NO. 2008-TS-01480

SUPREME COURT AND COURT OF APPEALS

STATE OF MISSISSIPPI

CHRISTOPHER LAGARDE and ELIZABETH BOSARGE

APPELLANTS

VERSUS

ALAN LAGARDE AND LISA LAGARDE

APPELLEES

APPEAL FROM

THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEES

ORAL ARGUMENT IS NOT REQUESTED

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VERSUS

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APPEAL FROM

THE CHANCERY COURT OF HANCOCK COUNTY, MISSISSIPPI

HONORABLE JAMES B. PERSONS, PRESIDING TRIAL JUDGE

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.

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PRESIDING TRIAL JUDGE:	Hon. James B. Persons Chancellor Post Office Box 457 Gulfport, MS 39502

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APPELLEES:

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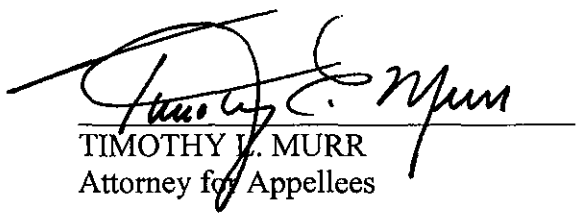
OTHER PARTIES:
Heirs of the Estate of Mary C. Lagarde

Kevin Lagarde
Frank Lagarde, Jr.
Jules Lagarde
Melissa Lagarde Brannin
Robert Andrew Lagarde
Mary Lagarde Hickey



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Attorney for Appellees

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STATEMENT OF ISSUES

I. The Chancellor applied the correct legal standard and was within his discretion in finding that the "Gift Equity Letter" from Mary C. Lagarde to Alan and Lisa Lagarde survived Mary C. Lagarde's death.

II. The Chancellor was within his discretion in finding the "Gift Equity Letter" acted as symbolic delivery of the equity from Mary C. Lagarde to Alan and Lisa Lagarde.

III. The Chancellor applied the correct legal standard and was within his discretion in finding that the "Gift Equity Letter" from Mary C. Lagarde to Alan and Lisa Lagarde was a valid and complete gift and became part of the consideration for the Agreement to Purchase or Sell of sale between the parties.

IV. The Chancellor applied the correct legal standard and was within his discretion in granting specific performance of the Agreement To Purchase or Sell (hereafter Agreement) which was certain and mutual.

V. The Chancellor applied the correct legal standard and was within his discretion in awarding attorney's fees against Christopher Lagarde and Elizabeth Bosarge.

STATEMENT OF THE CASE

Alan and Lisa Lagarde (hereafter, Alan and Lisa) filed a *Lis Pendens* Notice and Complaint for Specific Performance and for Other Relief in Cause No. C2301-06-034 on September 15, 2006, in the Chancery Court of Hancock County against the Executor of the Estate of Mary C. Lagarde, seeking to enforce the sale of real property located at 237 St. Charles Avenue, Bay St. Louis, Mississippi, more particularly described as 4th Ward, Bay St. Louis, Pt 66B, all Lot 153-A 7Pt 153-B, Bay St. Louis, Mississippi. (C.P. Pages 1-13 and C.P. Pages 14-15)

An Order was entered by the trial court on December 21, 2006, finding that service of process upon the Temporary Executor was not proper under Miss. R. Civ. P. 81 and authorized Alan and Lisa to amend their pleadings as no responsive pleadings had been filed by the Executor of the Estate of Mary C. Lagarde. (C.P. Page 16)

On July 24, 2006, Christopher Lagarde, Elizabeth Bosarge and Kevin Lagarde were appointed as Tri-Executors of the Estate of Mary C. Lagarde, Cause No. C2301-05-00794. On December 20, 2006, the Court instructed the Tri-Executors to either voluntarily enter their appearance in this matter or be served with process.

Alan and Lisa filed their Amended Complaint for Specific Performance and for Other Relief on January 8, 2007, requesting the Court to enforce the provisions of an Agreement to Purchase or Sell dated October 4, 2004, which had been executed by Alan and Lisa as purchasers and Mary C. Lagarde, mother of Alan. (C.P. Pages 17-27 and Exhibit D)

On February 28, 2007, letters from Andrew Lagarde, R. Kevin Lagarde, Frank Lagarde, Jr., Jules Lagarde and Melissa Lagarde Brannin, adult children of Mary C. Lagarde, were filed with the Court (C.P. Pages 28-34), where they advised the Court that they agreed Alan and Lisa should be allowed to purchase 237 St. Charles St, Bay St. Louis, Mississippi and further that they objected to Estate funds being used to pay the attorney fees of Chris Lagarde.

