IN THE SUPREME COURT OF MISSISSIPPI
IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LEA ANN BYRD	**PLAINTIFF/APPELLANT**
VS	**NO. 2011-CA-01410** **Bolivar County Chancery Court, District 1** **Case No. 2009-0093**
JONATHAN WAYNE BYRD, et al	**DEFENDANT/APPELLEE**

BRIEF OF THE APPELLEE, JONATHAN WAYNE BYRD

NATURE OF THE PROCEEDING: APPEAL

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NO. 2011-CA-01410

LEA ANN BYRD — APPELLANT

V

JONATHAN WAYNE BYRD, et al — APPELLEES

CERTIFICATE OF INTERESTED PARTIES

The undersigned Counsel of Record certifies that the following listed persons have an interest in the outcome of this case:

Lea Ann Byrd

Jonathan Wayne Byrd

Ashlea Byrd; Preslea Byrd; Kaylea Byrd; and, Natalea Byrd - the children of Lea Ann Byrd and Jonathan Wayne Byrd

Jackson Byrd; Jesse Byrd, and Mandy McFall - the other children of Jonathan Byrd

Keith Byrd; Debbi Byrd; and, their children, Cody Byrd and Kelli Byrd Peyton

Barry Lynn Byrd and Susan Byrd

Byrd Sons Residual Trust

The corporations set forth by the Appellant are no longer active. They were used for farming purposes with the Farm Service Agency of the United States Department of Agriculture. Forrest Plantation, a Partnership, consisted of 1 Green Acre, Inc., Highway 49, Inc., and Farrell, Inc. St. Charles Plantation, a Partnership, consisted of Highway 1, Inc., Green Grove, Inc., and Hillhouse, Inc. The Trust ceased farming in 2008.

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STATEMENT OF ISSUES

A. The Chancellor's Findings of Fact regarding classification of separate and marital assets, valuation of various assets, division of marital property, award of alimony, award of child support, and award of attorneys' fees should be affirmed under the deferential standard of appellate review.

B. The Chancellor's decision that counsel for appellee was not subject to sanctions should be affirmed under the deferential standard of review.

STATEMENT OF THE CASE

On August 3, 2009, Wife filed a Complaint for Absolute Divorce. On September 3, 2009, Husband filed his Answer to Complaint and Counter Claim for Divorce Absolute and Custody of Minor Children. A timeline of the protracted litigation between the parties is set out below.

1. October 31, 1991 - Jonathan Byrd and Lea Ann Byrd married. First child, Ashlea Byrd, was 19 months at that time.
2. August 6, 1993 - Jonathan Byrd and Lea Ann Byrd were divorced in the Chancery Court of Coahoma County, MS, Cause No. 31,129.
3. May 15, 1995 - Jonathan Byrd and Lea Ann Byrd married a second time. Three more children were born of this marriage.
4. October 1, 1997 - Lea Ann Byrd filed for divorce in the Chancery Court of Coahoma County, Cause No. 97-848.
5. March 31, 2003 - Lea Ann Byrd filed for divorce in the Chancery Court of Bolivar County, MS, Cause No. 2003-0126. This case was later dismissed for lack of prosecution.
6. May, 2003 - The parties separated and have not lived together since this date.
7. July 5, 2007 - Jonathan Byrd filed an action to establish visitation with his children, Bolivar County Chancery Court, Cause No. 2007-0059. He did not seek divorce.
8. August 2009 - Complaint for Divorce Absolute in the present action filed by Lea Ann Byrd in Chancery Court of Bolivar County, MS, Cause No. 2009-0093.
9. May 17, 2010 - Custody Hearing
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11. July 20, 2010 - Custody Hearing
12. December 30, 2010 - Hearing on Case
13. February 1, 2011 - Request by Counsel for Jonathan Byrd that the Court issue Finding of Facts and Conclusions of Law (Exhibit 1)
14. February 2, 2011 - Hearing on case
15. February 3 & 4, 2011 - Hearing on Case
16. February 28, 2011 - Hearing on Case
17. March 2 & 3 2011 - Hearing on Case

18. March 25, 2011- Proposed Finding of Facts and Conclusions of Law filed by Counsel for Jonathan Byrd (Exhibit 2)
19. March 25, 2011 - Proposed Finding of Facts and Conclusions of Law filed by Counsel for Lea Ann Byrd (Exhibit 3)
20. April 5, 2011 - Response to Proposed Finding of Facts and Conclusions of Law filed by Counsel for Jonathan Byrd (Exhibit 4)
21. April 8, 2011 - Response to Proposed Finding of Facts and Conclusions of Law filed by Counsel for Lea Ann Byrd (Exhibit 5)
22. June 13, 2011 - Findings of Fact, Opinion, and Order filed by Court (Exhibit 6)
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24. July 11, 2011 - Motion to Reconsider filed by Counsel for Lea Ann Byrd (Exhibit 8)
25. July 12, 2011 - Answer to Motion to Reconsider filed by Counsel for Jonathan Byrd (Exhibit 9)
26. July 18, 2011 - Motion to Strike Answer to Motion to Reconsider filed by Counsel for Lea Ann Byrd (Exhibit 10)
27. August 22, 2011 - Motion to Enforce Judgment and Deny Motion to Reconsider filed by Counsel for Jonathan Byrd (Exhibit 11)
28. August 25, 2011 - Final Order entered by Court (Exhibit 12)
29. June 29, 2011 - Delivery of Payment of initial monies ordered by Court to Lea Ann Byrd and Kay Farese Turner ($684,776.88) (Exhibit 13)
30. July 18, 2011 - Delivery of Payment of final amount of monies ordered by Court to Lea Ann Byrd and Kay Farese Turner ($459,116.88) (Exhibit 14)
31. September 26, 2011 - Acceptance of all the monies ordered by the Court by Lea Ann Byrd and Kay Farese Turner (Total amount paid $1,143,893.76) (Exhibit 15)

STATEMENT OF FACTS

Lea Ann Byrd and Jonathan Byrd were first married on October 31, 1991. At that time they had a nineteen month old child, Ashlea Byrd, born on April 2, 1990. They were living in a house very close to the Bolivar County - Coahoma County line, which was owned by T. W. Byrd (the father of Jonathan Byrd). Within a short time, Jonathan Byrd and Lea Ann Byrd separated and Lea Ann Byrd moved to Clarksdale, Coahoma County, Mississippi to be with her mother.

Jonathan Byrd filed for a divorce from Lea Ann Byrd in Coahoma County. Lea Ann Byrd was served with personal process, but filed no Answer. A Default Judgment Divorce was taken against Lea Ann Byrd on August 6, 1992.

Lea Ann Byrd and Jonathan Byrd were remarried on May 15, 1994 at Helena, Phillips County, Arkansas. After this marriage, three other daughters were born, Preslea Byrd (02-14-95), Kaylea Byrd (09-13-96), and Natalea Byrd (03-17-99).

In 1997, Lea Ann Byrd employed William O. Luckett, Jr., to file for divorce in Coahoma County, MS, Cause No. 97-848.

