IN THE SUPREME COURT OF MISSISSIPPI
NO. 2017-CA-00460

MICHAEL J. BOUNDS — **APPELLANT**

V.

SUZANNE MARIE BENSON, individually, and SUZANNE MARIE BENSON, as Trustee of the Suzanne Marie Benson Revocable Trust — **APPELLEES**

On Appeal From the Chancery Court of Lafayette County, Mississippi
The Honorable Robert Q. Whitwell
Cause No. CV2015-087(W)

APPELLANT'S BRIEF

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 disqualification or recusal.

1. Michael J. Bounds, Defendant/Appellant;
2. Suzanne Marie Benson, Individually, Plaintiff/Appellee;
3. Suzanne Marie Benson as Trustee of the Suzanne Marie Benson Revocable Trust, Plaintiff/Appellee;
4. Holcomb, Dunbar, Watts, Best, Masters & Golmon, P.A., counsel for Defendant/Appellant;
5. Richard Schwartz, potential purchaser of Mr. Bounds' interest in subject property;
6. Mayo Mallette, PLLC, counsel for Plaintiffs/Appellees; and
7. Honorable Robert Q. Whitwell, Chancellor.

/s/Thomas J. Suszek
Attorney of Record for Defendant/Appellant
Michael J. Bounds

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REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellant Michael Bounds respectfully requests oral argument on this appeal pursuant to Rule 34(b) of the Mississippi Rules of Appellate Procedure.

If not reversed, the long-established Mississippi law concerning partitions and concerning gifts will be materially changed. The Court's consideration of the issues would be enhanced by the ability to obtain answers and explanations from counsel at oral argument. We respectfully submit that oral argument will assist the Court and therefore promote a just decision and one that will provide guidance for similar disputes in the future.

STATEMENT OF ISSUES ON APPEAL BY PLAINTIFF/APPELLANT

ISSUE 1. **The lower court erred in awarding all proceeds from the sale of the house to Defendant Suzanne Benson.**

ISSUE 2. **The lower court erred by awarding ownership of all furnishings in the house to Ms. Benson.**

ISSUE 3. **The lower court erred when it held that the monetary gift, in the form of a Promissory Note, was unenforceable.**

STATEMENT OF THE CASE

On February 18, 2015, Michael J. Bounds, as a joint owner, filed his Complaint for Partition of Land and Other Relief. (RE 1) The Complaint was later amended to seek the unpaid balance of a Promissory Note Ms. Benson delivered to Mr. Bounds. (RE 1) A trial on the matter was held on March 1-2, 2017, during which the lower court heard the testimony of Mr. Bounds, Ms. Benson, and other witnesses. On March 2, 2017, the lower court issued its opinion finding in favor of Ms. Benson on the partition, ownership of the furniture, and Promissory Note issues. (RE 4 and 5) On March 6, 2017, the lower court issued its Amended Final Judgment. (RE 6 and 7) It is from that Amended Final Judgment that Mr. Bounds appeals.

This matter arose from the friendship between Mr. Bounds and Ms. Benson. The two first met on Match.com in 1999. (TR p. 15) At the time, Mr. Bounds lived in Washington D.C., while Ms. Benson lived in Wisconsin. (TR p. 57) After six or seven months communicating through Match.com and via email, the two met. (TR p. 15) After the summer of 2000, the two went on living their separate lives until 2013. (TR p. 17)

In the meantime, their lives went in different directions. With his background in the U.S. Army and U.S. Marshall Service, Mr. Bounds secured a senior inspector position in the witness protection program in Washington, D.C. (TR pp. 9-12) Yet in 2000, he returned to Jackson, Mississippi, to care for his mother and stepfather. (TR pp. 12-13) Once back in Jackson, he took

a job at the Southern District of Mississippi in Jackson, doing criminal investigations. (TR p. 13) Through hard work and determination, Mr. Bounds was promoted to senior inspector over judicial security for the U.S. Federal Courts for the entire Southern District and was responsible for the security of all Southern District judges. (TR p. 13) When he reached mandatory retirement age in 2011, he went to work for the Mississippi Supreme Court. (TR p. 13) During this time, Mr. Bounds was raising his three children, taking care of his ailing sister and living in a distressed part of Jackson. (TR pp. 14-15, 24-25) Money was tight and he was nowhere near to being in a position to retire. (TR p. 15)

Ms. Benson had better financial fortunes. In 2001, she met her partner, business owner Gary Tobias. (TR p. 243) Ms. Benson moved to Barrington Hills, Illinois, a plush suburb of Chicago. (TR p. 244) Over the course of the next decade, Ms. Benson accumulated great wealth, including the ownership of at least 23 separate certificate of deposits. (TR p. 102; RE 12)

