she have after an absence of 42 months. Therefore, though it is rarely done, this Court should *reverse* and *render* this award. It is simply not equitable.⁴

⁴This Court should take this opportunity for the benefit of the Bench and Bar to revisit its' holding in *Selman* that though a marriage had not been legally terminated, the relationship out of which equitable distribution arose had ended. *Selman*, 722 So.2d at 553(¶25). In *Selman*, the divorce action was filed on June 27, 1996 and the Final Decree of Divorce was entered on January 30, 1997. In the case *sub judice*, the divorce action was filed on May 15, 2000(Appellant's R.E. 2) and the Final Decree of Divorce was entered on December 2, 2003.(Appellant's R.E. 3). In *Selman*, a period of **7 months** elapsed from the time the divorce was filed until the Final Decree was entered. In *Striebeck*, a period of **42 months** elapsed from the time the divorce was filed until the Final Decree was entered. As Justice Irving stated in his concurring and dissenting opinion in *Graham v. Graham*, 767 So.2d 277 (Miss.App.2000), "Thus, it seems to me that in cases where the evidence is clear that both parties did not contribute to the accumulation of a particular asset acquired during the course of the marriage. . . , there is no compelling reason for equitable division of that asset." *Graham*, 767 at 283(¶24)(IRVING, J. concurring in part, dissenting in part, JOINED by KING and SOUTHWICK, P.JJ., and BRIDGES, J.). *Selman* should either be embraced by this Court as an equitable remedy in light of *Ferguson* and *Hemsley*, or it should be written a judicial obituary and laid to rest.

III. THE CHANCELLOR ERRED BY NOT GRANTING BILL'S MOTION FOR REIMBURSEMENT OF ALIMONY AFTER THE COURT OF APPEALS REVERSED AN ERRONEOUS GRANT OF ALIMONY BY THE ORIGINAL TRIAL COURT. (*Issue of First Impression for this Court*).

Prior to the *remand* hearing, Bill filed a Motion for Reimbursement of Alimony. (*Remand* R.C.P. 60-65). In her ruling, the Chancellor in effect denied Bill's Motion for Reimbursement of Alimony Previously Paid by awarding Ruth Ann \$75,000.00 of the attorney's fees Bill earned in the bridge case and then giving him credit against that award for the alimony he previously paid to Ruth Ann.

This simply never should have been an alimony case. Prior to considering the attorney's fees earned by Bill in the bridge case (three and one-half (3½) years after these divorce proceedings were initiated by Ruth Ann), the value of Ruth Ann's estate was \$793,876.08. (*Remand* R.C.P. 52-53; Appellant's R.E.11). If the *remand* Court had found that there was no equitable reason for Ruth Ann to share in the attorney's fees Bill earned in the bridge case, a very possible fact espoused by the Court of Appeals in its' decision, then the value of Ruth Ann's estate at the end of the day would have been \$793,876.08, while Bill's would have been \$272,930.68. Bill would still have been in a deficit as compared to Ruth Ann. Prior to the *remand* hearing, Bill paid unto Ruth Ann under the original Chancellor's ruling (which was subsequently reversed by the Court of Appeals) the sum of \$28,500.00 in periodic alimony. (*Remand* Trial Exhibit D-3).

To the authors knowledge, there are no Mississippi cases on the issue reimbursement of alimony. Thus, this Court should look to our sister states for guidance. *McFarland v. Energy of Mississippi, Inc.*, 919 So.2d 894, 901(¶21)(Miss. 2005). Our sister state of Alabama recently stated that there is an equitable remedy by which a paying spouse should be restored to the position he occupied prior to the rendition of an erroneous grant of alimony in a divorce judgment. In *Smith v. Smith*, 928 So.2d 287 (Ala.Civ.App. 2005), the Court reversed a trial Court which refused the

request of an ex-husband for reimbursement of alimony paid after the grant of alimony was reversed by the Appellate Court. Citing the Reinstatement of Restitution §74 (1937), the *Smith* Court stated that “[a] person who has conferred a benefit upon another in compliance with a judgment . . . is entitled to restitution if a judgment is reversed . . . unless restitution would be inequitable . . .”. *Smith*, 928 So.2d at 294. In the present case, Ruth Ann cannot say restitution would be inequitable when the present value of her estate, without the addition of a portion of the attorney’s fees Bill earned in the bridge case, was \$793,876.08: which is far greater than Bill’s after tax net worth of \$272,930.68.⁵