On March 31, 2003, Lea Ann Byrd employed William O. Luckett, Jr., again to file for divorce against Jonathan Byrd in Bolivar County, MS, Cause Number 2003-0136. The parties continued to be separated and on July 25, 2005, the case was dismissed by the Chancellor for lack of prosecution by Lea Ann Byrd.

The parties remained separated. In 2007, Jonathan Byrd filed a cause of action in Bolivar County, Mississippi, Cause No. 2007-0057 based upon Lea Ann's refusal to allow visitation with his four daughters. He did not seek a divorce.

In 2009, Lea Ann Byrd employed Kay Farese Turner to represent her in the present divorce action against Jonathan Byrd. In this action, Lea Ann Byrd asked the Court to set aside the Default Judgment of Divorce granted by the Honorable Chancellor Harvey Ross in 1997. The Court did set aside this divorce by finding that Lea Ann Byrd did not live in Coahoma County at the time of the divorce. The Court

also combined the action with Jonathan Byrd's petition for visitation. (Exhibit 16, *Order on Motion to Consolidate Causes*).

A hearing was held as to child custody before the divorce hearing. Each of the four daughters stated that they wanted to be in the custody of their father, Jonathan Byrd. The youngest child stated poignantly that he fed her, clothed her, and loved her. (Exhibit 17, *Transcript Excerpt Natalea Byrd, 62-65*) Nonetheless, the Court awarded custody to Lea Ann Byrd and visitation to Jonathan Byrd. This custody order was adopted in the Court's Final Opinion.

The matter was set for trial on August 30, 2010 and was continued. It was then set for November 15-17, 2010, and that was continued.

Finally there was a hearing in late December but no decision was rendered. In desperation, Jonathan Byrd confessed grounds for divorce and asked the Court to grant the divorce. (Exhibit 18, *Request for Entry of Divorce*) The Court denied this and set the case for trial on February 2, 2011.

The litigation was contentious, with both parties alleging wrongdoing on the part of the other. Both are currently involved in relationships with other people. Both alleged incidences of violence by the other. Jonathan testified to Lea Ann's refusal to allow him time with his children and interference with their relationship. Both Jonathan and Keith testified that Lea Ann was a disruptive force in the family. Keith testified that she broke into an office of the farming operation. The parties gave different accounts of a physical altercation between Lea Ann and Jonathan's mother. (Tr. 127-31, 139, 144-47, 1005-08, 1045-1057.)Lea Ann's allegations are recounted in the Appellant's Brief.

However, the grant of divorce and custody are not at issue in this appeal, which deals with the Court's financial awards of property division, alimony, and child support. Much of the dispute focuses upon a Trust established by Jonathan's father, Terry Wayne Byrd.

Terry Wayne Byrd passed away on September 19, 1999. This Testamentary Trust, the Byrd Sons Residual Trust, was established for the benefit of Terry Wayne Byrd's sons, Jonathan Byrd, Keith Byrd, Barry Lynn Byrd, and their children. Jonathan Byrd and Keith Byrd are the Co-Trustees of the Trust. The Testamentary Trust included property that was inherited from Terry Wayne Byrd, the father of Jonathan Byrd, Keith Byrd, and Barry Lynn Byrd. From the very beginning of the litigation, Jonathan and his attorney took the position that the Trust was not marital property. Although the Trust was not marital property, it was used throughout the marriage to support Jonathan's family, including support for Lea Ann during the parties' lengthy separation.

The Trust farmland was leased to two entities, St. Charles and Forrest, through which the Byrd brothers conducted their farming operations. Using the Trust land as collateral, the Trust took out loans and in turn loaned the money to St. Charles and Forrest for operating expenses. St. Charles and Forest repaid the loans out of the annual proceeds from their farming operations. Transfers back and forth between the corporations and the Trust as a result of this relationship were a point of contention in the action.

The Trust also owned land in Lafayette County, which is the subject of litigation, and a 2/3 interest in a business, Delta Farm Store. The Lafayette County land, and its valuation, was also a point of contention. Lea Ann hired Brad Walsh as an expert to testify regarding the land's value. Jonathan objected to the use of Brad Walsh as an expert witness, in light of the fact that Mr. Walsh also represented a potential buyer of the land in contract negotiations with a realtor representing the Trust. The Court rejected his argument that the dual relationship disqualified him as a witness.

In 2008 and 2009, the brothers decided to stop farming and rent the Trust land. Over a period of months, the brothers sold their farming equipment, paid the loans, and closed out their operations. The only income that Jonathan now receives is

income from the Trust, primarily from leasing the farmland. This was also a point of contention. Jonathan testified accurately to the existence and terms of the lease, which was initially an oral agreement. However, he did not initially provide the written lease embodying the terms of the agreement, a primary basis for Lea Ann's argument that Jonathan's counsel should be sanctioned – even though they were fully apprised of the terms of the lease.

At trial, Lea Ann attempted to demonstrate that the Trust had been commingled with marital funds. However, the Court held that the corpus of the Trust had not been commingled. The court did find that properties in Alabama, although purchased with Trust funds, had been put to family use and that the value of those properties, which had been transferred to the Trust, should be included in the marital estate. The matter concerning the property in Alabama was testified to, at length, by Billy Andrews, the accountant. (Exhibit 19, Transcript Excerpt 945-953, Billy Andrews) He testified that Jonathan Byrd and Keith Byrd used monies from the Byrd Sons Residual Trust to buy the property in Alabama, that the land was initially incorrectly titled in their joint names rather than as Co-Trustees for Byrd Sons Residual Trust, and was then correctly conveyed to Byrd Sons Residual Trust by Alabama lawyers. (Exhibit 20). The court found, however, that the brothers intended that the properties be used by their families and that it should be included in the marital estate. The court also held that the amount of checks cashed by Jonathan at casinos should be included in the marital estate. With these amounts included, the court valued the marital estate at $1,883,467.49 (Op. at 15). The court divided the marital assets equally, ordering a cash payment of almost $1 million to Lea Ann Byrd as her share of the marital assets. (Op. at 18). With regard to alimony, the court held that with the cash assets that she would receive and an earning capacity of $100,000, she would be able to meet her reasonable needs without permanent alimony. On rehearing, the court awarded her

thirteen months of rehabilitative alimony of $1500 a month, and free use of the marital home for the same period.

The court found that Jonathan's anticipated Trust income, after cessation of farming, would be $135,000 in adjusted income. (Op. at 4). However, the court deviated upward in its award, ordering him to pay $3,000 a month (27%) for three girls and to initially pay all of the girls' health insurance, and educational expenses. That amount was to be shared equally by Lea Ann once she finished her education. (Op. at 20-21).

Finally, the Court ordered that Jonathan pay to Lea Ann attorneys fees in the amount of $75,000 and cash sanctions of $150,000. (Op. at 21-23).

Lea Ann appeals, complaining of the Chancellor's refusal to declare Jonathan's Trust interest marital property, that she received only 50% of the marital assets, and that she did not receive permanent alimony in addition to $1 million in cash. She also appeals the award of child support (based on an upper deviation), and the award of $105,000 in attorney's fees. She alleges that Jonathan's counsel should be sanctioned for the failure to provide the written lease and Lafayette County land appraisal. She also asserts various errors in valuation and calculation of income.