In 2013, Ms. Benson and Mr. Bounds reacquainted through Facebook. (TR p. 17) While they did not meet, they spoke by phone and traded hundreds of e-mails and text messages. (TR p. 17) There was no dating relationship between Mr. Bounds and Ms. Benson and the two were not planning to marry or establish a domestic relationship. (TR pp. 193, 194)

During their "soul-mate" talks, their lives, including financial matters, were discussed. (TR p. 18) When they exchanged their dreams for the future, Mr. Bounds explained to Ms. Benson that he wasn't financially to retire anytime soon. (TR pp. 17-18) Learning about Mr. Bounds' difficult financial circumstances, Ms. Benson offered to help and told Mr. Bounds that she was more than capable of helping him out financially on account of her immense wealth. (TR p. 18) At that time, Ms. Benson began sending Mr. Bounds money to cover needed dental work as well as non-essential/life enjoyment expenses (she advanced him money for a motorcycle and later "wrote it off" as a Christmas gift.) (TR pp 18, 174; RE 15) Importantly, no

arrangements were ever made requiring Mr. Bounds to repay Ms. Benson; instead, the monetary support was a gift. (TR p. 19) Further, Ms. Benson could not have rationally expected to be paid back since she had a full understanding of Mr. Bounds' dire financial condition. (TR pp. 17-18)

The two gifts under review from Ms. Benson to Mr. Bounds came in the form of 1) a Promissory Note; and 2) joint ownership of a house located at 505 Thrasher Pointe in Oxford.

On December 9, 2013, Ms. Benson made a monetary gift to Mr. Bounds in the form of a Promissory Note. (RE 10) The Note provided for the payment of the principal amount of $208,000.00 through installment payments of $2,000.00 a week for 104 weeks. (TR pp. 22, 23) Ms. Benson was clear that she intended to provide Mr. Bounds with the money to be used at his own discretion. (TR p. 24) Ms. Benson even told Mr. Bounds that she drafted the Note so that in the event anything happened to her, he would still receive the money she promised him. (TR p. 24) When questioned by the Chancellor "why did you have to have a promissory note"? Ms. Benson answered:

> I don't - - I guess to show good faith, to show that I was earnest in my desire to help the family, that I wasn't trying to pull a fast one on him. I don't know.

(TR p. 167) Significantly, there was no provision in the Note – or anywhere else – allowing Ms. Benson to modify or stop making payments. (TR p. 29) She included a "no amendment, modification or waiver" clause, as follows:

> VI. Amendment; Modification; Waiver
>
> No amendment, modification or waiver of any provision of this Promissory Note or consent to departure therefrom shall be effective unless by written agreement signed by both Borrower and Lender.

(RE 10)

In reliance upon the Promissory Note gift, Mr. Bounds took early retirement. (TR p. 30) Mr. Bounds testified that without those payments he would not and could not have retired. (TR p. 30)

Shortly thereafter, Ms. Benson decided to help Mr. Bounds relocate from Jackson to Oxford. Ms. Benson decided to buy the subject house, sight unseen. (TR p. 32) Ms. Benson did not plan to move to Mississippi, but intended the Oxford house to be for Mr. Bounds. (TR p. 35) The house was conveyed to Michael J. Bounds and Suzanne M. Benson "as joint tenants with full rights of survivorship and not as tenants in common" by Warranty Deed dated April 4, 2014. (RE 8) Ms. Benson testified that the Warranty Deed was prepared exactly as she intended and that there was no mistake in the contents of the deed. (TR p. 170) Similarly, Ms. Benson directed the insurance agent that ownership/title would be as joint owners with right of survivorship, with Mr. Bounds and his family to be its occupants. (TR pp. 181, 294-295) Mr. Bounds had nothing to do with the preparation of the Warranty Deed or any other closing documents regarding the purchase of the house. (TR pp. 36-37) Ms. Benson testified that Mr. Bounds did not have any influence on changing the Warranty Deed or how it read. (TR p. 182)

In addition, Ms. Benson provided Mr. Bounds furniture for the house. (TR pp. 49-50) Mr. Bounds graciously accepted these gifts as he had no means to furnish his new house. (TR pp. 49-50)

Four to five months after the Promissory Note was executed, the friendly relationship between Mr. Bounds and Ms. Benson soured and Ms. Benson stopped making payments on the Note. (TR pp. 27-28) This left an unpaid balance of $163,800.00. *Id.* (RE 11)

