**IN THE SUPREME COURT OF MISSISSIPPI**

Clerk's Docket No. 2008-CP-01701

JACK W. HARANG,
Appellant,

v.

PAT M. BARRETT, JR.,
Appellee.

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ON APPEAL FROM THE CHANCERY COURT OF PEARL RIVER COUNTY

IN THE MATTER OF THE GUARDIANSHIP ESTATE
OF DYLAN N. BAKER, A MINOR CHILD

CIVIL ACTION, FILE NO. 07-0073-PR-W

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# BRIEF OF THE APPELLEE

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NO ORAL ARGUMENT REQUESTED

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## 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 the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Jack W. Harang, Esq., Appellant
2. Pat M. Barrett, Jr., Esq., Appellee
3. Alfred H. Davidson IV, Esq., attorney (admitted *pro hac vice*) for Appellee Pat M. Barrett, Jr.
4. The Honorable Johnny L. Williams, Chancery Court Judge for Pearl River County, Mississippi

Pat M. Barrett, Jr., Esq.
Attorney for the Appellee

## STATEMENT REGARDING ORAL ARGUMENT

The Appellee herein, Pat M. Barrett, Jr., Esq., respectfully states that oral argument would not aid the Court in the resolution of this appeal. Moreover, Appellant Jack W. Harang's request for oral argument should be denied in light of his failure to use the appropriate and mandated methods to put forth a suitable written argument. As the Court will note, Appellant Jack W. Harang's brief, the Brief of the Appellant, lacks any citation to the Record.

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## STATEMENT OF THE CASE

Appellant Jack W. Harang ("Harang") and Appellee Pat M. Barrett, Jr. ("Barrett") were attorneys of record for a minor, Dylan N. Baker, through his guardian, Brian Baker, in a case involving the wrongful death of his mother, who was killed by a train at a railroad crossing while a passenger in an automobile. That case was maintained in the Circuit Court of Pearl River County, Mississippi under cause number 2004-0406. Following settlement, and in a cause (07-0073-PR-W) involving the guardianship of the minor in the Chancery Court of Pearl River County, Mississippi, the chancellor awarded Barrett the majority of attorney's fees from the settlement of the minor's claims. Harang appealed this outcome. Harang seeks a split of fees (ostensibly a 50-50 division) based on a contingency fee agreement his firm had with the minor's grandparents – a contingency fee agreement that did not even reference the minor or the specific accident in question, and which at no time was submitted to any court for approval prior to the dispute regarding division of attorney's fees.

This appeal stems from the basic fact that Harang refuses to accept the long-established principle under Mississippi law – as applied in chancery courts across the State – that attorney's fees incurred in representing a minor are to be determined in accordance with equitable principles, irrespective of any potentially applicable agreements between the attorneys and client. This is essentially a matter where a Louisiana attorney, Harang, took on representation of a client, associated Barrett to be local counsel and do half the work and share 50/50 with Harang in the costs and fees, and then left the task of litigating the case exclusively in the hands of Barrett in breach of the applicable agreement between the attorneys. Finding that Barrett did the vast majority of the work in the case, the Chancery Court of Pearl River County, Mississippi awarded Barrett 90% of the legal fees as compared to 10% for Harang. Harang is dissatisfied with this

split favoring Barrett because he does not believe that equitable principles apply in this matter before the chancery court – hence the appeal.

To circumvent the applicability of an equitable determination of fees, Harang relies on (1) his purported contingency fee agreement with the minor's grandparents and (2) his relationship with Barrett to establish the point that he and Barrett were joint venturers subject to joint responsibility under Rule 1.5 of the Mississippi Rules of Professional Conduct (M.R.P.C.) and thus subject to a split (ostensibly an even split) of attorney's fees. In turn, Barrett maintains that the well-established application of equitable rules for the division of attorney's fees incurred in the representation of the minor is controlling hereunder, irrespective of the purported contingency fee agreement and the doctrine of joint responsibility, respectively. First, the Supreme Court of Mississippi has held that a court is not bound by the terms of a contingency fee agreement in determining attorney's fees where the representation of a minor is concerned. Second, the contingency fee agreement relied on by Harang was for Brian Baker and Gina Baker, not for Dylan N. Baker, the minor. Third, no joint responsibility, under M.R.P.C. 1.5(e)(1), was in effect because Barrett had no agreement jointly signed with the client and Harang. However, even if joint responsibility had been in effect under M.R.P.C. 1.5(e)(1), it would not carry sufficient effect to override the case law of this State for the reason that M.R.P.C. 1.5(e)(1) is a permissive rule merely allowing a splitting of fees.