SUMMARY OF ARGUMENT

Appellant Lea Ann Byrd argues that the Byrd Sons Residual Trust (the Trust) established by Jonathan's father for his three sons and their children should be treated as a marital asset. Her assertion flies in the face of established trust, property, and equitable distribution law. An unvested interest in a Trust does not belong to the beneficiary – it is not even a property interest for purposes of equitable distribution. In essence, she asks that the Court rewrite the terms of the Trust established by Terry

Wayne Byrd for his children and grandchildren, wiping out the contingent interest of the grandchildren and reclassifying Jonathan's interest as a presently vested interest.

Lea Ann's argument appears to be based on three prongs. (1) She argues that Jonathan Byrd made distributions from the Trust for family and personal expenses; This argument is without merit. Mississippi law is clear that use of the income from separate property for family purposes does not make the underlying asset marital. (2) She argues that the Trust is Jonathan's "alter ego" and its legal structure can be disregarded and the assets divided, a proposition for which there is no authority. (3) She argues that marital property was "inextricably commingled" into the Trust and therefore changed the nature of the Trust. However, the "extensive commingling" involves loans and repayments between legally separate entities, transfers of Jonathan's separate property, and payments by businesses owned by the Trust. And, even if she was correct, there is no authority for setting aside the interests of other beneficiaries to the Trust – in this case, her children. If marital property had been transferred to the Trust, the remedy would be to include the value of THAT ASSET in the marital estate.

Lea Ann also argues that the court below improperly valued several assets held by the Trust. She suggests that the Court erred in accepting Jonathan's values without supporting documentation. However, with the exception of a small fraction of the value of the Trust, the findings are clearly supported by evidence independent of Jonathan's 8.05 Financial Statement. To the extent that some are not, they represent a small fraction of a non-marital asset. Under those circumstances, an error in valuation should be harmless error, so long as the overall division of marital assets is fair.

She also claims that the Court erred in valuing the husband's residence, in failing to treat certain payments as dissipation of assets, and in awarding her only 50% of the marital assets. Her argument for a greater than equal division of marital assets is without support, as is her claim for permanent alimony. She left the marriage at forty-one, after many years of separation, in which she was fully supported, with one million dollars in cash and an earning capacity of $100,000. In addition, she was awarded child support based upon a deviation above her husband's income. A review of comparable cases shows that the division is fair, the award of short-term alimony appropriate, and the child support more than generous.

Finally, her request for attorneys fees above $105,000 already awarded and for sanctions to be applied to Jonathan's attorney, are unsupported. Her claims for sanctions are based primarily on the provision of two documents. One, a lease, was originally an oral lease, and the details had been fully revealed. There was no plot to hide the facts or terms of the lease. The other, an appraisal for Lafayette County land, was already in her hands, and was questionable as it was the subject of ongoing litigation, in which Lea Ann's expert played a role. Furthermore, both documents were provided, were before the court for consideration, and the court considered and denying her request for sanctions.

ARGUMENT

I. Scope of Review

The scope of review of the factual determination made by a Trial Judge sitting without a jury is limited. The Mississippi Supreme Court has held that an appellate Court will not reverse a chancellor's decision unless the Chancellor's findings were clearly erroneous, manifestly wrong, or the Chancellor applied an erroneous legal

standard. *Pearson v. Pearson*, 761 So 2d 157, 162 (Miss. 2000); *Parker v Parker*, 429 So (2d) 940 (MS 2005). A Chancellor's ruling will be upheld if it supported by substantial credible evidence. *Owen v. Owen*, 22 So (3d) 386 (Miss App 2009); Bridges & Shelton, Griffith Mississippi Chancery Practice (2000 Ed) Sec. 674. The limited scope of review applies to findings of evidentiary fact and of ultimate fact. It is "particularly applicable" in the areas of divorce, alimony, and child support. *Wright v Wright*, 723 So(2d) 1168 (Miss. 1998) *Friar v. Templet*, 724 So(2d) 517 (Miss. App. 1998), *Saliba v Saliba*, 753 So(2d) 1095 (Miss. 2000).

Almost all of the issues of which the Appellant complains – classification of assets, valuation of assets, division of assets, awards of alimony, child support, and attorneys' fees, sanctions – are questions of fact for determination by the Chancellor. As the Argument below illustrates, the Chancellor's decisions on these matters were supported by substantial evidence. The Appellant attempts to completely re-litigate a decision of a Chancellor who is the Senior Judge of the Seventh Chancery Court District and has been on the bench since 1989. The Chancellor in this case, Jon M. Barnwell, has handled many divorce cases, including farm properties, and estate cases in his twenty-plus years on the bench and has had much experience with judging the credibility of witnesses and the relevancy of evidence.

The Chancellor required each of the attorneys to file proposed Findings of Fact and Conclusions of Law. He then required each of the attorneys to file a Response to the proposed Findings of Fact and Conclusions of Law of Counsel Opposite. The Chancellor then made his own Findings of Fact and Conclusions of Law. After the filing of the Motion for Reconsideration by the Appellant, he considered all the evidence, again, in his final Order. By the time the process was finished, the issues in

this case had been heard and reviewed three times post-trial, by a Chancellor experienced in family law and estate matters.

II. The Byrd Family Trust was properly classified as separate

Provision IX of Terry Byrd's *Last Will and Testament* placed property in trust for his three sons, Jonathan, Keith, and Barry Lynn Byrd. (Exhibit 21) The primary asset held in trust for the sons is approximately farmland in Bolivar and Coahoma Counties. The will provides that the co-trustees, Jonathan and Keith, shall distribute the INCOME from the Trust "as they in their judgment deem that it is prudent" and considering that the sons each have a beneficial one-third interest while they are living. The will further provides that the trust will be dissolved after fifteen years and the ASSETS distributed equally to the sons "IF all three are living." (emphasis added). If any of the three sons are not living, their children will receive the one third that would have gone to that son. Under this fifteen-year provision, assets will be distributed to living sons in 2014.

A. Jonathan Byrd's interest in the Byrd Family Trust does not qualify as a "property interest" for purposes of equitable distribution, because it is not certain to become vested.

In order for an asset to be available for equitable distribution, one spouse must have a property interest in the asset. Based on the provisions of the Byrd Family Trust, Jonathan is currently entitled to receive *income* from the Trust. And, he will receive one third of the assets held by the trust IF he is living when the trust is terminated – a future interest that is contingent on his surviving until a specific date. His interest in the assets themselves is a contingent property interest – contingent on his surviving to the distribution date. His children hold alternate contingent interests. Jonathan does NOT

have a vested, certain right to the assets in the Trust. To disregard the Trust and distribute his share, ignoring the equally contingent interests of his children, would rewrite Trust and property law.

Jonathan's interests do not rise to the level of a "property interest" for purposes of equitable distribution. No cases were found directly on point on this issue in Mississippi. However, in a related context, the Mississippi Court of Appeals has held that an anticipation of inheritance is not a property interest subject to equitable distribution. *Schoffner v. Schoffner*, 909 So. 2d 1245, 1250 (Miss. Ct. App. 2005) (husband's anticipated inheritance of business not an asset for purposes of equitable distribution); *Parker v Parker*, 929 So. 2d 940, 946 (Miss. Ct. App. 2005) ("an expectancy of an inheritance is not an asset"). Similarly, Jonathan's contingent interest in the trust assets is not an interest that can be divided in equitable distribution -- it is too speculative. The property rights to these assets are held by a third-party entity – the Trust – and not by Jonathan.