The Defendants (now Appellants), Elizabeth Bosarge (hereafter Liz) and Christopher Lagarde (hereafter Chris), in their individual and official capacity as Tri-Executors of the Estate of Mary C. Lagarde, by and through their attorney of record, Clement S. Benvenutti, filed their Answer raising six Affirmative Defenses to the Amended Complaint on June 20, 2007. (C.P. Pages 35-39)

The remaining Tri-Executor, Kevin Lagarde (hereafter Kevin), testified at trial that in his personal and official capacity, he agreed with the Amended Complaint and with the relief requested by Alan and Lisa on January 8, 2007. [1] (T. Vol. 2, Page 259, Lines 27-29 and Page 260, Lines 1-5)

The matter was set for trial on August 27, 2007 and subsequently completed on October 4, 2007 at which time, the parties were asked to submit Proposed Findings of Fact and Conclusions of Law.

The parties submitted their Proposed Findings of Fact and Conclusions of Law on November 1, 2007 and November 7, 2007, and Alan and Lisa subsequently submitted a Rebuttal to Findings of Fact and Conclusions of Law on Behalf of Christopher Lagarde and Elizabeth Ann Lagarde on November 27, 2007.

On June 3, 2008, the Court rendered its Judgment wherein the Court found, ordered and adjudged that Alan and Lisa Lagarde stood ready, willing and able to perform the terms of the Agreement and complete the sale after Mary C. Lagarde's death; that the written agreement/contract of the parties should be enforced according to it's initial terms; that the Agreement of the parties dated October 8, 2004 is not voided due to the death of Mary C. Lagarde prior to closing and did not expire by its own terms; that Alan, Lisa and Mary C. Lagarde agreed to memorialize and add further consideration for their initial agreement in the form of a written Gift Equity Letter and their agreement for Mary C. Lagarde to live in the house rent free; that the modifications made by Alan and Lisa to the Agreement to Purchase or Sell and the Gift Equity Letter were never accepted in writing by Mary C. Lagarde and are, therefore,

[1] Kevin Lagarde, in his capacity as Tri-Executor, filed, in the Estate matter, an Objection to Chris and Liz's Motion For Authority To Defend Lawsuit and Employ Attorney in the estate and admitted that the Agreement for Sale of their mother's home should be enforced. The Court denied the Motion and authorized Chris and Liz, as they so choose, to retain private counsel at their individual expense to object to the sale of the home.

unenforceable for lack of consideration; that the Tri-Executors shall execute any and all necessary documents to complete the closing on the real property located at 237 St. Charles Avenue., Bay St. Louis, Mississippi and to convey title to Alan and Lisa Lagarde, within 30 days of the entry of the Judgment for the purchase price of $250,000 with a down payment in the amount of $50,000.00 in gift equity with the buyer paying all closing costs; that Christopher and Elizabeth Lagarde are required to pay attorney's fees in the amount of $11,490.58, representing the reasonable value of the portion of the attorney's fees attributable to the issues on which they did not prevail, to Alan and Lisa Lagarde; and that any relief prayed for and not specifically granted herein, was denied. (C.P. Pages 40-58)

A Motion to Reconsider Judgment and For New Trial was filed by Chris and Liz on June 6, 2008 (C.P. Pages 59-63) and the Court entered its Order Denying Motion To Reconsider and For New Trial on August 8, 2008. (C.P. Pages 64-66) As a result, Notice of Appeal was filed by Chris and Liz on August 29, 2008. (C.P. Pages 67-68)

STATEMENT OF THE FACTS

Alan and Lisa Lagarde are adult residents of Dallas, Texas. Alan is one of nine (9) children born to Mary C. and Frank Lagarde of Bay St. Louis, Mississippi. (C.P. Page 42)

Frank Lagarde died in 1991. Frank and his wife, Mary C. Lagarde, were the joint owners of real property located at 237 St. Charles Avenue, Bay St. Louis, Mississippi. Upon Frank Lagarde's death, his interest passed by operation of law to his widow, Mary C. Lagarde. After Frank Lagarde's death, Mary C. Lagarde never remarried and remained a widow until her death on January 11, 2005. (C.P. Page 42)

Mary and Frank Lagarde had 9 children, Frank, Jr., Mary, Jules, Chris, Melissa, Kevin, Andrew, Alan and Liz. All of the adult children are very were educated and are gainfully

employed in occupations ranging from lawyer, librarian, architect, congressional aide, horticulturist, naval architect, teacher, and businessman. (T. Vol. 1, Page 48, Lines 24-29 and Page 49, Lines 1-3) All of Mary C. Lagarde's adult children are living and participated in the trial. (C.P. Page 42)