Barrett also emphasizes that Harang has failed to make any citations to the Record. Harang's contentions are thus completely unsubstantiated.

## FACTS

Briana L. Kirtland perished as the result of a collision of a train and automobile (in which she was a passenger) at a railroad crossing in Carriere, Pearl River County, Mississippi on March

20. 2002. Order Authorizing Settlement of Minor's Doubtful Claims **(CP 29)**. Upon her death, she left behind a son, legally a minor, who was born on April 30, 1997, *id.* **(CP 29)**, and an estranged husband who is not the father of the minor wrongful death beneficiary. Barrett and Harang were attorneys for the minor in the wrongful death action filed and prosecuted on behalf of the minor. *Id.* at pp. 1-2 **(CP 29 – 30)**. [The minor, Dylan N. Baker, was adopted by Brian N. Baker, who became his guardian. Petition for Letters of Guardianship at p. 1-3 **(CP 4 - 6)**; Order Appointing Guardian at pp. 1-3 **(CP 8 – 10)**].

Harang, who was licensed in Louisiana, entered into a contingency fee contract with the minor's maternal grandparents, Brian Baker and Gina Baker, to pursue a wrongful death action against Norfolk Southern Railway Company. Order of the Chancery Court of Pearl River County, Mississippi, dated July 1, 2008 at pp. 1-2 **(CP 226 – 227)**. The contract between Harang and the Bakers, which actually did not reference the minor or the specific accident, established different percentages for the attorney's fee depending on the stage at which recovery occurred (thirty-three and a third percent if resolved before filing of the suit, forty percent if resolved thereafter, and a greater fee to be negotiated later if an appeal is involved). Attorney Agreement of the law firm of Richard Hobbs Barker, IV and the The Law Offices of Jack W. Harang with Brian Baker and Gina Baker, dated April 1, 2002 (hereinafter "Attorney Agreement") **(CP 106)**. Barrett, a Mississippi lawyer, was associated by Harang to assist in the case. *Id.* at p. 2 **(CP 227)**.

Barrett entered into an agreement (for association of counsel) with Harang's firm on completely even terms with respect to fees, expenses, and workload. *See* letter of Richard H. Barker, IV, dated April 18, 2003, on the letterhead of Harang & Barker, L.L.C. **(CP 108)**(wherein Barker references "our agreement to share the expenses, fees and work in this case on a 50/50 basis"). A wrongful death case was filed on behalf of the minor in the Circuit Court

of Pearl River County, Mississippi under the cause number 2004-0406. *See* Order Authorizing Settlement of Minor's Doubtful Claim **(CP 30)**. The case was against Norfolk Southern Railway Company for wrongful death involving an automotive incident resulting in the death of the minor's mother. *See* Petition for Authority to Compromise and Settle a Minor's Doubtful claim at p.1 **(CP 14)**.

The equal division of burdens under the agreement between counsel was not honored by Harang. A lopsided relationship developed between the two lawyers: Barrett, who bore the burden of litigating and funding the case, and Jack Harang, who contributed pathetically little (a relatively minor amount of pre-suit investigation and strategy formulation with no financial contribution). *See* Order of the Chancery Court of Pearl River County dated July 1, 2008 at p. 2 **(CP 227)** (where the chancery court found that it was "Mr. Barrett who did the overwhelming majority of the work as far as trial preparation and settlement.... ); *id.* **(CP 227)** (Harang admitted his effort "consisted of investigating the facts surrounding the accident, interviewing potential witnesses" and that he "formulated a strategy regarding prosecution of the suit"). In fact, the chancery court made clear that Harang deliberately avoided working with or otherwise assisting Barrett, essentially leaving Barrett the full, unmitigated burden of prosecuting the case on behalf of the client from his office in Lexington. As the chancery court stated, "Testimony further showed that Mr Harang failed to pay any part of the fees associated with this case, failed to show up to depositions and motion hearings, and did not return or accept Mr. Barrett's phone calls." *See id.* **(CP 227)**. Nowhere in the Record does Harang maintain that the allocation of contribution between Barrett and Harang made by the chancery court somehow does not reflect the actual contributions of counsel.

The case settled on the eve of trial. Order Authorizing Settlement of Minor's Doubtful Claim at pp. 2-3 **(CP 30 - 31)**. On May 9, 2008, Barrett filed a motion for attorney's fees in the

Chancery Court of Pearl River County, Mississippi. Motion by Pat M. Barrett, Jr. for Attorney's Fees, **(CP 101 – 105)**. In his motion for attorney's fees, Barrett requested "no less than 90% of the total attorneys' fee awarded, and that ... Jack W. Harang should be awarded no more than 10% of such fee." Motion by Pat M. Barrett, Jr. for Attorney's Fees at p. 4 **(CP 104)**.