In August, 2014, Ms. Benson conveyed her interest in the subject property to the Suzanne Marie Benson Revocable Trust (the "Trust"), by Deed recorded as Instrument Number

201408603, followed by a Corrected Quitclaim Deed (to correct the address of the grantor and grantee) recorded as Instrument Number 201409931. (TR pp. 311-12; RE 9)

Mr. Bounds relied on Ms. Benson's promises to his detriment. He left his job, gave away his furniture, abandoned his home, missed a pay raise, and set his retirement back many years because of his reliance upon Ms. Benson's promises. (TR pp. 30, 51, 54)

SUMMARY OF THE ARGUMENT

The Chancery Court of Lafayette County erred in finding in favor of Ms. Benson on the partition, ownership of the furniture, and Promissory Note issues.

The lower court first erred in awarding Ms. Benson all the proceeds from the sale of the house, since she had previously transferred her interest and thus had no ownership interest in the house.

The lower court erred when it awarded all proceeds from the sale of the house to Defendant Suzanne Benson in reliance on *Jones v. Graphia*, 95 So.3d 751 (Miss. Ct. App. 2012), which appears to be an anomaly in Mississippi jurisprudence. The Mississippi Supreme Court has consistently held that "equitable distribution – which authorizes a chancellor to look beyond title and consider disparity in contribution to divest a joint owner of his or her interest in martial property" – is simply "unavailable to the unmarried" parties such as Mr. Bounds and Ms. Benson. *Jones,* 95 So. 3d at 757, J. Maxwell, dissenting.

The lower court erred by considering the contribution to the initial purchase price of the house. It is long settled Mississippi partition law that the amount of each co-owner's purchase contribution does not vary the undisputed joint title ownership status. *Bennett v. Bennett*, 36 So. 452 (Miss. 1904).

Further, the lower court erred in awarding Ms. Benson the furniture in the house. The evidence demonstrates that the furniture constituted a completed *inter vivos* gift from Ms. Benson to Mr. Bounds.

Finally, the lower court erred in not enforcing the monetary gift provided to Mr. Bounds, by Ms. Benson, as evidenced by the Promissory Note. The Mississippi Supreme Court has held that a promissory note constituted a completed *inter vivos* gift upon delivery. *Estate of Laughter*, 23 So. 3d 1055, 1066 (Miss. 2009). "Delivery" is symbolic via the delivery of the document, not the collection of the money gift evidenced thereby. The gift was in the form of a right to payments. Moreover, the evidence shows that Mr. Bounds justifiably relied to his detriment on Ms. Benson's promises.

LEGAL ARGUMENT AND AUTHORITIES

A. STANDARD OF REVIEW

This Court on appeal should apply the substantial evidence standard to all factual determinations made by the court below.

> This Court's standard of review of a judgment from a bench trial is well settled. "A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor," and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence. *Puckett v. Stuckey*, 633 So.2d 978, 982 (Miss.1993); *Sweet Home Water & Sewer Ass'n v. Lexington Estates, Ltd.*, 613 So.2d 864, 872 (Miss.1993); *Allied Steel Corp. v. Cooper*, 607 So.2d 113, 119 (Miss.1992). This Court will not disturb those findings unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Bell v. City of Bay St. Louis*, 467 So.2d 657, 661 (Miss.1985).

City of Jackson v. Perry, 764 So.2d 373, 375 (Miss. 2000). Decisions of law made by the court below should be afforded much less deference, and are reviewed de novo.

> This Court reviews errors of law, which include summary judgments and motions to dismiss, de novo. *Cooper v. Crabb*, 587 So.2d 236, 239 (Miss.1991). "Notwithstanding our respect for and deference to the trial judge, on matters of

> law it is our job to get it right. That the trial judge may have come close is not good enough." *Cooper*, 587 So.2d at 239 (quoting *UHS–Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.*, 525 So.2d 746, 754 (Miss.1987).

Perry, 764 So.2d at 375

B. PLAINTIFF'S/APPELLANT'S BRIEF

ISSUE 1. The lower court erred in awarding all proceeds from the sale of the house to Defendant Suzanne Benson.

A. Ms. Benson was not a co-owner of the house, and therefore considering her "equities" was contrary to statute.

The Chancery Court of Lafayette County awarded Ms. Benson all the proceeds from the sale of the house; this was clear error because she had no ownership interest in the house.