Alan and Lisa filed their Amended Complaint on January 8, 2007, in the Hancock County Chancery Court (C.P. Pages 17-27) and the Hancock County Chancery Court had personal and subject matter jurisdiction. Further, the real property that is the subject of this action is located in Hancock County, Mississippi. (C.P. Page 42)

Contrary to the picture being portrayed by the Appellants, which is unsupported by medical evidence and/or expert testimony, (T. Vol. 3, Page 321, Lines 22-29; Page 322, Lines 1-16; Page 362, Lines 27-29; Page 363, Lines 1-9; Page 378, Lines 24-29; and Page 379, Lines 1-8) in the Fall of 2003 and up until the time of her unexpected death in January of 2005, Mary C. Lagarde was actively involved in her church and community activities in Bay St. Louis, Mississippi. The Chancellor made a specific finding regarding this issue (citations to Record have been added):

30. .....Although she suffered from physical health issues, the testimony was unanimous that she was mentally strong and was fully capable of handling all of her financial affairs, although she did add Liz to her accounts around the time her husband, Frank, passed away. There was no testimony that a power of attorney had ever been executed between Mary and anyone else. .....The witnesses also testified that Mary lived alone up until shortly before her death when Chris moved into her house with her. Mary's failing eyesight did prevent her from reading the paper and she even drafted her holographic will after her eyesight began failing. Even with her health issues, she remained active in her church, community and with the Chamber of Commerce up until the time of her death. Mary was eighty-two (82) years old at the time of the contract and at her death. (C.P. Pages 49-50)

Further, as shown by the testimony and evidence presented at trial, Mary traveled quite a bit, volunteered at the Chamber of Commerce, was very active in church activities, was active in

charity work with providing meals for families at funerals, "was sharp as a tack", continued to make her own decisions and was mentally competent to handle her affairs. (T. Vol. 1, Page 50, Lines 13-27; Page 124, Lines 5-7; T. Vol. 2, Page 230, Lines 18-23; T. Vol. 2, Page 258, Lines 4-9; Vol. 2, Page 267, Lines 10-16) Mary continued these activities up until the time of her death (T. Vol. 3, Page 307, Lines 3-19; Page 361, Lines 25-29; and Page 362, Lines 1-9) as stated in the Hancock County Chamber of Commerce Acknowledge (Exhibit Z) which included among others the following statements:

> "Ms. Lagarde was active in so many community organizations: Our Lady of Gulf Church, Retired Senior Volunteers, the Historical Society and more."
>
> "Ms. Lagarde was a familiar face at the Hancock County Chamber office and events. At the age of 82, she never slowed down making all the After Hours to welcome members, checking people in at the Business Expo, answering questions from visitors about the community, and working with other RSVP volunteers to get the monthly newsletter out. She loved people and she was committed to the promotion of Hancock County, where she raised her nine children"
>
> "Whenever we needed reliable administrative help, a friendly face to meet and greet our members and visitors; she was there for Hancock County."

Mary C. Lagarde, who was 81 years of age at the time, wrote a letter to all of her children on October 24, 2003 (Exhibit B), advising them of her concern about maintaining the house and her plans of selling the home or staying in the home and bringing in another person or family to share the expenses. She asked each of her children to respond to her letter and provide their input. (T. Vol. 1, Page 50, Lines 28-29 and Page 51, Line 1; T. Vol. 2, Page 225, Lines 28-29; Page 226, Lines 1-2; Page 240, Lines 14-22; Page 256, Lines 6-12 and Page 280, Lines 1-5 and T. Vol. 3, Page 308, Lines 27-29; Page 309, Lines 1-3; Page 320, Lines 17-21 and Page 374, Lines 23-25) At some point after receiving the letter, Alan and Lisa, began discussing the prospect of purchasing Mary's home, as they desired to live in Bay St. Louis upon their

retirement. These discussions lasted for several weeks and all of Mary's adult children testified at trial that they were either aware of, or had no concern about Alan and Lisa purchasing Mary's home. The children felt it was their mother's right to choose any option she desired since it was her home. (T. Vol. 2, Page 231, Lines 16-17 and 19; Page 241, Lines 14-22; Page 244, Lines 17-22; Page 259, Lines 27-29; Page 260, Lines 1-5; Page 281, Lines 9-14 and T. Vol. 3, Page 309, Lines 26-28; Page 310, Lines 27-29; Page 311, Lines 1-10, Page 326, Lines 3-5; Page 332, Lines 21-25; Page 356, Lines 26-29; Page 357, Lines 1-5; and Page 362, Lines 23-26) (C.P. Pages 42-43)