In its Order addressing the division of attorney's fees, the chancery court granted 90% of the fees to Barrett and the remaining 10% to Harang. Order dated July 1, 2008 at p. 4, **(CP 229)**. The chancery court applied equitable principles in arriving at this division of fees between Harang and Barrett:

> Applying the above stated rules and case law to the case at hand, this Court finds that since Mr. Barrett appears to have done most of the work in this litigation, and expended upwards of 700 hours and $30,000 of his own money (without compensation from Mr. Harang), he is entitled to ninety percent (90%) of the total amount of attorneys' fees recovered in this case. As such, Mr. Harang, for his part in investigating the case, interviewing witnesses, and formulation of a preliminary legal strategy will be entitled to ten percent (10%) of the attorneys' fees.

*Id.* **(CP 229)**.

The chancery court opted for the application of equitable principles in light of well-settled authority in Mississippi that a minor is not bound by contingency fee agreements (assuming such a valid agreement with the minor ever existed) and that the legal fees associated with a minor's representation are to be determined on equitable grounds:

> This Court is reminded that with regard to minors' matters in the state of Mississippi, principles of equity have always governed. Justice Griffith stated, "Long ago it became the established rule for the court of chancery to act as the superior guardian for all persons under such disabilities ... and will in general take all necessary steps to conserve the best interests of these wards of the court." *Mississippi Chancery Practice Equity* at §45. In Sunnyland Contracting Co., Inc. v. Davis, 75 So. 2d 638 (Miss 1954), the Court stated, "Where minors are involved, the courts must necessarily determine the fees; and any contract for fees does not bind the minors. We must, therefore, determine the amount of fees on the basis of fairness to the attorney and client."

*Id.* pp. 2-3 **(CP 227 – 228)**.

Harang has sought to circumvent equitable principles for the representation of a minor on the basis of a putative (and unsupported) joint assumption of responsibility. *See, e.g.*, Brief of the Appellant at p. 5 ("[T]he assumption of joint responsibility basis (trial preparation and trial itself) does not require that the attorney be actively involved in providing legal services at every stage of the prosecution of the client's case."); *id.* ("The testimony submitted at trial supports the proposition that Mr. Harang and Mr. Barrett were joint venturers, with Mr. Harang's responsibility for trial and being responsible for the trying of the case, should such trial be necessary."). None of these contentions are supported by Record citations in the Brief of the Appellant; in fact, said brief does not have a single Record citation anywhere. Harang's position taken in chancery court also indicated that fees should be determined in accordance with a joint responsibility basis. *See Post Trial Memorandum of Jack W. Harang*, at p. 3 (**CP 167**)("For the reasons aforesaid it is respectfully represented that this Court ... adopt a joint responsibility basis for the reasonable allocation of the attorney's fees herein."). As set forth in the Argument hereunder, Harang never attempted to identify the elements necessary to establish a joint responsibility and, as a result, did not offer facts that purported to meet those elements.

## SUMMARY OF THE ARGUMENT

It is an established principle in Mississippi that a chancery court in a matter concerning a minor need not rely on the terms of a contingency fee agreement to guide its apportionment of attorney's fees. Principles of equity, under such circumstances, solely control the matter of how the fees are to be determined and split among counsel. The chancery court, in awarding the bulk of the fees to Barrett for a vastly more significant contribution, clearly functioned within its discretion. Harang simply refuses to accept this core and controlling principle by which the chancery court abided. There is, further, no foundation for Harang's statement that the adoption

of such principles somehow is tantamount to the chancery court's imposing an oral contingency fee contract between Barrett and the client.

Harang unavailingly argues that Barrett and Harang had a joint responsibility status for representing the client which justifies a different fee allocation. Joint responsibility under M.R.P.C. 1.5(e)(1) was never effectuated because no agreement was jointly executed by the client (through the guardian or otherwise) and the different attorneys representing the client. Even if such status had been effectuated, the common law of this State is not trumped by a merely permissive rule under the Mississippi Rules of Professional Conduct.