It is undisputed that the seller conveyed the subject property to "Michael J. Bounds and Suzanne M. Benson as joint tenants with full rights of survivorship and not as tenants in common" by Warranty Deed dated April 4, 2014. (RE 8) It is further undisputed that in August 2014, Ms. Benson conveyed her interest in the subject property to the Suzanne Marie Benson Revocable Trust (the "Trust"). Deed. (RE 9)

On account of this later transfer, the lower court erred in adjusting the equities between Ms. Benson and Mr. Bounds, because Ms. Benson was not a cotenant.

Miss. Code Ann. § 11-21-9 is our statutory law concerning the Chancellor's consideration of appropriate adjustments to govern the partition of property. In pertinent part, the statute provides:

> The court may adjust the equities between and determine all claims of the several cotenants, as well as the equities and claims of encumbrancers.

Miss. Code. Ann. § 11-21-9. Without question, those claims and equities must, per statute and logic, involve matters between "the several cotenants." Ms. Benson divested her ownership

interest long before the trial, so her payment toward the purchase price at the April 2014 closing and any other "equities" she could possibly claim are irrelevant to any adjustment under our partition law.

Further, the lower court erred in setting aside Ms. Benson's conveyance to the Trust. Moreover, the Chancellor erred by not allowing the parties a fair opportunity (here, no opportunity), to provide evidence on the issue. At no point ever – either during the litigation or during the trial – was the validity of the transfer questioned. Ms. Benson had never raised it, the Trust never questioned it, and Mr. Bounds never challenged it. The lower court never invited proof or argument from counsel. Until announcing his ruling at the close of trial, the lower court gave no indication of its deliberation of the matter. Significantly, no basis to invalidate the transfer to the Trust was disclosed, and none exists either in the record or elsewhere. (TR p. 312) The Chancellor clearly abused his discretion in setting aside the transfer to the Trust.

B. Mississippi law prohibits equitable distribution when partitioning non-domestic property.

The Chancery Court erred in awarding all proceeds from the sale of the house to Defendant Suzanne Benson. This holding was premised on the lower court's reliance on *Jones v. Graphia*, 95 So.3d 751 (Miss. Ct. App. 2012), which appears to be an anomaly in Mississippi jurisprudence. *Graphia* held that where an engaged couple separated, their jointly titled property would be divided based on principles of "equitable distribution." *Id.* The court allowed each co-owner's relative contribution to the purchase price of jointly titled property to be considered when dividing the property or its sale proceeds. *Id.*

Judge Maxwell's dissent in *Graphia* demonstrates that the lower court's use of the *Graphia* decision is misplaced. In *Graphia*, the chancellor relied on *Chrismond v. Chrismond*, 52 So.2d 624, 629 (Miss. 1951); *Pickens v. Pickens*, 490 So.2d 872 (Miss. 1986); and *Cotton v.*

Cotton, 44 So.3d 371 (Miss. Ct. App. 2010), to "hold that he could look beyond joint ownership and consider each owner's contribution to the accumulation of the property." *Jones*, 95 So. 3d at 756, J. Maxwell, dissenting. He reasoned that the chancellor and the Court of Appeals erred by not recognizing the fact that "the Mississippi Supreme Court has made clear the equity power in *Chrismond* and *Pickens* does not extend to cohabitants . . . who never attempted a valid marriage." *Id.* At 756-57 citing to *Davis v. Davis*, 643 So. 2d 931, 934-36 (Miss. 1994).

In *Davis*, the Mississippi Supreme Court rejected a woman's claim for an equitable division of her boyfriend's property after the unmarried couple separated. *Malone v. Odom*, 657 So. 2d 1112 (Miss. 1995); citing *Davis v. Davis*, 643 So. 931 (Miss. 1994). The Court held that since the parties "never entered into a ceremonial marriage" nor was "an innocent partner to a void marriage" involved, the holdings in *Chrismond* and *Pickens* were inapplicable. *Id.* The Mississippi Supreme Court noted that the distinguishing fact was that the unmarried couple in *Davis* had never entered "into a ceremonial marriage," therefore denying the girlfriend's request for equitable division of the assets.

The Mississippi Supreme Court has consistently held that "equitable distribution – which authorizes a chancellor to look beyond title and consider disparity in contribution to divest a joint owner of his or her interest in martial property" – is simply "unavailable to the unmarried" parties such as Mr. Bounds and Ms. Benson. *Jones,* 95 So. 3d at 757, J. Maxwell, dissenting citing, *Davis*, 643 So. 2d at 934-36.

Therefore, since the parties to the current case were never married, had no plans to marry or even establish a less formal domestic relationship, nor were even romantically linked, equitable distribution principles did not apply in this case. The Chancery Court should not have considered the relative contributions to the purchase price of the subject property as a factor in

deciding the proper distribution of the proceeds of the property's sale. Further, as discussed above, Ms. Benson was not a co-owner so her contribution was wholly irrelevant.