Although no Mississippi case was found specifically discussing this issue in detail, the principle is implicit in the court of appeals' decision in *Owen v. Owen*, 22 So. 3d 386 (Miss. Ct. App. 2009). The court affirmed a chancellor's property division that classified a husband's interest in trust assets as his separate property. The husband had an interest in a family land partnership that held title to the marital home and a second home. The trust assets were held to be his separate property *even though* the couple lived in the home owned by the trust, and even though the wife testified that her parents contributed $75,000 to improvement of the second home and $36,000 to improvement of the marital home.

Courts in other states have similarly held that a contingent interest in trust assets is not a property interest for purposes of equitable distribution – particularly where the contingency requires the spouse's survival past some point in the future. The Indiana case of *Loeb v. Loeb*, 301 N.E.2d 349, 353 (Ind. 1973) held that trust assets of a family business were not subject to distribution where the husband's ownership interest was contingent on his survival beyond a time specified in the trust. In *Loeb*, as in the Byrd Trust, the husband's children would take the assets if he did not survive a particular event (his mother's death). In a later case involving a husband's VESTED remainder interest in property, the Indiana court distinguished *Loeb*, stating, "[T]he case at bar is distinguishable because David's interest in the real property is **not subject to defeasance**. David's interest in the real property as a tenant in common with his two siblings has been conveyed by deed. He has already satisfied the only condition that attached to the gift in David's father's will, that is, to survive his father." *In re Marriage of Moyars*, 717 N.E. 2d 976, 979 (Ind. Ct. App. 1999) (emphasis added). These cases point out the critical distinction: a vested interested not subject to defeasance MAY be property, but an interest like Jonathan's, which is contingent and opposed by the interest of other contingent beneficiaries, is not.

In a Wyoming case, a family-owned ranch held in trust for a son and daughter was not subject to distribution when the son and his wife divorced. The trust specified that the son would receive his share of the ranch only if he was living on a specified date. *Storm v. Storm*, 470 P.2d 367, 369 (Wyo. 1970) (property to go to the son and daughter, or the survivor). The court determined that the ranch was not a "property" of the husband, even though the date to which he must survive was a mere four and a

half months after the petitioner filed for divorce and only weeks before the judgment was issued. *Id.* at 368. For example, the Wyoming court later distinguished *Storm* from a case in which a husband owned an outright, present interest in a family limited partnership, making the same defeasible/nondefeasible analysis. The court noted that in *Storm*, "one spouse sought to include unvested future interests in the marital estate and we held that future property cannot be included if it may never come into being. In this case, Husband has a current vested interest." *Humphrey v. Humphrey*, 157 P. 3d 451, 453 (Wyo. 2007).

Assets held in a vested, nondefeasible remainder interest and contingent interests which may never come into being are different animals. If Jonathan Byrd dies before 2014, his children will take a one-third interest in the corpus of the trust. Essentially, Lea Ann Byrd is asking that the court declare Jonathan's interest vested as of the date of their divorce, ignoring the contingent beneficiaries of the interest – her children. The court has no authority to ignore the contingent rights of other beneficiaries to read a present interest into a trust that simply does not exist.

B. Even if it was a vested interest, Jonathan's Trust interest is separate property.

Even if Jonathan's right in the Trust was a vested interest, it would be separate property not available for equitable distribution. Jonathan acquired his beneficial interest in the Byrd Family Trust through inheritance. Property received by a spouse through inheritance or gift belongs to that spouse as separate property and not part of the marital estate. *Ferguson v. Ferguson,* 639 So. 2d 921, 928 (Miss. 1994); *Parker v Parker*, 929 So. 2d 940, 944 (Miss. Ct. App. 2005). The same rule applies to income from the Trust that has not yet been distributed. *Franks v. Franks,* 759 So. 2d 1164

(Miss. 1999) (reinvested income from husband's separate property was separate property).

C. Use of Trust income for family purposes does not make the Trust marital.

Jonathan used Trust income for family, personal, and marital purposes over the years, a fact that Lea Ann somehow finds suspect, even though she was the beneficiary of much of that support. She refers to the Trust as his "piggy bank". That piggy bank provided her with a home for many years and paid the utilities and other living expenses for her – something that benefitted her and was in fact the purpose of the trust – to support the settlor's sons and children. Mississippi law could not be more clear that the use of separate income for family or marital expenses does not convert the source of the separate income into marital property. The appellant's brief acknowledges this in its discussion of *McKissack v. McKissack*, 45 So. 3d 716, 721 (Miss. Ct. App. 2010), in which the court held that a husband's use of $350,000 from certificates of deposit for family purposes converted the money actually used to marital property, but did not convert the remaining value of the certificates to marital. Appellant's Brief at 27. *See also Boutwell v. Boutwell*, 829 So. 2d 1216, 1222 (Miss. 2002) (income from husband's separate property promissory note was marital to the extent that it was used for marital expenses, but future income from the note was not marital); *Pearson v. Pearson*, 761 So. 2d 157, 163 (Miss. 2000) (rejecting wife's argument that husband's use of income from separate property company for marital expenses converted company to marital asset).

D. The "Piercing-the-Corporate-Veil" Doctrine is inapplicable to property not owned by Jonathan.

The appellant cites an inapplicable Mississippi case to support her argument that the court should set aside a third-party trust with multiple beneficiaries. *A & L, Inc. v. Grantham,* 747 So. 2d 832 (Miss. 1999) involved a family business solely owned by a divorcing husband who worked in the business. A large part of the business value was clearly marital, caused by his active efforts in building the business. He did not meet his burden of separating out the premarital, separate value of the business from the marital portion, converting the entire value to marital. In addition, he completely commingled business and household funds so that the corporation was deemed his "alter ego", allowing the court to pierce the corporate veil and distribute the business assets. This case is easily distinguishable from *Grantham*. First, the business was partly marital and partly separate, and the husband failed to establish the premarital separate value, which is alone sufficient to convert the business to marital. Second, he OWNED 100% of the business so that it was available for conversion to marital property. It is difficult to see how an asset that one does not own can become an "alter ego." This case involves assets owned by a third party, the Trust, with a number of contingent beneficiaries. The fact that Jonathan used the trust for personal and family expenses, with his brothers blessing, does not convert the Trust into a marital asset. In a Colorado case, the court of appeals held that a husband's interest in discretionary trust income was not "property", even though he was a co-trustee with his sister and even though there was evidence that he handled all trust transactions, that his sister acceded to his decisions, and that he "had used the assets of this trust on occasions as

if he were the sole owner thereof." *In re Marriage of Rosenblum*, 602 P. 2d 892, 893 (Colo. Ct. App. 1979).

E. Transfers between the Trust and other entities are not commingling, and, even if they were, the Trust could not be converted to a marital asset.

Finally, Lea Ann argues also that the Trust should be treated as marital property, because the corpus of the Trust has been "inextricably commingled" with marital assets. This is simply not true. Furthermore, even if marital funds were commingled into the Trust, the remedy would be to include the value of those assets in the marital estate, NOT to set aside a third-party Trust, not owned by Jonathan and including multiple beneficiaries.