## ARGUMENT

### A. Deficiencies of authority on the part of Harang abound.

Before addressing Harang's specifically enumerated issues, Barrett first underscores the serious point that Harang fails to cite to the Record in support of his arguments, thereby triggering a violation of M.R.A.P. 28(a)(6). In a previous filing with the Court, Barrett presented a *Motion to Dismiss* on three separate grounds, one of which was that Harang's appeal should be procedurally barred for such an infraction of the Court's rules. The Court will note that not a single Record citation appears in support of any issue in the Argument or, for that matter, in any other section of the Brief of the Appellant.

Another point meriting the Court's attention is the conspicuous weakness of the legal authority presented by Harang. The Table of Authorities constructed by Harang identifies only two case citations, both limited to page 4 of Harang's brief. *See* Brief of the Appellant at p. iv. As discussed *infra*, one of the cases is cited for the standard of review (and actually presents the incorrect standard) while the other case is merely raised for the purpose of Harang's assertion that the chancery court should not have relied upon it. The only other authority presented in the Table of Authorities is Rule 1.5(c) of the Mississippi Rules of Professional Conduct. *See* Brief

of the Appellant at p. 4. Harang also mentions the doctrine of "joint responsibility" but without any mention of that the fact that it is governed by M.R.P.C. 1.5(e)(1).

**B. Standard of Review: Manifestly Wrong, Clearly Erroneous Standard**

One of the two cases cited by Harang is *Townsend v. Estate of Gilbert,* 616 So.2d 333, 335 (Miss. 1993). *See* Brief of the Appellant at p. iv and p. 4. He cites *Townsend* for the limited purpose of stating that an order such as the one entered by the trial court should result in a "**de novo** review of the evidence in the record." Brief of the Appellant at p. 4 (emphasis original). It is somewhat difficult to fathom Harang's suggestion of a *de novo* review of the evidence in the record when, in fact, he has entirely failed to cite to the Record.

But more importantly, Harang has simply articulated the wrong standard of review. The correct standard of review is set forth as follows: "The Court employs a limited standard of review on appeals from chancery court.... The Court will not interfere with the findings of the chancellor unless the chancellor was manifestly wrong, clearly erroneous or a wrong legal standard was applied." *Reddell v. Reddell*, 696 So.2d 287, 288 (Miss.1997)(emphasis added). As such, "[g]reat deference is given to the chancellor as both finder of fact and trier of law." *Buford v. Logue*, 832 So.2d 594, 600 (Miss.Ct.App. 2002). Harang bears a heavy burden in attempting to seek reversal of the ruling from the chancery court. Without any citations to the Record, and scant reliance on other authorities, Harang is not postured for such a reversal.

**C. Harang's issues on appeal are unavailing.**

**Issue I:** **Whether the trial court erred in deciding that it did not have to recognize the existing contingency fee contract in this matter and, as such only equitable principles control the division of attorney's fees. In relying on *Sunnyland*, supra, the trial court totally disregarded that the provisions of Mississippi Rules of Professional Conduct, Rule 1.5(c), which requires that all contingency fee contracts "shall be in writing and shall state the method to which the fee is determined."**

As an initial matter, the second part of the statement of Issue I by Harang is not properly posed in the form of a question but rather is imposed as an argumentative comment. *See* Brief of the Appellant at p. 4 (relevant text in Brief of the Appellant is in bold). Harang therein blames the chancery court for having disregarded a provision of the Rules of Professional Conduct. *See* Brief of the Appellant at p. 4 ("the trial court totally disregarded" a provision under M.R.P.C. 1.5(c))(bold emphasis omitted). Such a comment does not present an issue for this Court's consideration, but rather simply levels an accusation – an inappropriate maneuver for framing an issue in an appellate brief.

It is also notable that within this second part of the description of Issue I Harang asserts that the chancery court "totally disregarded" M.R.P.C. 1.5(c) but never again references M.R.P.C. 1.5(c) in the argument underlying the presentation of the issue. *See* Brief of the Appellant at p. 4 (bold emphasis omitted).

Regarding the substance of Issue I, the essential point is that Harang is displeased that equitable principles were applied in chancery court (for the representation of the minor) to the exclusion of his contingency fee agreement with the minor's grandparents – which never referenced the minor or the subject accident. *See* Attorney Agreement **(CP 106)**. The chancery court was required to adopt the use of equitable principles and had the discretion to do so outside the parameters of the purported contingency fee agreement. This power firmly reposes in the hands of the chancellor as articulated by this Court in *Sunnyland Contracting Co. v. Davis*, 75 So.2d 638 (Miss. 1954): "Where minors are involved, the courts must becessarily [sic] determine the fees; and any contract for fees does not bind the minors. We must, therefore, determine the amount of the fees on the basis of fairness to attorney and client." *Id.* at 639 (emphasis added). This quotation from *Sunnyland* is precisely on point as to the subject facts.