C. *Graphia* can be easily distinguished, so that even a broadened application of equitable distribution to include romantically linked couples, or parties that cohabit, would not impose equitable distribution to the instant case.

Even if the *Graphia* decision demonstrates a departure from precedent set by the Mississippi Supreme Court in *Davis*, *Malone*, and numerous other decisions, and further demonstrates a willingness to broaden the use of equitable distribution to all cases in which parties have a romantic interest or cohabit, the lower court's and Defendants' reliance on *Graphia* is still misplaced.

In *Graphia,* two unmarried, romantically involved people bought a house together as joint tenants. *Jones v. Graphia*, 95 So.3d 751, 752 (Miss. Ct. App. 2012). At the time of the purchase, it was their intention to marry and live in the home as their marital dwelling. *Id.* It was undisputed that even though intentionally jointly titled, Mr. Graphia paid the entire purchase price. *Id.* at 753. Mr. Graphia testified that Ms. Jones agreed to but failed to give him fifty percent ownership of her townhome in Louisiana in return for including her as a joint tenant of the Mississippi property. *Id.* at 757. Ms. Jones breached her promise. *Id.* On these facts the chancellor awarded Mr. Graphia the entire sale proceeds. *Id.* at 751.

Unlike the parties in *Graphia*, Mr. Bounds and Ms. Benson were not romantically linked. (TR pp. 193-94) They did not buy the house with the intention of marrying and using the house as a marital home. (TR pp. 193-94) They did not intend marriage at any time and did not even consider living together in the subject property. (TR pp. 193-94) In fact, Ms. Benson never even visited the subject property. (TR p. 260) She and her partner lived in Illinois and she had no plans to move to Mississippi. (TR p. 244) And further unlike *Graphia*, here there was no

promise breached – Mr. Bounds had not promised to give Ms. Benson an interest in his property or any other consideration. His title was obtained as a gift. The Chancellor validated the JTROS deed, nothing that its validity had not been attacked. (TR pp. 311-312)

Therefore, even if *Graphia* represents the extension of equitable distribution to non-marital property in a domestic relationship split, applying *Graphia* to the instant case was wrong. An extension of the equitable distribution principles to a non-domestic division, as here, is wholly unwarranted under the law.

D. Contributions toward purchase price should not have been considered while adjusting the equities.

In addition, the Chancery Court erred by even considering the contribution to the initial purchase price of the house.

It is long settled Mississippi law that the amount of each co-owner's purchase contribution does not vary the undisputed joint title ownership status. In *Bennett v. Bennett*, 36 So. 452 (Miss. 1904), the Supreme Court held that notwithstanding the co-owners' unequal payment toward the purchase price – one owner paid approximately twenty-five percent (25%) versus seventy-five percent (75%) by the other – as joint tenants, each co-owner was entitled to an equal fifty percent (50%) share. For over a century, and to this day, *Bennett* stands as our law.

Similarly, Judge Carlton's dissent in *Graphia* demonstrates that the Chancery Court's use of the *Graphia* decision to completely divest title of a joint owner based upon contribution to the purchase price, was clearly a mistake. Judge Carlton discussed *Murphree v. Cook*, 822 So. 2d 1092 (Miss. Ct. App. 2002). In *Murphree*, the Court of Appeals explained that the chancellor abused his discretion in attempting to fashion a unique remedy to sever a co-tenancy by ignoring Mississippi statutes defining the only lawful method available to accomplish that purpose. *Graphia*, 95 So.3d at 755. Judge Carlton observed that "if the chancellor determined that the

lands were not subject to equal partition in kind or that the interest of the parties were served by a sale, then the chancellor should have ***equally*** divided any sale proceeds in accordance with each co-tenant's respective joint interest." *Id.* at 756 (emphasis added). Judge Carlton added that "the equities that may be adjusted between the parties upon partition and cancellation of the joint title include adjustments such as rent, improvements to the property, payment of taxes, and other related expenses." *Id.* Judge Carlton quoted *Moorer v. Willis*, 239 Miss. 118, 129–30, 121 So.2d 127, 132 (Miss. 1960); "The equities arising out of the cancellation of the title concern matters such as the collection of rents, payment of taxes, and costs of maintenance and upkeep." *Id.*

Conspicuously missing from that list is each co-owner's contribution to the purchase price. Who paid how much to obtain their respective joint ownership is simply not relevant. If a co-owner is gifted or inherits his or her interest, is his or her share upon partition nothing, 0.00%? Only post-title matters are allowed to be considered.