Alan testified that some of the discussions concerning the purchase of the home occurred in Mary's home around her kitchen table and at their home in Dallas and that Liz and Chris, (the Defendants/Appellants and two of the three Tri-Executors) were present during the discussions. (T. Vol. 1, Page 52, Lines 15-29; Page 53, Lines 1-4 and Lines 10-22; T. Vol. 2, Page 155, Lines 22-27; and Page 160, Lines 24-28) Further, the discussions of the sale of home to Alan and Lisa were not hidden or private and were open to all the children (T. Vol. 1, Page 90, Lines 17-21 and T. Vol. 2, Page 161, Lines 21-23) (C. P. Page 43)

Alan and Lisa entered into a written Agreement with Mary C. Lagarde on October 8, 2004, (Exhibit D) (T. Vol. 1, Page 58, Lines 8-15) to purchase the home located at 237 St. Charles Avenue, Bay St. Louis, Mississippi, and Alan and Lisa agreed to purchase the property from Mary for $250,000. Alan testified that $50,000 of the purchase price was to be paid with gift equity in the house from Mary C. Lagarde. Alan and Lisa also provided testimony showing that an additional unwritten consideration for the purchase was Mary's right to live in the home for the remainder of her life, at no costs, so long as she desired. (T. Vol. 1, Page 76, Lines 11-29, and Page 77, Lines 1-20; Page 106, Lines 4-19) Further, that family members were aware that

the additional unwritten consideration provided for was Mary living in the home for the remainder of her life, at no costs, so long as she desired, as confirmed by Mary's children whom all testified at trial. (T. Vol. 2, Page 227, Lines 19-27 and Page 241, Lines 25-29 and Page 242, Lines 1-7) (C. P. Page 43)

Mary had previously obtained a home equity loan with Keesler Federal Credit Union (Exhibit V and W) on November 6, 2003, which contained a penalty of the repayment of closing costs if the loan was paid off prior to November 6, 2004. The parties' real estate Agreement specified a closing on or before October 30, 2004. It is noted that there was not a realtor representing either party. According to testimony, Mary requested to Alan and Lisa that the closing be delayed after October 30, 2004, to avoid Mary having to pay an early payment penalty to Keesler Federal Credit Union, and the parties mutually agreed to delay the closing. (T. Vol. 1, Page 71, Lines 26-29; Page 72, Lines 9-16; Page 98, Lines 20-28; and T. Vol. 2, Page 221, Lines12-20) (Exhibit V) In addition to testimony, Alan and Lisa provided numerous documents showing the parties intention to move toward the closing and complete the sale. (T. Vol. 1, Page 101, Lines 18-21; Page 102, Lines 13-23; Page 103, Lines 10-17; Page 104, Lines 15-29 and Page 105, Lines 1-14) (C. P. Pages 43-44) (Exhibits C, D, E, F, G, H, I, J, K, L, M, N, O and P)

Mary executed a written Gift Equity letter in the amount of $50,000 on November 9, 2004, evidencing her intent to extend the initial closing date. (Exhibit G) (C. P. Page 44) As such, the Chancellor found as follows (with citations to the record added):

27. ....Although the contract made time of the essence, the parties' actions after the closing show a contrary intent. According to the testimony, the waiver of the closing date was agreed upon by both parties in order to benefit Mary Lagarde. If the closing date would have remained October 30, 2004, Mary Lagarde would have incurred a penalty on her loan from Keesler Federal Credit Union. Although there was no written agreement to extend the closing date, the actions of all parties clearly show their intention to extend the closing date beyond the initial date. Mary Lagarde signed the Gift Equity letter, which according to evidence and testimony, was required by the

lender on November 9, 2004. Alan and Lisa signed the Gift Equity Letter on November 12, 2004, applied for Homeowner's Insurance on November 1, 2004, inquired about financing on November 29, 2004, had an appraisal performed on December 1, 2004, and a Power of Attorney was given to Alan by Lisa because she was going to be out of town on the date of closing on January 7, 2005. (C.P. Pages 47-48) (T. Vol. 1, Page 71, Lines 26-29; Page 72, Lines 9-16; Page 98, Lines 20-25; T. Vol. 1, Page 101, Lines 18-21; Page 102, Lines 13-23; Page 103, Lines 10-17; Page 104, Lines 15-29 and Page 105, Lines 1-14) and T. Vol. 2, Page 221, Lines12-20) (Exhibits C, D, E, F, G, H, I, J, K, L, M, N, O , P and V)

28. The above actions of the parties clearly show their intention to waive the date of performance for the sale to a later time. No testimony was provided showing any of the parties reinstated the essentiality of time. Therefore, the Court finds the contract did not expire on its own terms due to the waiver of the time for closing by the actions and oral agreement of the parties. (C.P. Page 48)