As long as equitable principles are maintained, therefore, the chancellor is generally free to accept the contract, in whole or part, or reject it.

Harang simply argues that *Sunnyland* is inapplicable because there the chancellor recognized the contract, but reduced the contingency fee percentage – a point that varies from the instant case where the chancery court did not recognize Harang's contract as operative. *See* Brief of the Appellant at p. 4. First, this factual distinction does not alter the controlling principle that a contract for attorney's fees "does not bind the minors" and must be determined "on the basis of fairness to attorney and client." *Sunnyland*, 75 So.2d 638 at 639. Second, an alteration of a contract is not necessarily dissimilar to, or inconsistent with, disregarding a contract and setting new terms. Both approaches could actually reach the same result. The result in *Sunnyland* is also consistent with other authorities. *See McKee v. McKee*, 418 So.2d 764 (Miss. 1982)(in a matter of equity, specifically domestic litigation, attorney's fees depended on various equitable issues, including the skill of the attorney, the time and labor involved, and the complexity of the litigation – among other factors); *Estate of Stewart*, 732 So.2d 255, 259 (Miss. 1999)(Mississippi applies *quantum meruit* principles in the awarding of attorney's fees).

Harang's argument fails for the separate reason that contingency fee agreement which he indicates should apply is not facially for the representation of the minor. That agreement is expressly for the representation of the Brian Baker and Gina Baker, not the minor, who is nowhere referenced in the agreement. *See* Attorney Agreement **(CP 159).**

Harang further attempts to undermine the chancery court's ruling by suggesting that Barrett and the client had an improper oral contingency fee contract that was imposed by the chancery court. *See* Brief of the Appellant at p. 4 ("There is no provision in the Mississippi Rules of Professional Conduct or Juris Prudence [sic] of the State which recognize an oral contingency fee contract between a client and an attorney. Yet, in refusing to recognize Mr.

Harang's contract ... the trial court has done just that."). This is a ludicrous contention by Harang as there is no evidence in the Record (or anywhere) that an oral contingency agreement was reached between the client/guardian and Barrett. Later in the brief, Harang essentially admits that there could not have been an oral contingency fee contract: "As Mr. Barrett had no contractual relationship with the Bakers all actions taken by Mr. Barrett was pursuant [sic] that the authority that he was granted through the contract executed with Mr. Harang and to whom he had been associated." Brief of the Appellant at p. 6 (emphasis added). If, as Harang maintains, Barrett had no contractual relationship with the Bakers, then how could there have been an oral contract? An oral contract would certainly amount to a contractual relationship.

Harang's supposition that an oral contingency fee was imposed by the court seems to rest on the point he noted that the chancery court awarded "ninety (90%) of a forty percent (40%) contingency fee on the monies collect on behalf of the minor...." Brief of the Appellant at p.4. The 40% figure did not arise from a contingency fee contract, whether oral or written, but rather from a petition by Barrett to the Chancery Court requesting 40% of the $200,000 settlement dollar figure. *See* Petition for Authority to Distribute Settlement Funds.at pp. 1-2 **(CP 36 – 37)**. Barrett stated that "[t]he total legal services rendered on behalf of the wrongful death beneficiaries justifies a gross attorney's fee of forty percent (40%) of the total amount of the settlement, or $80,000, which is just and reasonable under the circumstances." *Id.* at p. 2 **(CP 37)**. Barrett did not rely on any contract in his Petition as justification for the fee equal to 40% of the settlement. *See id.* **(CP 36 – 40)**. A request for fees in the form of a percentage of the value of settlement does not perforce mean that a contingency fee contract (oral or written) is at issue.

Barrett submitted to the chancery court the expert affidavit of W.C. Trotter, III in support of his arguments for attorney's fees. *See* Affidavit of W.C. Trotter III **(CP 216 – 223)**. Trotter

observed that "Mr. Barrett is not requesting attorneys fees on such contingent fee contract, but upon that of equity." *Id.* at p. 5 **(CP 220).** Trotter, incidentally, served on the Mississippi Bar's Ethics Committee for many years, including a four-year period when he presided as its chairman. Curriculum Vitae of W.C. Trotter, III at p. 2 **(CP 213).** Trotter also served as President of the Mississippi Bar in the period of 2001-2002. *Id.* **(CP 213).**

**Issue II:** **Whether the trial court erred in granting Pat M. Barrett, Jr., ninety (90%) of the total amount of attorney's fees recovered in the this case and awarding Jack W. Harang ten (10%) of the attorney's fees recovered in this case and further refusing to recognize the Joint Venture Agreement between Pat M. Barett, Jr., and Jack W. Harang.**