As evidence of this commingling, she has compiled charts of transfers from the Trust to the brother's farming operations and payments from the farming operations back to the Trust, occurring in 2008, the last year that the brothers farmed, and in early 2009. The charts also include transfers to the Trust from Delta Farm Store – an entity owned by the Trust, as evidence of "commingling." Jonathan, his brother Keith and Co-Trustee, and William Andrews, their accountant, all explained the relationship between the Trust and the brothers' independent corporate farming entities, Forrest and St. Charles. Andrews explained that the Trust land was used as collateral for loans, that the loan funds were then loaned to Forrest and St. Charles as farm operating loans, which were repaid at the end of the farming season. (Tr. 358, 369, 373). The Trust borrowed money to loan to Forrest and St. Charles for annual operating expenses. Forrest and St. Charles repaid the Trust from their annual income. (Tr. 972, 985-986). This is not an usual arrangement. It would be difficult to make the debtor-creditor relationship work without transfers between the two entities. The fact that the

farming operations were marital businesses does not make these payments suspect. Charles Swayze, Jonathan's expert, testified that it is a common practice for Delta farming operations to form multiple partnerships to conduct the farming operations in this manner. (Tr. at 825 -826).

Lea Ann also lists as evidence of commingling payments from Delta Farm Store, an asset owned by the trust. It is unclear how this could constitute commingling of marital assets. The Store is not marital property – it is owned by the Trust. William Andrews testified that the Delta Farm Store is owned by the Trust and that the Trust receives income from it. (Tr. 362).

She also cites as evidence of commingled property that Jonathan was the owner of three annuities in his name, which he transferred to the Trust. However, the annuities were bought with a disbursement from the Trust (separate property income) and therefore were Jonathan's separate property, NOT marital property. The fact that they were in his name does not convert them to marital. (Tr. 949-951).

That leaves a single, unexplained check from in the amount of $50,000 from Jonathan's account to the Trust (valued at $14,000,000) as evidence of the "inextricable commingling" of the Trust with marital asset. The remaining assets that Lea Ann claims are commingled, the Alabama properties, were bought by Jonathan and his brother with Trust income, but in their names, and were used by the families. The chancellor held that these properties, which were later transferred into the Trust, were marital. However, rather than finding that this transfer "commingled" and converted the Trust, the Chancellor held that the value of Jonathan's interest should be included in the marital estate. (Op. at 11-14).

The payments into and out of the Trust grow out of the relationship between the farming operations and the Trust and between the Trust and it's own business. Furthermore, even if Lea Ann had shown "extensive commingling" and identified commingled assets, the solution, as applied by the chancellor to the Alabama properties, would be to include the value of the commingled asset in the marital estate, rather than to convert a contingent Trust interest into a vested interest.[1]

F. The Court should affirm the Chancellor's finding that the Trust interests are separate property.

The Court below held that the Trust, composed primarily of real property and cash, had not been commingled in a manner that would convert it to marital property. The court rejected the argument that use of the Trust assets for family purposes converted it to marital. The court also found that no commingling occurred. "This Court is of the opinion that the main corpus of the Trust, i.e, the farm real estate, has at all times been treated and maintained as Trust property. Additionally, all real property originally purchased in the name of the Trust and continually maintained within the Trust is found to be Jonathan's separate property." (Op. at 10). The Court made this finding after lengthy testimony and review of Lea Ann's assertions regarding commingling. Jonathan respectfully requests that the Court affirm the court's findings of fact on this issue.

[1] Lea Ann also relies on the doctrine of "active appreciation" to argue that the Trust is marital. The problem with this argument is that it has no application. The cases on which she relies involve a spouse's active work in a business OWNED by him or her. Furthermore, the Trust assets consist primarily of land. Even if the land were owned by Jonathan, it is unlikely that the increased value of the land would be attributable to his efforts.

III. The Court's Valuation of the Trust should be affirmed

Lea Ann also argues that the Chancellor erred in valuing several assets of the Trust. First, it should be noted that a significant portion of her argument is based on her assertion that Jonathan was not forthcoming with information about some assets and that therefore values asserted on his 8.05 Financial statement should not be accepted without other corroboration. Appellant's Brief at 22-23. If a spouse does fail to disclose information, the court may impose sanctions to remedy the failure. But the failure does not give rise to a per se rule that a chancellor is barred from adopting some of the party's proposed values. The case cited by the appellant, *Trim v. Trim,* 33 So. 3d 471 (Miss. 2010) does NOT stand for the proposition that if the chancellor finds an inaccuracy one asset value of a party, he should reject ALL of the party's proposed values.

In this case, the chancellor accepted some values offered by Lea Ann and some offered by Jonathan. The chancellor is charged with making a decision about value. If the sanctioned party's values appear more accurate, those are the values the chancellor should adopt. "The credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation, are primarily for the chancellor as the trier of facts." *Chamblee v. Chamblee,* 637 So.2d 850, 860 (Miss.1994) (quoting *Polk v. Polk,* 559 So.2d 1048, 1049 (Miss.1990)).

Furthermore, an error in valuation of a party's separate property, which is not available for equitable distribution, should be harmless error, particularly in a case involving the level of assets in this case. No Mississippi case was found in which

equitable distribution was reversed for an alleged error in valuing one spouse's separate property. And certainly no case was found reversing a court's division of marital assets based on an error in valuing a contingent, unvested separate interest not available for equitable distribution. And, as will be shown, there is credible, independent evidence to support the chancellor's findings on the bulk of the value about which she complains.

A. *Lafayette County Property*. Lea Ann argues that property owned by the Trust in Lafayette County, valued at $952,068 by the court, should have been valued higher, based on the fact that at one time the property was under a contract of sale for $2,000,000, and was valued at close to that amount in an appraisal and on a loan application. Appellant's Brief at 24. She neglects to mention, however, that the purchaser backed out of the contract, that the property is the subject of a lawsuit, and that Jonathan testified that he had subsequently been unable to sell the property. (Tr. at 861-63). Furthermore, the testimony offered by Lea Ann was provided by Brad Walsh, who also represented a potential purchaser of the property, and who was now in litigation over the alleged contract and appraisal. Counsel for Jonathan objected to his qualification as an expert based on this dual relationship, but the court permitted his testimony. (Tr. 723-730). However, the Court did not in fact accept the testimony and determined to base the value on the sale price of the property rather than the disputed appraisal. The court did not err in placing the property's value at $952,0003 the amount the trust paid for the land in 2006, (Exhibit 22) rather than the value set out in the failed contract or the appraisal involved in the litigation.

