IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00118 COA

JUDY L. EDWARDS **APPELLANT**

v.

GEORGE W. EDWARDS, JR. **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	01/02/96
TRIAL JUDGE:	HON. JASON H. FLOYD JR.
COURT FROM WHICH APPEALED:	HARRISON COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	KAYE J. PERSONS
ATTORNEYS FOR APPELLEE:	HENRY LAIRD
	ANNE SCHAEFER WARREN
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	PROMISSORY NOTE FOUND NOT ENFORCEABLE
DISPOSITION:	AFFIRMED - 9/23/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/14/97

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

KING, J., FOR THE COURT:

Judy L. Edwards filed a complaint against her ex-husband, George W. Edwards, Jr. seeking to enforce a promissory note. The Chancery Court of Harrison County found the note unenforceable because it lacked consideration. Aggrieved, Judy Edwards perfected this appeal alleging that the chancellor erred in denying and dismissing the complaint and prayer for relief based upon a failure or want of consideration. We affirm.

FACTS

Judy Edwards and George W. Edwards, Jr. were married for thirty-five years and had two daughters.

Mrs. Edwards filed for a divorce in 1992. In 1993, she filed a separate action in the Harrison County Circuit Court to enforce a promissory note and letter agreement executed by Mr. Edwards. The court transferred the suit to the Harrison County Chancery Court and consolidated it with the divorce action. The chancery court severed the divorce proceedings and preserved the action to enforce the promissory note for subsequent disposition. The court granted the divorce in 1994. In 1995, the court heard the suit to enforce the promissory note.

Testimony revealed that in the early 1980's, the Edwards family began to experience financial difficulties. Mr. Edwards, who had financially supported the family until that time, had investments that went sour and caused him to loose large sums of money. Bills were not being paid, and creditors made constant demands for payment. Mr. Edwards believed that bankruptcy was eminent.

About this same time, Mrs. Edwards inherited $150,000. The inherited funds were used to support the family. Mrs. Edwards paid doctor bills, tuition, and provided the every day needs of the family.

In 1981, Mr. Edwards quitclaimed all of his interest in the family home to Mrs. Edwards. Mr. Edwards testified that he executed the quit claim deed in order to protect Mrs. Edwards's interest in the home from creditors. One of whom had received a large judgment against Mr. Edwards in a recent law suit. Mrs. Edwards testified that she used the inheritance to pay the mortgage and maintain and make improvements to the home.

In 1983, Mr. Edwards executed a promissory note in the amount of $100,000 with Mrs. Edwards as the payee. Mr. Edwards promised to repay Mrs. Edwards in ten annual installments of $10,000 each beginning on the first day of November 1984 and each year after that for a period of ten years. The Edwards's attorney also prepared a contemporaneous letter agreement, which provided for alternative payments of $5,000 if Mr. Edwards could not make the $10,000 payments. Mrs. Edwards never transferred to Mr. Edwards any sum of money as consideration for the promissory note. Mr. Edwards testified that the document was created in anticipation of his having to file bankruptcy and hoped it would afford some protection to Mrs. Edwards from his creditors.

Nick Roberts, Jr., the Edwards's attorney, testified that the promissory note was executed in an attempt to afford Mrs. Edwards some protection from creditors in the event of bankruptcy. He stated that the Edwards needed to be able to show Mrs. Edwards's investment in the house. Mrs. Edwards testified that she had no such understanding. She stated that she believed that Mr. Edwards would honor the note as repayment for her having used the inheritance to support the family and maintain the family home.

The chancellor found that Mr. and Mrs. Edwards had no arms length bargained for exchange, and that Mrs. Edwards had invested in the family home for the mutual benefit of the family. Additionally, Mr. Edwards quitclaimed his interest in the property, and Mrs. Edwards invested the money in the house and family some time before the execution of the promissory note. The chancellor determined from the testimony that Mr. Edwards never intended to repay the money and that the note was intended to protect Mrs. Edwards interests from creditors. The chancellor held that because there was no consideration for the note, Mrs. Edwards could not enforce it against Mr. Edwards. Mrs. Edwards perfected this appeal.

I.

DID THE CHANCELLOR ERR IN DENYING AND DISMISSING MRS. EDWARDS' COMPLAINT AND PRAYER FOR RELIEF BASED UPON A FAILURE OR WANT OF CONSIDERATION?

The chancellor determined that the promissory note executed by Mr. Edwards was unenforceable because there was no consideration to support it. The chancellor found that before the execution of the note Mrs. Edwards used the funds to support the family and make improvements to the family home and that there was never a transfer of the funds after the note's execution. Finding that Mrs. Edwards owned the home prior to using her inherited funds to make any improvements, the chancellor held that Mr. Edwards received no benefit that he was legally required to repay. The chancellor found that Mr. Edwards intended only to protect his wife's investment in the property from his creditors. The chancellor held that because Mr. Edwards received no benefits by executing the note, his promise to repay it was a voluntary promise without consideration except mere goodwill or natural affection.

Mrs. Edwards argues that the note was enforceable. She contends that § 75-3-308(b) of the Mississippi Code of 1972 establishes a rebuttable presumption of consideration. Mrs. Edwards contends that the note was supported by consideration as a result of her investment in the family home and the support of the family when Mr. Edwards could not provide support. Additionally, Mrs. Edwards contends that the principles of estoppel and waiver make the note enforceable.

We will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Denson v. George*, 642 So. 2d 909, 913 (Miss. 1994); *Bowers Window and Door Company Inc. v. Dearman*, 549 So. 2d 1309,1312 (Miss. 1989); *Johnson v. Hinds County*, 524 So. 2d 947, 956 (Miss. 1988).