**a.) Harang's request for relief is undefined.**

In his depiction of Issue II, Harang is hardly clear as to the nature of his dispute regarding the split of attorney's fees, with 90% apportioned to Barrett and 10% to Harang. *See* Brief of the Appellant at pp. 5-6. It seems that he predicates his issue on the point that a "Joint Venture Agreement" between Barrett and Harang justifies a different split. Yet, under Issue II, Harang actually does not specifically state what manner of split (other than the 90-10 split favoring Barrett that was granted by the chancery court) he is seeking through the appeal. *See* Brief of the Appellant at pp. 5-6. Barrett surmises that Harang is seeking a 50-50 split of the fees, although this is far from clear. This lack of precision concerning requested relief presents a non-cognizable and non-justiciable question for the Court to resolve. For this reason alone, the appeal should be denied.

**b.) Harang relies on vague assertions and unsupported facts.**

Barrett has been placed into a difficult position – with respect to his drafting of an appellee response brief – in rebutting putative facts that have not been specifically identified. This problem is compounded by the complete absence of Record citation in the Brief of the

Appellant. *See* Brief of the Appellant. For example, in the header for Issue II of the Argument within the Brief of the Appellant, Harang mentions a "Joint Venture Agreement between Pat M. Barrett, Jr. and Jack W. Harang." Brief of the Appellant at p. 5. Then, nowhere in the argument provided for Issue II does Harang mention the term "Joint Venture Agreement" or otherwise reference such an agreement. *See* Brief of the Appellant at pp. 5-6. Given the dearth of textual description, and the complete absence of citation to the Record, it is unclear what agreement Harang is even referencing.

Is Harang referencing a joint responsibility agreement as contemplated by M.R.P.C. 1.5(e)(1)? Or is he referencing an agreement that is a joint venture in the commercial sense of the term of art? Neither Barrett nor the Court should be put in the position of having to chase phantom agreements and venture a guess as to what Harang is actually referencing. Harang's refusal to provide detail (whether through absence of Record citation or otherwise) in the Brief of the Appellant impedes Barrett's ability to respond to specific contentions.

**c.) Harang's argument must fail given the demonstrable absence of joint responsibility.**

Harang's reliance on joint responsibility is unavailing because joint responsibility was demonstrably never effectuated. Of dispositive consequence, the client (through his guardian or otherwise) and Barrett never executed the same agreement – a critical point fatal to joint responsibility. All of the attorneys representing the client must execute the same document signed by the client before joint responsibility takes effect. M.R.P.C. 1.5(e)(1). Specifically, M.R.P.C. 1.5(e)(1) allows a division of attorney's fees where, "by written agreement with the client, each lawyer assumes joint responsibility for the representation."

These elements specified under M.R.P.C. 1.5(e)(1) were not satisfied with respect to the case at bar as evidenced by Harang's own admission, which is memorialized in the Brief of the

Appellant. The following statement by Harang, though disjointed and in need of editing, makes this point clear: "The refusal by the trial court to recognize the written contingency fee contract Jack W. Harang is contrary to the law and allows that Mr. Barrett to collect a contingent fee where he has no written contract with the client nor is there a written contingent fee contract with counsel that associate him recognized by the court." Brief of the Appellant at pp. 6-7 (emphasis added). Where, as here, there is no written agreement between Barrett and the client, there can be no joint responsibility.

Even if the elements of joint responsibility were satisfied, the authority under M.R.P.C. 1.5(e) regarding a split of fees would not be controlling and certainly would be insufficient to counteract the authority under *Sunnyland* discussed *supra*. This is true, in part, because M.R.P.C. 1.5(e) is a permissive rule rather than one which is obligatory: "A division of fee between lawyers who are not in the same firm may be made only if ... by written agreement with the client, each lawyer assumes joint responsibility for the representation...." Emphasis added. The word "may" indicates that this is a permissive rule. The Scope section of the Mississippi Rules of Professional Conduct makes this distinction clear: "Some of the Rules are imperatives, cast in the terms 'shall' or 'shall not'.... Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has professional discretion." M.R.P.C. (Scope).

Further, the Mississippi Rules of Professional Conduct cannot trump *Sunnyland* because said Rules are subordinate to the law. "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." M.R.P.C. (Scope).