The closing was re-scheduled for January 12, 2005, but Mary passed away unexpectedly on January 11, 2005, the day before the real estate closing at U.S. Title Company PLLC of Long Beach, Mississippi. (T. Vol.1, Page 105, Lines 28-29 and Page 106, Lines 1-3) (C. P. Page 44)

At some point prior to closing, the Agreement was modified by striking through the typed sale price and writing in, by hand, a new sales price of $256,000.00 to accommodate increased closing costs (T. Vol. 1, Page 65, Lines 5-7 and Lines 20-24) Also handwritten on the Agreement was an increase in the cash down payment, in the form of gift equity, from $50,000.00 to $51,200.00 which would be credited at the closing as per requirement by the lender and the seller would pay closing costs in the amount of $4,100. These handwritten modifications were initialed by Alan and Lisa on the Agreement. Alan testified that Mary C. Lagarde, who was aware of these modifications, was to approve and initial these modifications at the time of closing. However, since Mary C. Lagarde died prior to closing, she never signed off on these modifications. (T. Vol. 2, Page 170, Lines 12-14; Page 171, Lines 6-11; and Page 175, Lines 1-3) (C. P. Page 44-45)

The Gift Equity Letter was also modified by striking through the initial amount of $50,000 and writing in, by hand, a new amount of $51,200. This modification was also initialed by Alan and Lisa on the Gift Equity letter. Mary C. Lagarde did not sign off on these modifications prior to her death, as she was to approve and sign off on the modification at the time of closing. (T. Vol. 2, Page 170, Lines 12-14; Page 171, Lines 6-11; and Page 175, Lines 1-3) (C. P. Pages 44-45)

The only copy of the Agreement submitted to the Court was the one containing the modifications as the original Agreement was on file at U.S. Title Company, whose office along with all of its contents was destroyed by Hurricane Katrina. (T. Vol. 1, Page 61, Lines 26-29 and Page 62, Lines 1-3) (C. P. Page 45)

Following Mary's death, Alan and Lisa made their intentions known to Alan's siblings regarding the purchase of Mary home pursuant to the terms of the contract. As shown by the testimony, Alan and Lisa discussed the sale of the house with Mary's other children immediately following Mary's funeral. (T. Vol. 1, Page 110, Lines 21-29; Pages 111, Lines 1-29; Page 112, Lines 1-11; T. Vol. 2, Page 212, Lines 24-29; Page 212, Lines 1-16)

Six of the nine siblings submitted letters to the Court evidencing their approval of the sale. (C.P. Pages 28-34) The two defendants (Appellants), Chris and Liz are the only siblings who opposed the sale to Alan and Lisa with the final sibling, Mary Hickey, remaining indifferent. (C. P. Page 45)

SUMMARY OF ARGUMENT

The Appellees would show unto the Court that the written gift equity letter, dated November 9, 2004, from Mary C. Lagarde to her child, Alan, and his wife, Lisa, had not been revoked by Mary prior to her death, is an essential part of the Agreement, is merged with the

Agreement and therefore, survives Mary's death. The Appellees would show that the initial Agreement, dated October 8, 2004, between Mary C. Lagarde, Alan Lagarde and Lisa Lagarde is in compliance with the Statute of Frauds. Further, the Appellees would show that the Chancellor was within his discretion in awarding attorney's fees pursuant to the provisions of the Agreement.

ARGUMENT

I. **The Chancellor applied the correct legal standard and was within his discretion in finding that the "Gift Equity Letter" from Mary C. Lagarde to Alan and Lisa Lagarde survived Mary C. Lagarde's death.**

II. **The Chancellor was within his discretion in finding the "Gift Equity Letter" acted as symbolic delivery of the equity from Mary C. Lagarde to Alan and Lisa Lagarde.**

III. **The Chancellor applied the correct legal standard and was within his discretion in finding that the "Gift Equity Letter" from Mary C. Lagarde to Alan and Lisa Lagarde was a valid and complete gift and became part of the consideration for the Agreement To Purchase or Sell between the parties.**

The Appellees shall jointly argue the foregoing three statements of issue dealing with the validity of the "Gift Equity Letter' from Mary C. Lagarde to Alan and Lisa Lagarde as the law regarding all three issues is interconnected.