The Chancellor awarded Ms. Benson 100% of the proceeds of the intended sale. As a co-owner, Mr. Bounds had a vested 50% interest, subject to adjustments of the legally proper equities. Therefore, the lower court erred when it considered the relative purchase price contributions of the parties in the instant case.

ISSUE 2. The lower court erred by awarding ownership of all furnishings in the house to Ms. Benson.

The trial testimony clearly demonstrates that the furniture in the house was an *inter vivos* gift from Ms. Benson to Mr. Bounds. Therefore, awarding all furnishings in the house to Ms. Benson was erroneous.

A valid *inter vivos* gift requires: (1) the donor was competent to make a gift; (2) the donation was a voluntary act and that the donor had donative intent; (3) the gift must be complete and not conditional; (4) delivery was made; and (5) the gift was irrevocable. *In re*

Estate of Laughter, 23 So. 3d 1055, 1066 (Miss. 2009), as modified on denial of reh'g (Oct. 29, 2009); *In re Estate of Ladner*, 909 So.2d 1051, 1054 (Miss.2004). Delivery and relinquishment of control are requisites of an *inter vivos* gift. "A delivery either actual, constructive, or symbolical is an element essential to the validity of a[n *inter vivos* gift]." *Id.*

Mr. Bounds testified that he and Ms. Benson discussed acquiring furniture for the new house. (TR pp. 49-51) The furnishings were gifts to him and he was neither asked to pay for the furniture, nor could he afford to in the first place. (TR pp. 49-50) In reliance on Ms. Benson's furniture gift, Mr. Bounds gave away the furniture he had in his Jackson, Mississippi home. (TR p. 51)

Ms. Benson cannot legitimately claim that she bought the furniture for herself because Ms. Benson never even visited the subject property. (TR p. 260) She and her partner lived in Illinois and she had no plans to move to Mississippi. (TR pp. 36, 244) Mr. Bounds and his family were to be the sole residents, and hence the only regular users of the furniture. (TR pp. 36, 244) She told him to choose whatever he wanted and needed. (TR p. 49)

Moreover, after conveying her interest in the house to the Trust, Ms. Benson never removed or even claimed "her" furniture. She never transferred "her" interest to the Trust, and instead simply abandoned the furnishings and any claim to it.

The evidence clearly demonstrates that: 1) Ms. Benson was competent to make a gift; 2) the donation or purchase of the furniture was a voluntary act and she had donative intent; 3) the gift was complete and unconditional; 4) delivery was made; and (5) the gift was irrevocable. Since the furniture was delivered to the house in Oxford to which Mr. Bounds and his family were to move and occupy, there was a completed gift. *In re Estate of Laughter*, 23 So. 3d at 1066. Ms. Benson has presented no evidence that Mr. Bounds was renting or borrowing the

furnishings, that she could revoke the gift at her whim, or that his use of the furniture was subject to repayment or any condition whatsoever.

Mr. Bounds owns the furnishings. At the very least, he is a joint/fifty percent (50%) owner. Finding Ms. Benson as full owner of the home's furnishings was clear error.

ISSUE 3. The lower court erred when it held that the monetary gift, in the form of a Promissory Note, was unenforceable.

The defense improperly focused on whether the Note contained certain formalities. The Chancery Court erred by invalidating Ms. Benson's monetary gift.

An *inter vivos* gift requires the following: (1) the donor was competent to make a gift; (2) the donation was a voluntary act and that the donor had donative intent; (3) the gift must be complete and not conditional; (4) delivery was made; and (5) the gift was irrevocable. *In re Estate of Laughter*, 23 So. 3d 1055, 1066 (Miss. 2009), as modified on denial of reh'g (Oct. 29, 2009); *In re Estate of Ladner*, 909 So.2d 1051, 1054 (Miss.2004). "A delivery either actual, constructive, or symbolical is an element essential to the validity of a[n *inter vivos* gift]." *Estate of Ladner*, 909 So.2d at 1055.

The Mississippi Supreme Court has held that a gift transfer of a promissory note constituted a completed *inter vivos* gift upon delivery. *In re Estate of Laughter*, 23 So. 3d at 1066. "Delivery" is symbolic of the tender of the document, not the collection of the money gift evidenced thereby. The gift consisted of the right to receive installment payments, not unlike an annuity. No Mississippi case law supports Ms. Benson's contrary position.