Harang suggested that his burden under the putative joint venture was to try the case should it go to trial. *See* Brief of the Appellant at p. 5 ("The testimony submitted at trial supports

the proposition that Mr. Harang and Mr. Barrett were joint venturers, with Mr. Harang's responsibility for trial and being responsible for the trying of the case, should such trial be necessary."). There is no record citation for this statement. *See* Brief of the Appellant at p. 5. Barrett maintains that no agreement was ever reached making Harang principally responsible for trial.

**d.) Harang failed to present a prima facie case of joint responsibility in the chancery court and has thus waived the viability of the argument.**

In the chancery court, Harang failed to present a *prima facie* case of joint responsibility between the attorneys. He failed to do so even when challenged by Barrett to set forth and prove the elements of joint responsibility under the subject facts. Barrett will demonstrate below the sequence of relevant omissions by Harang in the chancery court. Barrett maintains that in failing to present a basic case of joint responsibility in the earlier proceeding, Harang has waived his right to challenge (by way of appeal) the chancery court's decision to rely on equitable principles and impliedly not accept a joint responsibility standard for the determination of attorney's fees. Harang did not offer a sufficient justification for joint responsibility in order for the chancery court to declare that joint responsibility was indeed effectuated. Going forward, Harang cannot offer such a justification because key contentions cannot be raised for the first time on appeal. *See Bates v. State*, 952 So.2d 320, 324 (¶ 13) (Miss.Ct.App. 2007)("We do not consider matters on appeal that were not placed first before the trial judge for decision.")(citing *Duplantis v. State*, 708 So.2d 1327, 1339-1340 (¶ 49) (Miss. 1998)).

In a motion for attorney's fees and a post-trial brief filed contemporaneously, including an expert affidavit attached to the latter, Harang nowhere laid out the elements of joint responsibility as defined under M.R.P.C. 1.5(e)(1). *See* Motion by Jack W. Harang for Approval and Recognition of Attorney's Contingency Fee Contract **(CP 160 – 164)**; Post Trial

Memorandum of Jack W. Harang (**CP 165 – 182**). In his combined response to these two submissions by Harang, Barrett stated that there was "no evidence in this dispute that the requirements of joint responsibility have been satisfied.... Specifically, the attorneys in question never jointly entered into a written agreement with the client for joint responsibility as defined under M.R.P.C. 1.5." Combined Response to (1) the Motion by Jack W. Harang for Approval and Recognition of Attorney's Contingency Fee Contract and (2) the Post-Trial Memorandum of Jack W. Harang at p. 6 (**CP 206**). Thereafter, the chancery court effectively found that joint responsibility did not apply, determining that "only equitable principles control the division of attorney's fees in this case, regardless of the terms of the contract and whether or not said contract adequately sets forth the representation in this matter." Order of the Chancery Court of Pearl River County, dated July 1, 2008, at p. 3 (**CP 228**).

After the chancery court's ruling, Harang moved the court for a new trial and/or reconsideration. Motion for New Trial and/or Reconsideration of Order Dated July 1, 2008 (**CP 233**). In his memorandum in support thereof, Harang did not, in the slightest, address what had been unaddressed before by Harang and challenged by Barrett: whether the elements of joint responsibility had been satisfied. *See* Memorandum In Support of Motion for New Trial and/or Reconsideration of Order Dated July 1, 2008 (**CP 241 – 244**). Given this failure by Harang to address a critical point, Barrett in his response to the motion for reconsideration and/or new trial firmly brought up Harang's deficiency in this regard: "Harang fails to identify the elements necessary for constituting a joint responsibility agreement. As such, he has failed to take even preliminary steps in establishing a *prima facie* case that such an agreement was ever consummated." Attorney Pat Barrett, Jr.'s Response to Attorney Jack W. Harang's Motion for New Trial and/or Reconsideration of Order Dated July 1, 2008 at p. 4 (**CP 251**). *See also id.* (**CP 251**) ("Barrett further submits that while the conclusory nature of Harang's assertion of joint

responsibility status was previously raised as an issue with the Court, Harang nonetheless continues to avoid substantiating the existence of such status."). The fact that that a *prima facie* case of joint responsibility was at issue in the chancery court makes it all the more problematic that Harang submitted an opening brief in this appeal entirely without citation to the Record.

**Issue III: Whether the trial court erred in denying the Motion for Approval and Recognition of Attorney's Contingency Fee Contract filed by Jack W. Harang in this case.**

Issue III seems to be redundant as it is subsumed under Issue I; both issues concern, in part, the fact that chancery court refused to recognize Harang's contract with the minor's grandparents. *See* Brief of the Appellant at pp. 4-6. In response to this redundancy, Barrett is required to recapitulate what is stated above: A court is not bound to accept a contingency fee contract associated with the representation of a minor. "Where minors are involved, the courts must becessarily [sic] determine the fees; and any contract for fees does not bind the minors. We must, therefore, determine the amount of the fees on the basis of fairness to attorney and client." *Sunnyland*, 75 So.2d at 639 (emphasis added). In view of this wide discretion afforded the chancery court, Harang has not identified why or how the chancery court is in error.