Your Appellees would show that after the written Agreement was executed (Exhibit D), the parties agreed to add further consideration in the form of a written Gift Equity Letter (Exhibit G) and that the Chancellor found the Gift Equity Letter was a valid and complete gift to Alan and Lisa and became part of the consideration under the Agreement. As such, your Appellees would argue the Gift Equity Letter was thereby merged with the Contract. Specifically, the Court found as follows (with citations to the Record added):

15. ...Alan testified that $50,000 of the purchase price was to be paid with a gift equity in the house from Mary C. Lagarde. Alan and Lisa also provided testimony showing that an additional unwritten consideration for the purchase was Mary's right to live in the home for the remainder of her life, at no costs, so long as she desired. (T. Vol. 1, Page 76, Lines 11-29, and Page 77, Lines 1-20; Page 106, Lines 4-19) Further, that family members

were aware that the additional unwritten consideration provided for Mary living in the home for the remainder of her life, at no costs, so long as she desired. (T. Vol. 2, Page 227, Lines 19-27 and Page 241, Lines 25-29 and Page 242, Lines 1-7) (C. P. Page 43)

17. Mary executed a Gift Equity letter in the amount of $50,000 on November 9, 2004, evidencing her intent to extend the initial closing date. (Exhibit G) (C. P. Page 44) (T. Vol. 1, Page 84, Lines 10-25)

20. The Gift Equity Letter was also modified by striking through the initial amount of $50,000 and writing in, by hand, a new amount of $51,200. This modification was also initialed by Alan and Lisa on the letter. Mary C. Lagarde did not sign off on these modifications prior to her death, as she was to approve and sign off on the modification at the time of closing. (T. Vol. 2, Page 170, Lines 12-14; Page 171, Lines 6-11; and Page 175, Lines 1-3) (C. P. Pages 44-45)

Further, the Chancellor found (with citations to the Record added):

35. After the Agreement was executed, the parties agreed to add further consideration to their Agreement and memorialized further promises they made in regard to transaction in the form of the Gift Equity Letter (T. Vol. 1, Page 56, Lines 21-28) and their agreement to allow Mary C. Lagarde to live in the house as long as she so desired (C. P. Page 52) (T. Vol. 2, Page 241, Lines 25-29 and Page 242, Lines 1-7)

36. The Gift Equity Letter, signed and executed by all parties, effectively transferred $50,000.00 in equity Mary C. Lagarde had in the property to Alan and Lisa. (Exhibit G) According to its terms, this equity was to be used to purchase the subject property. In their Proposed findings of Fact and Conclusions of Law, Chris and Liz claim the gift of equity did not constitute a valid inter vivos gift because it was "not a completed *inter vivos* gift as there was not delivery nor was the gift completed with nothing to be done and in fact the "gift" was contingent on closing the transaction and the purported $50,000.00 equity gift was revoked by Mary's death." The Supreme Court has set forth the requirements of an *inter vivos* gift as follows:

> "To constitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive, or symbolical delivery without power of revocation." 20 Cyc. 1193. "A mere promise or declaration of intention to give, however clear and positive, is not enough to constitute a valid gift inter vivos. The intention must be consummated, and carried into effect, by those acts which the law requires to divest the donor and invest the donee with the right of property. Complete and unconditional delivery is essential to the perfection of such a gift for when the donor retains dominion over the property, or where a locus poenitentiae remains in him, there can be no legal title and perfect donation, and this rule has been held particularly applicable to parol gifts, and is founded upon

> grounds of public policy and convenience, to prevent mistake, imposition, and perjury. Delivery to be effectual must be according to the nature and character of the thing given, and hence may be actual or constructive according to the circumstances. There must, however, be a parting by the donor with all present and future legal power and dominion over the property." 20 Cyc. 1195; *Thompson v. Thompson*, 2 Howard 737; *Wheatley v Abbott*, 32 Miss. 343; *Conner v. Hull*, 36 Miss. 424; *Young v. Power*, 41 Miss. 197; *Carradine v. Collins,* 7 S. & S. 428

Meyer v. Meyer, 64 So. 420, 424 (Miss. 1913).
(C.P. Pages 52 and 53)

37. The Gift Equity letter makes it clear that Mary Lagarde intended to give a gift equity to Alan and Lisa. Equity is intangible and cannot be physically delivered from one party to another. The letter acted as the symbolic delivery of the equity from Mary Lagarde to Alan and Lisa. Since it was to be used as consideration in the sale of the property, it was directly attached and became a party of the contract for the sale of land upon its delivery to Alan and Lisa. The contract to sell the property is enforceable and the remedy for breach is specific performance, therefore Mary Lagarde relinquished all control over the equity when she delivered the Gift Equity Letter to Alan and Lisa. The Court finds the Gift Equity Letter was a valid and complete gift to Alan and Lisa and became part of the consideration for the contract. (C. P. Page 53-54) (Emphasis added)

Your Appellants, have continually argued that the Chancellor incorrectly interpreted *Meyer v. Meyer*, 64 So. 420, 424 (Miss. 1913). However, the Appellants have selectively quoted from *Meyer* which is factually distinguishable from *Lagarde*. The *Meyer* case centered upon a verbal promise to grant an *inter vivos gift* of monies from a father to his adult children. The *Lagarde* case was not a mere verbal promise, but rather a written contractual agreement to sell real property signed by the buyer and seller which the Chancellor found was in conformity with the Statute of Frauds, and the written gift equity letter, signed by the buyer and sellers, which was also supported by written documentation admitted into evidence, also meet the requirements of the Statute of Frauds (See Exhibits D and G).