B. *Bolivar and Coahoma County Properties.* Lea Ann argues that the court erred in valuing the Trust farmland based on 5,083 acres at $2,500 an acres rather than on 5,648 acres. Appellant's Brief at 24. However, Jonathan testified that only 5,083 acres were capable of cultivation, and that no one would pay for "ditches and turnrows". (Tr. 861). Keith Byrd, Jonathan's Co-Trustee, also testified that the cultivatable acreage consisted of 5,085 acres. (Tr. 761-62, 779). This value is also supported by the amount for which the Trust leased the land when the brother stopped farming. The annual contract rental amount of $762,450 equals $150 an acre multiplied by 5,083. (Exhibit 23)

C. *Delta Farm Store.* Lea Ann also argues that the Delta Farm Store, 2/3 of which is owned by the Trust, should have been valued based on a loan application, rather than on the actual sale price of the property used by the court. Appellant's Brief at 25. Jonathan and his brothers purchased a one-third interest in the store in 2006 for $250,000. William Andrews testified to that fact, identifying a bill of sale for the purchase of the one-third interest for that amount. (Tr. 944-45). While a court certainly may rely on loan application statements of value, other indications of value may prove more accurate. The Chancellor chose to base value on the amount paid for the 1/3 interest several years earlier.

These alleged errors in valuation, all supported by evidence independent of Jonathan's 8.05 financial statement, amount to 90% of Lea Ann's claimed mistakes in valuing the Trust assets. For each of these, the court based its valuation on evidence other than Jonathan's Financial Statement – actual sale values and lease agreements and the testimony of Jonathan's Co-Trustees and accountant. The remaining alleged

errors – failure to include a $150,000 debt, erroneous inclusion of a $195,000 debt, and an alleged $20,000 error in valuing property in Nevada, are a tiny fraction of the overall value of the Trust. Even if the court erred in it's valuation of the Nevada property and inclusion of debts, these amount to approximately $360,000, of which Jonathan's share would be $120,000.

A minor error in valuation or classification of MARITAL assets may be harmless error if the overall division of assets is fair. *Kimbrough v. Kimbrough,* 76 So. 3d 715, 721 (Miss. Ct. App. 2011). Certainly, a minor error in valuation or classification of separate property should not be a reason for reversal.

IV. The Court should affirm the Chancellor's valuation of marital assets

Lea Ann also argues that the chancellor erred in valuing several marital assets and in the roughly equal division of marital assets. Lea Ann argues that the chancellor erred in valuing the Jonathan's residence at $395,000, the purchase price of the house, (Tr. at 583), rather than at $425,000, based on a 2011 appraisal of the house. There is no requirement that a court rely on an appraisal over an actual sale price. Even if the valuation were error, the difference is $30,000 in a marital estate of almost two million dollars. She also argues that the court erred in valuing her 2001 Cadillac at $15,000, rather than based upon a Kelly Blue Book printout showing a value of $2,775. However, it should be noted that even if this value was incorrect, it did not affect her share of the division of assets. The court ordered an equal division of assets *other than* the Cadillac and the home furnishings, which were provided to Lea Ann in addition to her 50% share.

In *Kimbrough v. Kimbrough*, 76 So. 3d 715, 721 (Miss. Ct. App. 2011), the court of appeals affirmed property division even though a chancellor erred in classifying a husband's separate property truck, motor home, and four-wheeler as marital. The court held that an error in classification does not warrant reversal if the overall division is fair. Similarly, a court's failure to classify a husband's $30,000 pension was error, but the division was affirmed because his wife received approximately two-thirds of the marital assets. *Tillman v. Tillman*, 716 So. 2d 1090, 1095 (Miss. 1998).

The court's valuation of the Cadillac, even if error, was harmless. The Cadillac was awarded to the wife in addition to one-half of the marital assets. The court's valuation of Jonathan's home, based on actual sale price rather than an appraisal, was supported by independent evidence. And, even if it was a $30,000 error, the overall division of almost two million dollars in assets, leaving Lea Ann with almost a million dollars in cash, was a fair division.

V. There was not sufficient evidence of dissipation of assets

Lea Ann seeks to have the court treat three years of Jonathan's credit card payments as dissipation of assets, in addition to payments made to third parties, some for purchases and some as gifts or political contributions. There is no evidence that these payments involve dissipation of marital assets.

Over a three-year period, Jonathan paid a total of $18,705.50 on personal credit cards, or an average of $6,000 a year. Lea Ann argues that the amount of these payments should be included in the marital estate because Jonathan did not produce the credit card statements in a timely manner and did not introduce proof that the

payments were NOT dissipation. In effect, she is placing the burden on Jonathan to prove non-dissipation.

She also seeks to declare payments of credit cards by the farming operations dissipation. As the farming operations were winding down, St. Charles made credit card payments in the amount of $99,404.75 and Forrest made credit card payments in the amount of $135,385.14. Lea Ann alleges that these business payments of credit card debt must be dissipation because "Husband had been out of the farming business since December of 2008 and because the farming partnerships were defunct, the charges incurred on such credit cards could not be credibly shown to have been for farming purposes." Appellant's Brief at 34. However, a review of the her summary exhibit shows that in fact, the credit card payments were made between January 2008 to early 2009, during the time in which the farming operation was winding down. Not a single credit card payment was made after early 2009. Jonathan pointed out in testimony that while Lea Ann's summary indicated that payments were made through 2010, the payments actually ended in early 2009. He explained that the payments were to tie up loose ends in the farming operation. (Tr. 92 -23). It should also be noted that even if she was correct, since the payments were from corporations owned by all three brothers, only 1/3 of that amount, or approximately $78,000, could be included in marital assets.

Lea Ann also argues that the court should have included in marital assets $221,103.19 in payments to "third Parties" as dissipated. She provides a list of payments from husband's personal bank account over a three-year period, and argues that they are all dissipation. Jonathan explained the purpose of many of these payments, which

included payments for boats, a payment to assist a disabled farm worker, payments to his brothers, payments to purchase a vehicle, to participate in a fishing tournament, to purchase a depth finder, and a political contribution. (Tr. 901 – 905). It should be noted that not every expenditure for personal pleasure, such as boating, or to assist others, is dissipation. There is no requirement that a spouse spend every penny of his or her income on household expenses. That should particularly be the case where, as here, a substantial portion of the funds are from that spouse's separate property.

VI. The court's 50/50 division of marital assets was not unfair

Although the chancellor divided the marital assets unequally in FAVOR of Lea Ann, she argues that the chancellor should have awarded her even more. The court awarded her the Cadillac and all the furnishings in the home owned by the Trust. The remaining assets, valued at $1,883,467.49, were divided equally. (Op. at 15). Lea Ann received her share of $918,233.75 in two payments in cash, within six months of the entry of judgment. She was also awarded temporary (or rehabilitative) alimony of $1500 a month and free occupancy of the Nolan Topper road house for slightly over a year, extending five months after she testified that her schooling would end. In addition to previously awarded interim attorneys fees of $35,000 and additional attorneys fees of $75,000 at the end of the trial, the court awarded her cash sanctions in the amount of $150,000. (Op. at 21-23).

Her argument that the court misapplied the *Ferguson* factors by not giving her more than 50% of the assets asks this court to overrule a chancellor's findings of fact under *Ferguson* to require an unequal division of assets in her favor. The standard of review of a chancellor's actual division of marital assets is extremely deferential. A

court's division of assets will not be reversed "unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Spahn v. Spahn*, 959 So. 2d 8, 12 (Miss. Ct. App. 2006) (court does not conduct a new *Ferguson* analysis, but reviews for abuse of discretion); *Lauro v. Lauro*, 924 So. 2d 584, 590 (Miss. Ct. App. 2006) (property division reviewed under abuse of discretion standard).