Our review of the record indicates that Mr. Edwards presented substantial evidence to support his contentions that he never intended to repay the $100,000 that his wife invested in the family and the family home, and that the note was unsupported by consideration. Both Mr. Edwards and Mr. Roberts, the couple's attorney who drafted the note, testified that Mr. Edwards never intended to repay Mrs. Edwards for her investment in the family home. The note was created simply to protect Mrs. Edwards's interest in the home from Mr. Edwards's creditors in the event of a bankruptcy. Mr. Roberts testified that:

We were trying to figure out some way to protect the funds that she had invested at that time in the event that George had to file bankruptcy and one of the discussions that we had was that even though she had given or put this money in the house, there was no record as such of that and if she was an insider, being the wife of a person that filed bankruptcy, they needed to kind of memorialize a time frame and also to try to come up with an amount that would reflect what her investment was in the house. So that was the purpose of it. We were trying to protect that in the event that George was going to have to go into bankruptcy. . . . It was -- it my understanding that as between Judy and George there was never intended to be any payment on this note as between themselves. This was really -- this was really an attempt to protect these funds.

Mr. Edwards provided evidence that he quitclaimed all of his interests in the home to Mrs. Edwards well over a year before the promissory note was executed. A promise without a benefit flowing to the promisor is a gratuitous promise, which lacks consideration to support the legal enforcement of a such promise. *Edwards v. Ellis*, 478 So. 2d 282, 286 (Miss. 1985); *Dabbs v. International Minerals and Chemical Corn.*, 339 F. Supp. 654, 664 (Miss. 1972). Although the promissory note was drawn up to meet the mechanical specifications of the Uniform Commercial Code, it lacked the essential element of consideration to make it enforceable. Miss. Code Ann. § 75-3-303(b) (Supp. 1996).

Mrs. Edwards failed to convince the chancellor that any consideration, presumptive or actual, existed to support the promissory note. She fails to convince this Court as well. Mrs. Edwards contends that the note complies with Mississippi's Uniform Commercial Code, and neither Mr. Edwards nor Mr. Roberts dispute it as having the form of a negotiable instrument signed by Mr. Edwards. Even so, section 75-3-308(b) of the Mississippi Code provides that Mrs. Edwards would be entitled to payment only if Mr. Edwards could not prove a defense. That defense is the lack of consideration to support the note.

Finally, Mrs. Edwards asks this Court to find the note enforceable under the principles of estoppel and waiver. Our law has long been that where a promise induces action or forbearance of a definite and substantial character on the part of the promisee, that promise is binding if injustice can be avoided only by the enforcement of the promise. *Martin v. Dixie Planing Mill*, 24 So. 2d 332 (Miss. 1946). We cannot find that Mrs. Edwards was induced to act or engaged in any forbearance as a result of the promissory note. When the Edwards executed the note, Mrs. Edwards had already invested the money in the home and in the support of her family during a time when Mr. Edwards could not provide support. While it is unfortunate that the family's dismal financial state required Mrs. Edwards to use the inherited funds to support it, it is reasonable to recognize that both spouses have a mutual obligation to provide support. Miss. Code Ann. § 93-13-1 (1972); *Tedford v. Dempsey*, 437 So. 2d 410, 421 (Miss. 1983). We affirm.

THE JUDGMENT OF THE HARRISON COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.

BRIDGES, C.J., McMILLIN P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, AND SOUTHWICK, JJ., CONCUR. PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY HERRING, J. THOMAS, P.J., NOT PARTICIPATING.

PAYNE, J., SPECIALLY CONCURRING:

While my colleagues have reached the correct result under the particular facts of the case before us, I am compelled to write separately in an effort to clarify what our opinion does not say. The majority has held that because Mrs. Edwards transformed her inheritance into marital property prior to the execution of the promissory note, no consideration existed to support the note. This is not to say that the transformation of non-marital property into marital property can never constitute consideration. In determining whether consideration is sufficient to support a contract, our supreme court has

stated:

There is a sufficient consideration for a promise if there be any benefit to the promisor or any loss, detriment, or inconvenience to the promisee. The consideration to be sufficient in law need not be adequate. The consideration is sufficient if the person to whom the promise is made refrains from doing anything which he has the right to do, whether there be any actual loss to him or actual benefit to the party making the promise or not.

Martin v. Dixie Planing Mill, 199 Miss. 455, 463, 24 So. 2d 332, 334 (1946) (quoting *Miller v. Bank of Holly Springs*, 131 Miss. 55, 95 So. 2d 129, 130 (1922)). In the present case, Mrs. Edwards did not have to transform her inheritance into marital property. She chose to do so voluntarily before Mr. Edwards executed the promissory note in which he agreed to repay Mrs. Edwards for foregoing her right to keep her inheritance separate from marital property. Had Mrs. Edwards transformed her inheritance into marital property in reliance on Mr. Edwards's promise (in the form of a promissory note) to repay $100,000 of the inheritance then I would be more likely to find that consideration existed and that the promissory note should be enforced. In the case before us, however, these facts did not exist and the majority reached the correct result.

On another aside, I am compelled to point out that the majority opinion, from my perspective, also does not mean that natural affection can never constitute consideration. The majority affirms the decision of the chancellor who stated that because Mr. Edwards received no benefits by executing the note, his promise to repay it was a voluntary promise without consideration except mere goodwill or *natural affection* (emphasis added). Notwithstanding this affirmance, I believe that natural affection may constitute consideration under certain circumstances. This is not to say that natural affection comes into play in the case before us considering the deterioration of the marriage. I write separately only to clarify that natural affection may play a role under particular circumstances.

HERRING, J., JOINS THIS SEPARATE WRITTEN OPINION.