Meyer states "the intention must be consummated and carried into effect, by those acts which the law requires to divest the donor and invest the donee with the right to property." (Id. at

424) These acts outlined in *Meyer* are the execution of written Agreements which memorialize the parties' agreement and are supported by consideration.

Alan and Lisa entered into a written agreement with Mary C. Lagarde to sell the property. This agreement is not a mere promise, or declaration of intent to give property, but rather a written contractual right granted by Mary to purchase her property for $250,000.00. The written Gift Equity Letter (Exhibits G, J, and K) is Mary's contractual agreement to reduce the net distribution to her by $50,000.00 which was required by the mortgage company to prove her intent as a condition of the mortgage loan to Alan and Lisa Lagarde (T. Vol. 1, Page 138, Lines 13-29, T. Vol. 2, Page 179, Lines 26-29; and Page 180, Lines 1-8)

In summary, the Appellants are seeking to argue an incorrect interpretation of *Meyer* and Appellees would argue that the Chancellor correctly applied the legal standard in reviewing the facts and documents admitted into evidence in determining that the Gift Equity Letter survives the death of Mary C. Lagarde and is binding upon her Tri-Executors to execute any and all documents necessary to consummate the sale of the property to Alan and Lisa Lagarde. Further, *Jenkins v. Jenkins*, 278 So. 2d 446 (Miss. 1973), *Carter v. State Mutual Federal Savings and Loan Association*, 498 So. 2d 324 (Miss. 1986), *McClellan v. McCauley*, 158 Miss. 456, 130 So. 145 (Miss. 1930) and *Johnson v. Collins*, 419 So. 2d 1029 (Miss. 1982) as argued by the Appellants are distinguishable from the *Lagarde* case as none of these cited cases deal with contracts/agreements which have been reduced to writing.

VI. The Chancellor applied the correct legal standard and was within his discretion in granting specific performance of the Agreement To Purchase or Sell which was certain and mutual.

The Appellees would show that Mary C. Lagarde was 81 years of age when she wrote to all of her children (Exhibit "B") on October 24, 2003 advising the children of her concern about

her age and plans of selling or staying in the home or, bringing in a family to share the house expenses and she asked each of her children to answer her letter in writing to request their input. (T. Vol. 1, Page 50, Lines 28-29; and Page 51, Line 1) Alan and Lisa, desiring to live in Bay St. Louis upon their retirement, began discussing the prospect of purchasing Mary's home. (T. Vol. 1, Page 52, Lines 8-13) These discussions lasted for several weeks and all of Mary's adult children testified at trial that they were either aware of, or had no concern about Alan and Lisa purchasing Mary's home, as it was their mother's right to choose any option she desired as she was the sole record title holder of her home. (T. Vol. 2, Page 231, Lines 16-17 and 19; Page 241, Lines 14-22; Page 244, Lines 17-22; Page 259, Lines 27-29; Page 260, Lines 1-5; Page 281, Lines 9-14 and T. Vol. 3, Page 309, Lines 26-28; Page 310, Lines 27-29; Page 311, Lines 1-10, Page 326, Lines 3-5; Page 332, Lines 21-25; Page 356, Lines 26-29; Page 357, Lines 1-5; and Page 362, Lines 23-26) (C.P. Pages 42-43)

Alan and Lisa entered into a written Agreement with Mary C. Lagarde on October 8, 2004 to purchase Mary's home located at 237 St. Charles Avenue, Bay St. Louis, Mississippi, and Alan and Lisa agreed to purchase the property from Mary for $250,000 (Exhibit "D") with a Gift Equity of $50,000 from Mary C. Lagarde. (Exhibit "G") (T. Vol. 1, Page 58, Lines 8-15)

The testimony of Alan, and the documents placed into evidence, is replete with the party's efforts to move toward the closing and to complete the transaction. (Exhibits "C", "D", "E", "F", "G", "H", "I", "J", "K", "L", "M", "N", "O", and "P") Additionally, the testimony at trial and the evidence confirms in Exhibit "J", that the parties continued to negotiate their Agreement to increase the purchase price to cover the closing costs incurred by Mary.