One spouse's separate property estate does not require an unequal division of marital assets in favor of the other spouse. For example, marital assets were divided equally between a physician husband with $614,848 in separate property assets and his nurse wife of eight years, who was working part-time. The court denied her request for lump sum alimony to reflect the difference in their separate estates. *Wells v. Wells*, 35 So. 3d 1250, 1259 (Miss. Ct. App 2010). The court also considered under *Ferguson* "other factors" that the husband had paid more than $80,000 of her living expenses since the entry of a temporary order, even though the couple shared joint custody. *Id.* Similarly, the fact that Jonathan supported Lea Ann through many years of separation and several divorce filings should weigh against an unequal division in her favor.

Furthermore, the fact that 1/3 of the marital estate comes from Jonathan's separate property weighs against an unequal award in Lea Ann's favor. The court found that the Jonathan's share of the Alabama house, condominium and boat slip was marital through family use. These converted separate property assets constitute approximately one-third of the marital estate.

VII. Lea Ann Byrd is not entitled to alimony.

The Mississippi Supreme Court has set out the following factors for a court to consider in determining whether to award a spouse permanent or rehabilitative

alimony: (1) the parties' income and expenses; (2) the parties' health and earning capacity; (3) the needs of each party; (4) the obligations and assets of each party; (5) the length of the marriage; (6) the presence or absence of minor children in the home, which may require child care; (7) the parties' ages; (8) the parties' standard of living during the marriage and at the time support is determined; (9) tax consequences of the spousal support order; (10) fault or misconduct; (11) dissipation of assets by either party; or (12) any other factor deemed to be "just and equitable". *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993).

The facts in this case do not warrant an award of permanent alimony. Lea Ann Byrd is forty-one years of age and in excellent health. The couple's four daughters are past the age requiring at-home childcare. In 2009, her gross annual income for only eight months was approximately $60,000. She returned to school to enhance her earning capacity as a nurse practitioner. The court found that her earning capacity, when she finishes her training in May, 2012, will leave her with an earning capacity of $100,000 a year. (Op. at 17). She will receive $36,000 in child support. (Op. at 20). She leaves the marriage with liquid assets of over $1 million dollars.

Lea Ann and Jonathan were married for less than one year, divorced, remarried and lived together for nine years before separating in 2003, and then remained separated until the date of trial. Her own brief acknowledges that she was "completely supported" by him until she earned her nursing degree and began working. Appellant's Brief at 13. The court found that during this lengthy period of separation, Jonathan fully supported her, provided her with a house, paid the expenses of the house, and paid for his children's education. (Op. at 2.) Jonathan has provided Lea Ann with ample

support during a lengthy separation. She is now fully capable of supporting herself to meet her reasonable needs.

She argues that an income of $100,000, $36,000 in tax-free child support annually, and over a million dollars in cash, plus payment of most of her attorneys' fees, will leave her unable to support herself adequately at the age of 41. However, an award of rehabilitative alimony to Lea Ann is consistent with other recent cases. In *Tatum v. Tatum*, 54 So. 3d 855 (Miss. Ct. App. 2010), a thirty-year-old wife of six years and mother of two children, who had been a homemaker by agreement with her husband, was awarded $2,000 a month in rehabilitative alimony for two years from a husband with an annual income of approximately $150,000. She was not working and would need additional time and training to transition from homemaker to work. The marriage ended because of his adultery. In *Hults v. Hults*, 11 So. 3d 1273 (Miss. Ct. App. 2009), a forty-year-old wife and homemaker of twenty years was properly denied permanent alimony and awarded five years of rehabilitative alimony of $900 a month. Her husband's annual income was between $63,000 and $113,000, depending on overtime. She planned to return to school for two to three years to obtain a bachelor's degree and to reenter the workforce. The Court of Appeals rejected her argument that she should have been awarded permanent alimony She received marital assets worth $414,000. *Id.* at 1281. Lea Ann Byrd leaves the marriage with far more. As in *Hults*, the court's decision that rehabilitative alimony was appropriate should be affirmed. Inequality of assets does not require an award of alimony to a spouse whose income is sufficient to meet reasonable needs. In *Craft v. Craft*, 825 So. 2d 605 (Miss. 2002), a thirty-nine year old wife of twelve years, with earning capacity of $65,000 to $75,000,

was denied alimony from an adulterous husband with income of $128,000 and substantially greater assets. *Id.* at 610-611. Finally, *Cosentino v. Cosentino*, 986 So. 2d 1065 (Miss. Ct. App. 2008) is instructive. In that case, this court reversed a chancellor's award of permanent alimony to a wife of thirty-three years who received marital assets of approximately $2.6 million. Unlike Lea Ann, who was forty-one and capable of earning $100,000 a year, Ms. Cosentino was a fifty-five year old homemaker who had not worked in twenty-five years and would need extensive training to reentry the workforce. The chancellor found that she was "not employable." *Id.* at 1069. Her husband, who had committed adultery, had a flourishing radiology practice. Lea Ann was awarded $1 million in cash and has the capacity to earn $100,000.

The three cases on which Lea Ann primarily relies are distinguishable. The wife in *Johnson v. Johnson*, 650 So. 2d 1281, 1287 (Miss. 1994) received far less in property division. She was a fifty-year-old homemaker with no professional training who had not worked for most of the marriage. and had no expectation of employment. In *Sanderson v. Sanderson*, 824 So. 2d 623 (Miss. 2002), the wife had earning capacity of $22,000 if she returned to work, and received only $200,000 in a lump sum payment, while her husband had earning capacity of $100,000 and $4 million in assets. *Id.* at 626-627. And in *Johnson v. Johnson*, 877 So. 2d 485 (Miss. Ct. App. 2004), the unemployed wife, with earning capacity of $25,000, received only $250,000 in property division. *Id.* at 498.

VIII. The court's upward deviation in child support should be affirmed

The Chancellor found that Jonathan's anticipated adjusted gross income from the Trust is $135,000. (Op. at 4). Nonetheless, he was ordered to pay child support in

the amount of $3,000, constituting 27% of his adjusted income, plus providing one-half of private school tuition, also considered an upward deviation. (Op. at 20-21). His finding regarding Jonathan's income was based on the testimony of William Andrews, a certified public accountant and accountant for the Byrd Trust. Extrapolating from Jonathan's 2009 Trust income, Andrews calculated Jonathan's income from the Trust for 2010. He subtracted a one-time cash out of an annuity from the 2009 income of $208,000, leaving Jonathan's anticipated income at $175,000. (Tr. at 366-68, 955-57). Lea Ann argues that because the Trust paid taxes on each brother's income, that amount should be included. Her argument is misplaced. Andrews did not testify that Jonathan RECEIVED $208,000 in income from the Trust in 2009; rather, that was the taxable amount of income attributed to him.