The clear and convincing evidence presented at trial demonstrates that Ms. Benson made a monetary gift to Mr. Bounds, upon which he justifiably relied. However, when their relationship soured four to five months later, Ms. Benson simply stopped making payments. (TR p. 29) The lower court held that since the form of the Promissory Note was "vague" and lacked

"consideration," as such that she did not intend to make a monetary gift to Mr. Bounds. (RE 4) To the contrary, her own testimony is clear – she intended Mr. Bounds to receive the planned installments even if she died. (TR p. 24)

Shortly after Ms. Benson and Mr. Bounds became reacquainted in December 2013, Mr. Bounds' financial condition was discussed. (TR p. 18) In response to learning about Mr. Bounds' difficult financial circumstances, Ms. Benson offered to help and assured Mr. Bounds that she was more than capable of providing him with monetary assistance. (TR p. 18) Ms. Benson stressed that she was in a "wonderful position" to help him out and to "pay it forward." (TR p. 19) Ms. Benson made it clear that the arrangement was not a loan, but in fact was a gift. (TR p. 19)

Proving her point, Ms. Benson sent an image itemizing more than 20 Certificates of Deposit that she owned, and directed Mr. Bounds to:

> Close your eyes and pick a CD(s)! To heck with penalty charges!!!! My annual inheritance from the trust, of 100k+ for life, can go towards taxes and all that other unnecessary bullsh*t?

(Tr. Ex. 5, R.E. 12)

To effectuate her gift, Ms. Benson created the Promissory Note. (TR pp. 19, 25-26; RE 10) Ms. Benson prepared, signed and sent the Promissory Note document to Mr. Bounds. (TR p. 68) Simultaneously, she set up an auto-pay system with her bank. (TR p. 23) Ms. Benson wanted to be sure that the Note's installments were paid even if she died. (TR p. 24) Similarly, she arranged the later purchase of the Oxford house to be titled as joint tenants with right of survivorship; this way, Mr. Bounds would have full title to the house if she died. (TR p. 131)

The Note provided for the payment of the $208,000.00 through installments of $2,000.00 a week for 104 weeks. (TR pp. 22, 23) Ms. Benson made it clear that Mr. Bounds could use the funds at his own discretion. (TR p. 24) Ms. Benson even told Mr. Bounds that she decided to

document her intentions with the Note so that in the event anything happened to her, he would still receive the money she wanted him to have. (TR p. 24) Specifically, text and email messages from Ms. Benson to Mr. Bounds at the time of the creation of the Promissory Note demonstrate Ms. Benson's donative intent. For example:

> Promissory note between you and I might be what is needed. With monthly payments I make to you. Something like that.
>
> And . . .
>
> Payments are set up for two years. I set it up this way because should something happen to me, you'll still receive these funds.

(TR pp. 106-107, 154)

In addition, when questioned at trial about whether her messages intended to communicate her desire that Mr. Bounds would continue receiving those payments "if something happened to you," Ms. Benson testified at trial:

> "Apparently I was, yes."

(TR p. 154)

Mr. Bounds received the $2,000.00 installments until several months after he retired and moved to Oxford; he received a total of $44,200.00. (TR. 27, RE 11) However, Ms. Benson had the payments stopped, leaving $163,800.00 unpaid. *Id.* Just days earlier, Mr. Bound's sister required institutional treatment for her mental health issues; her move from the home to a health care facility was cited at trial as one of Ms. Benson's excuses to stop the payments.[1]

Regardless of Ms. Benson's actual motive, the gift Note constitutes a legally valid transfer. Despite her counsel's arguments that the payment obligation is unenforceable due to the alleged absence of consideration, the monetary gift is enforceable because a transfer via gift

[1] Ms. Benson testified at her deposition and trial that the note payments were in no way tied or conditioned on the sister's presence in the Oxford home. (TR p. 160)

requires no consideration. Such is the essence of a "gift." A gift is undeserved; a favor one is "blessed" with and encouraged to receive. A gift is not something earned or entitled to in compensation for services rendered. Givers receive nothing tangible, yet the knowledge of "spreading the wealth" and helping those less fortunate is often "priceless." Unjust enrichment by a valid gift simply cannot happen. Arguments that Mr. Bounds may have "gotten enough" or even "too much," or "didn't deserve it," are inappropriate. It is not for us to question or judge how Ms. Benson chose to distribute her vast wealth.

The evidence clearly demonstrates that the Promissory Note evidenced a valid, complete gift. Further, the delivery of the Promissory Note and the multiple payments made unmistakably demonstrate performance and Ms. Benson's recognition and ratification of the gift exactly per her expressed intentions.