It would simply be inequitable for Ruth Ann to have such a larger estate at the time of the parties’ divorce and then be able to keep the previous payments of alimony paid by Bill. The Court of Appeals stated the obvious, “*we have determined that the Chancellor erred in valuing Ruth Ann’s net worth. As such, it is entirely possible that the separate assets of the parties will adequately provide for their respective households*”. *Striebeck v. Striebeck*, 911 So.2d 628, 635(¶26)(Miss. App.2005)(bold italics added for emphases). This Court should not only *reverse* and *render* the award of \$75,000.00 to Ruth Ann out of the attorney’s fees Bill earned in the bridge case, but this Court should go one step further and adopt the holding in *Smith* and *reverse* and *remand* the issue of whether Bill should be entitled to be reimbursed for alimony previously paid under the principle of equitable restitution.

⁵The figure of \$272,930.68 is only applicable if this Court *reverses* and *renders* the award to Ruth Ann of \$75,000.00 of the attorney’s fees Bill earned post separation in the bridge case.

CONCLUSION

It was clear, manifest error, and an abuse of discretion for the Chancellor on *remand* to award Ruth Ann \$75,000.00 out of the attorney's fees Bill earned three and one-half(3½) years post separation and post divorce proceedings. At the *remand* hearing, Ruth Ann offered no proof, according to the *Ferguson* factors, that she helped with the acquisition of these fees. In addition, the Chancellor on *remand* committed further manifest error by basically reversing a finding of fact by the original Chancellor. The original Chancellor after two (2) days of trial, specifically found that Ruth Ann "***rendered little assistance to [Bill] in his law practice.***" This finding of fact was not disturbed on the first appeal. It should be remembered that many of the assets which Ruth Ann received in the original divorce were marital assets which Bill stipulated prior to the original trial she could receive. Ruth Ann's estate properly valued (without a portion of the attorney's fees) is \$793,876.08.⁶ Bill's estate, if this Court finds it necessary and equitable to *reverse* and *render* the Chancellor's award on *remand*, would have a value of \$272,930.68. In reviewing a Chancellor's distribution of marital assets upon divorce, and in the present case, "*this Court's focus is upon equity. . .*" *Phillips v. Phillips*, 904 So.2d 999, 1003(¶13)(Miss.2004). As such, this Court should consider the inequities of the award of the attorney's fees by the Chancellor after she reversed a finding of fact from the original Chancellor and *reverse* and *render* her award of \$75,000.00 to Ruth Ann.

Additionally, this Court should adopt the equitable restitution principle recognized by the Alabama Court in *Smith v. Smith*, 928 So.2d 287(Ala.Civ.App. 2005) and *reverse* and *remand* this case for the Chancellor to determine if there is any reason in equity whereby Bill should not be

⁶It should be remembered that Ruth Ann also received \$28,500.00 in periodic alimony payments during the time the original Chancellor ordered it, the Court of Appeals *reversed* and *remanded* it, and the Chancellor on *remand* discontinued it.

reimbursed under the principle of equitable restitution the sum of \$28,500.00 he previously paid to Ruth Ann in periodic alimony payments; especially when the correct value of her estate has always been far greater than Bill's.

RESPECTFULLY SUBMITTED this the 20th day of November, 2007.

WILLIAM R. STRIEBECK, Appellant

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CERTIFICATE OF SERVICE

I, Willard L. McIlwain, Jr., Esq., attorney for William R. Striebeck, do hereby certify that I have this day served via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to the following interested parties:

Luther P. Crull, Jr., Esq.
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Winona, MS 38967

Honorable Dorothy W. Colom
Special Chancellor (on *remand*)
P.O. Box 708
Columbus, MS 39703-0708

Mrs. Betty W. Sephton, Clerk
Mississippi Supreme Court
450 High Street
Jackson, Mississippi 39201
(Via Federal Express)

THIS the 20th day of November, 2007.

Willard L. McIlwain, Jr. ^{by was}
WILLARD L. MCILWAIN, JR., ESQ.
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