Furthermore, even if the finding was error, it is harmless error since the chancellor did not base his child support on Jonathan's income – instead, he deviated upward, awarding $3000 a month in support (27% of $135,000) for the three unemancipated girls. In *Strange v. Strange*, 43 So. 2d 1169 (Miss. Ct. App. 2010) the court held that a chancellor's miscalcuation of a payor's income was harmless error, since the chancellor also found that the child's needs had increased, warranting a deviation. In fact, $3000 would be just about 22% of the amount that Lea Ann argues the chancellor should have found for his income. She also argues that the court erred in ordering her to pay one-half of the children's educational and medical expenses beginning on July, 2012, when it is anticipated that she would complete her training. It is not unreasonable to ask a woman with earning capacity of $100,000, receiving $36,000 in tax free child support a year, to share equally in the costs of educational and

medical expenses with a husband with gross income of $175,000, who will be paying $36,000 a year in nondeductible child support as well as sharing medical and educational expenses. Finally, she argues that the court erred in considering Jonathan's support for other children in setting the child support award. There is no indication in the court's opinion that the court awarded less child support based upon Jonathan's support for his other children, Jesse and Jackson. (Op. at 20-21). In reviewing child support awards, "this Court will not overturn a chancellor's findings which are based on substantial credible evidence unless the findings were manifestly wrong, clearly erroneous, or an incorrect legal standard was applied." *Spahn v. Spahn*, 959 So. 2d 8, 11 (Miss. Ct. App. 2006)

IX. Attorneys' fees

The awarding of attorney fees in a divorce case is generally left to the discretion of the Chancellor. *Daigle v Daigle,* 626 So(2d) 140 (Miss 1993). A spouse who has adequate income with which to pay fees, or who has adequate resources after an award of marital assets may not be awarded attorneys fees. *Pacheco v Pacheco,* 770 So 2d. 1007 (Miss Ct. App. 2000); *Jones v Jones* 917 So. 2d 95 (Miss Ct. App. 2005).

In the present case, there are several factors which the Court obviously considered in the amount of attorney fees allowed. First, the facts show that Lea Ann Byrd's tax statements reflected that she made $60,000.00 in 2009 by working only 3/4 of a year. In addition, she testified she would make $100,000.00 or better a year as a Nurse Practitioner after she had completed her education (at Jonathan Byrd's expense). Finally, the Court allowed her in division of property $1,143,893.76 which she accepted as reflected by the receipt of funds. Moreover, the huge debt, now

$5,584,916.00, (Exhibit 24) incurred by Jonathan Byrd and Byrd Sons Residual Trust to make these monies available to Lea Ann Byrd and Kay Farese Turner is a factor in determining attorneys' fees. Finally, the Court could make its own determination of the reasonableness of the fees charged by Counsel for the Appellant.

Furthermore, the Court was aware that the attorneys for Lea Ann Byrd were not flawless in their representation of the case. This was shown by the attempt to collect twice on utilities as acknowledged by the letter of Emily Hamm. (Exhibit 25).

X. The Court properly refused to sanction Jonathan's counsel, Lee Graves

Sanctions against counsel are a serious matter, entrusted to the discretion and judgment of the chancellor who heard the witnesses, determined their credibility, and weighed the evidence. In this case, Lea Ann seeks to sanction counsel primarily for the failure to offer two documents in discovery. Both were provided long before the court made its decision. One was inadverdently omitted by counsel – a fact that should be apparent since there was absolutely nothing to hide with respect to the document. The document, a lease agreement for the Trust farmland, was originally an oral agreement. The terms were exactly as testified to by Jonathan. The second involved an appraisal of Lafayette County property that was involved in litigation over the very appraisal – litigation in which neither, Jonathan or his counsel participated. There was a lawsuit in Lafayette County between Ramiro Munoz (who wanted to purchase the property) and April White, who was a realtor trying to sell the property. The land was bought with Byrd Sons Residual Trust funds, was titled in Byrd Sons Residual Trust, and was found by the Court to be property of the Trust. Neither, Jonathan Byrd, or Byrd Sons Residual Trust, were parties to the lawsuit. However, Brad Walsh, who was an expert and a Counsel with Lea Ann Byrd, represented Munoz in the suit. The appraisal which was referred to was ordered by the bank and was part of the lawsuit that Brad Walsh was Counsel for Munoz on. The land was listed on the 8.05 at $950,000.00, which was what

Byrd Sons Residual Trust paid for the land when it was purchased. The Judge had all this information at trial long before any Findings of Fact and Conclusions of Law.

The law is clear that Trust assets are not marital assets. *Owen v Owen* 22 So(3d) 386 (Miss Ct. App 2009). *Kroha v Kroha,* 578 S. W. 2(2d) 10 (Ark Sup. Ct. 1979) *In Re Rosenblum,* 602 P 2(d) 892 (Colo Ct. App. 1979). The Court correctly made this ruling in his final Opinion when he classified the agricultural land, Lafayette County land, and the other assets of the Trust. The income from these assets may be considered for support purposes. Therefore, the reluctance of the Counsel for Jonathan to list them on the 8.05 is understandable. Moreover, these assets had confidentiality as far as the other beneficiaries of the Trust, brothers Keith Byrd and Barry Lynn Byrd, and their children. However, after the Court ordered this action, the assets were listed. All of these assets were before the Court long before the Court made its Findings of Fact and Conclusions of Law. As previously set forth, Counsel for the Appellee took very seriously the fact that the assets of the Byrd Sons Residual Trust were not marital assets for division. Counsel also took seriously the fact that the confidential interests of other beneficiaries of the Trust --- brothers Keith Byrd and Barry Lynn Byrd, and, their children --- were implicated in this action. Nevertheless, when the Court ordered the inclusion of the assets on the 8.05 Financial Declaration, Counsel put the assets on the 8.05.

Counsel for the Appellant states two times in her Brief that the Counsel for Appellee "proudly proclaimed" that he represented the Byrd Family for thirty (30) years. It is stated in a manner to make you believe it is wrong to represent a family for thirty (30) years. "Pride or proud" is not the correct word. There is a caring for people you represent. It is not a "burned earth" grasping of divorce law. It is a caring for the people you represent in all matters of law affecting their well being --- estate law, real property law, agriculture law, evidentiary law, confidentiality law, and yes --- divorce law.

CONCLUSION

This action was lengthy, hard-fought, and contentious. The seasoned Chancellor carefully reviewed the voluminous evidence and exhibits and reached a decision. In some respects, his decision favored Lea Ann, in some, Jonathan. He thoroughly heard this case, received Findings of Fact and Conclusions of Law from each Counsel ---- and their responses thereto. Then, he made his own Findings of Fact and Conclusions of Law and, finally, reconsidered the same on the Motion to Reconsider. Jonathan respectfully requests that this court affirm the Chancellor's decision. Almost all of the contested issues on appeal involve issues of fact, matters peculiarly within the trial judge's province. The overall division of assets, award of alimony, attorneys' fees, child support, and sanctions, is fair to the Appellant, and provides her not only with sufficient resources to support herself, but great wealth for a woman of forty-one with high earning capacity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, M. LEE GRAVES, do hereby certify that on the 4th day of May, 2012, I served a true and correct copy of the foregoing *Brief of Appellee* by United States Mail, postage prepaid on M. Lee Graves, Attorney for Appellee, P. O. Box 1476, Clarksdale, MS 38614 and Chancellor Jon M. Barnwell, 310 W. Market Street, Greenwood, MS 38935.

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