Harang indicates that all of Barrett's authority flowed through Harang's contingency fee contract with the minor's grandparents and that therefore the Court erred in not recognizing his contingency fee agreement. Brief of the Appellant at pp. 6-7. A requirement that the chancery court must recognize the contingency fee agreement would improperly trump the authority in *Sunnyland* that a court is not bound by such an agreement with regard to the determination of attorney's fees. It would also undermine the equitable character of a chancery court. Harang is effectively asking this Court to revisit and revise *Sunnyland*. There is no basis for such a revision.

And from whence Barrett obtained his authority does not alter the primacy of equitable rules in apportioning attorney's fees in a matter involving a minor. As an attorney of record in a case before the chancery court, Harang voluntarily subjected himself to principles inherent to a court of equity, here the Chancery Court of Pearl River County, Mississippi. *See RAS Family Partners, LP v. Onnam Biloxi*, LLC, 968 So.2d 926, 928 (Miss. 2007)(Generally speaking ... chancery courts are courts of equity)(citing Miss. Const. art. 6, § 156)).

Lastly, Barrett wishes to highlight a misstatement in Harang's brief. He asserted that "[t]here is no dispute that on April 1, 2002 Brian Baker and Gina Baker executed a contingency fee contract with Jack W. Harang on behalf of the minor, Dylan N. Baker to pursue a claim against Norfolk Southern Railroad as the result of the death of Dylan N. Baker's mother." Brief of the Appellant at p. 6 (emphasis added). Contrary to this assertion, there was a dispute as to whether this contract was on behalf of the minor. *See* Combined Response to (1) the Motion by Jack W. Harang for Approval and Recognition of Attorney's Contingency Fee Contract and (2) the Post-Trial Memorandum of Jack W. Harang at pp. 4-6 **(CP 204 - 206)**(Barrett noted that the contract did not address the minor, Dylan N. Baker). The point noted by Barrett (no reference to the minor) can be verified by viewing the contract itself. *See* Attorney Agreement **(CP 106)**.

Even putting aside the primacy of equitable principles, *arguendo*, Harang can find no error in the chancery court's refusal to recognize the contingency fee contract because the contingency fee agreement is inapplicable to the subject representation. Specifically, the contingency fee contract lacks a nexus to the minor. It is imprinted on a boilerplate form, does not mention the minor by name or other reference, fails to mentions – for that matter – that any third party is the subject of representation, and does not identify the specific accident. *See* Attorney Agreement **(CP 159)**. The first paragraph of the Attorney Agreement references "my claim" for "my accident," while the only client signatures are those of Brian Baker and Gina

Baker. *See id.* **(CP 159).** Looking at the agreement, without knowing more, one could only conclude that Brian Baker and Gina Baker enlisted attorneys for their own personal injury. The minor is nowhere referenced, whether directly or indirectly. *See id.* **(CP 159).**

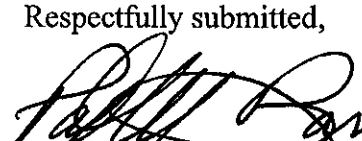
In fact, Harang first submitted this contingency fee contract for approval after the emergence of a dispute over attorney's fees. Harang filed an opposition to Barrett's request for attorney's fees on May 20, 2008. *See* Opposition of Jack W. Harang to the Motion by Pat M. Barrett, Jr., for Attorney's Fees **(CP 152 - 154).** In a later-filed motion (June 5, 2008), Harang made his request for the approval of the subject contingency fee contract. Motion by Jack W. Harang for Approval and Recognition of Attorney's Contingency Fee Contract at p. 2 **(CP 156)** and Ex. A **(CP 159).**

## CONCLUSION

For the foregoing reasons, Barrett requests that the Court deny the appeal of Jack W. Harang in its entirety.

Dated: July 9, 2009

Respectfully submitted,



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## CERTIFICATE OF SERVICE

This is to certify that I have this day served, via postage prepaid United States Mail, a true and correct copy of the foregoing Brief of the Appellee on the following person:

Jack W. Harang, Esq.
JACK W. HARANG, APLC
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This the 10th day of July, 2009.

Pat M. Barrett, Jr.