As for Ms. Benson's trial level attack on the Note as being conditional and hence revocable, she overlooks Mr. Bounds uncontested detrimental reliance. This estops Ms. Benson from adding a termination condition. Promissory estoppel differs from equitable estoppel in that the representation is promissory rather than as to an existing fact. *Weible v. Univ. of S. Mississippi*, 89 So. 3d 51, 67 (Miss. Ct. App. 2011); *Suddith v. Univ. of S. Miss.*, 977 So.2d 1158, 1180 (¶ 52) (Miss. Ct. App. 2007) (quoting *Old Equity Life Ins. Co. v. Jones*, 217 So.2d 648, 652 (Miss. 1969)). The doctrine of promissory estoppel "may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetuation of fraud or would result in other injustice." *C.E. Frazier Constr. Co. v. Campbell Roofing and Metal Works Inc.*, 373 So.2d 1036, 1038 (Miss. 1979).

The Mississippi Supreme Court recently decided *Swartzfager v. Saul*, which provides significant guidance concerning equitable principles. *Swartzfager v. Saul*, 213 So.3d 55 (Miss.

2017). In *Swartzfager,* the Court makes clear that in the face of a defense to the enforcement of a promise or agreement, justice requires enforcement of the broken promises in the face of detrimental reliance. *Id.*

Mr. Bounds relied upon Ms. Benson's promises to his detriment. He left his job, gave away his furniture, abandoned his home, missed a pay raise, and set his retirement back many years because of his reliance upon Ms. Benson's promises. (TR pp. 30, 51, 54)

Furthermore, to the extent the Note was argued to be vague, the supposed vagueness must be construed against Ms. Benson. *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 763 (Miss. 2003) ("As such, the ambiguity is to be construed against the drafter."). Ms. Benson drafted it. (TR p. 24) Perhaps the most telling aspect of Ms. Benson's intent to make sure Mr. Bounds received the payments required by the Note is the fact that Ms. Benson even provided for interest and collection costs in the event she failed to honor her obligations. Equally noteworthy is what she did not put in the Note: there was no termination provision or terms making the payments conditional. (RE 10). Importantly, there was nothing in the Note or elsewhere allowing Ms. Benson to stop making payments. (TR p. 29) She herself included a "no amendment, modification or waiver" clause as follows:

VI. Amendment; Modification; Waiver

> No amendment, modification or waiver of any provision of this Promissory Note or consent to departure therefrom shall be effective unless by written agreement signed by both Borrower and Lender.

(RE 10) That she now wants to change her mind or add more terms provides no ambiguity or vagueness to the detailed and precise terms she herself prepared.

CONCLUSION

Our clear, long-established partition law, controlled by specific statutes and case law, must be adhered to. Gift deeds and other gratuitous transfers are common.

As with any gift, in the absence of wrongdoing – not present here – "consideration" plays no role. It is not for us to second-guess and prevent a willing donor from helping others. Ms. Benson's ability to help and Mr. Bounds' entitlement are wholly irrelevant.

While the Chancellor's rulings were no doubt well-intended, particularly in light of *Graphia*, his rulings were erroneous. Ms. Benson cannot now withdraw or invalidate her valid transfers/gifts. An "unjust gift" is an oxymoron. Clearly, legal principles having no application to the undisputed facts of the case were argued and accepted in the trial below.

We respectfully submit that our law requires that the matter be properly resolved, as follows:

(1) On the partition, to reverse and render, finding that Mr. Bounds holds a fifty percent (50%) interest in the Oxford home, and remand with instructions for the Chancellor to make adjustments using appropriate "equities";

(2) On the home's furnishings, reverse and render, finding that Mr. Bounds is the sole owner; and

(3) Reverse and render, validating the gift via Promissory Note, and remand with instructions for the Chancellor to calculate and award pre-judgment interest at the agreed three percent (3%) annual rate on the undisputed unpaid balance, together with reasonable attorney's fees.

Respectfully submitted, this the 20th day of October, 2017.

BY: /s/Thomas J. Suszek
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CERTIFICATE OF FILING AND SERVICE

I, Thomas J. Suszek, of HOLCOMB, DUNBAR, WATTS, BEST, MASTERS & GOLMON, P.A., attorney of record for the Appellant, Michael J. Bounds, certify that I have this day electronically filed and served, to those required to be served, through the ECF Filing System, the foregoing Brief of Appellant, which sent notification of such filing to all counsel of record, including:

J. Cal Mayo, Jr., Esq.
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and have provided copies to the following via Hand Delivery:

Honorable Robert Q. Whitwell
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This the 20th day of October, 2017.

/s/Thomas J. Suszek
THOMAS J. SUSZEK