It is clear from the testimony of the witnesses that Mary took no action to revoke or cancel the Agreement (T. Vol. 2, Page 259, Lines 10-13; Vol. 3, Page 338, Lines 16-19) and that

she was cooperating with Alan and Lisa to sell her home for $256,000 and was relieved to be able to keep the historic home in the Lagarde family where her children would be welcome for their annual July 4 reunion around the pecan tree. (T. Vol. 2, page 283, Lines 19-29; Page 284, Line 1-5; and T. Vol. 3, Page 316, Lines 15-25)

The evidence admitted at trial and never rebutted by the Appellants, that the Agreement to Sell (Exhibit "D") contained Paragraph #17, titled "Agreement of the Parties" which states in part:

> "The provisions of this Agreement shall apply to and bind the heirs, executors, Administrators, successors and assigns of the respective parties hereto."

The testimony of the parties is clear that Alan and Lisa stood ready, willing and able to close the Agreement even after Mary passed away on January 11, 2005 and Alan wrote to all of his brothers and sisters advising that they were ready to close the real estate transaction per the terms of the agreement of the parties, even after Mary's death. (T. Vol. 1, Page 101, Lines 18-21; Page 102, Lines 13-23; Page 103, Lines 10-17; Page 104, Lines 15-29 and Page 105, Lines 1-14) (C. P. Pages 43-44) (Exhibits C, D, E, F, G, H, I, J, K, L, M, N, O and P)

Chancellor Persons correctly relied on the legal precedent as outlined in the Judgment dated June 3, 2008 and correctly applied the law to the facts in reaching his Conclusions Of Law as follows (with citations to the Record added):

23. The first affirmative defense put forth in Chris and Liz's Answer to the Complaint for Specific Performance is that the Agreement for the Sale of Land is invalid under *Miss. Code Ann. §15-3-1(c)* and *(d)*, more commonly known as the Statute of Frauds, which States:

> An action shall not be brought whereby to charge a defendant or other party:
> ...(c) upon any Agreement for the sale of lands, tenements, or hereditaments, or the making of any lease thereof for a longer term than one year,
> (d) upon any agreement which is not to be performed in the space of fifteen months from the making thereof;...Unless, in each of said cases, the promise or agreement upon which such action may be brought, or some memorandum

> or note thereof, shall be in writing, and signed by the party to be charged therewith or signed by some person by him or her thereunto lawfully authorized in writing.

Miss. Code Ann. §15-3-1 (Rev. 2003). The Supreme Court interpreted the requirements of the writing in a contact for the sale of land in *Taylor v. Sayle*, 142 So. 3 (Miss. 1932), by stating, "A Agreement for the sale of land to be valid under the statute of frauds...must describe the land with a reasonable certainty, or refer to and identify other writings by the aid of which the description can be made reasonably certain." The Supreme Court further explained the requirements of the writing in *Gulf Refining Co. V. Travis,* 30 So. 2d 398, 401 (Miss. 1947), by stating "In order to comply with [the statute of frauds]the memorandum must contain words appropriate to, and indicating an intention thereby, to convey or lease land, must identify the land, set forth the purchase price, or, if a lease, the rent to be paid, and the terms of payment." (C. P. Page 45-46)

24. The case *sub judice*, the Agreement titled "Agreement to Purchase or Sell" submitted to the Court states in the opening paragraphs, "In consideration of the mutual promises herein, Mary C. Lagarde ('Seller') agrees to sell, to Alan & Lisa Lagarde ('Purchasers') who agrees to buy, the herein described property on the terms and conditions stated below." The Agreement then describes the land in Paragraph 1 as, "4th Ward, BSL, Pt 66B, All Lot 153-A & Pt 153-B." Paragraph 2 of the Agreement, while there is a handwritten modification, clearly shows the initial purchase price of $250,000. paragraph 2a of the Agreement has a handwritten figure similar to the handwritten modification, and therefore appears to have been blank at the time of the initial Agreement. Paragraph 2b of the Agreement states the terms of the payment as a thirty (30) year conventional mortgage. Finally, the Agreement was signed at the end of the document by all parties involved in the Agreement. (C. P. Page 46)

25. For the above stated reasons, the Court finds the initial Agreement to be sufficiently written, expressing the parties intention to convey specifically identified property for a set price with set terms and signed by the parties to be charged in compliance with the statute of frauds. (C. P. Page 46)

26. The second affirmative defense put forth in Chris and Liz's Answer to the Complaint For Specific Performance is that the Agreement for the Sale of Land expired by its own terms on October 30, 2004. The Supreme Court has expressed its stance on waivers of time in Agreement cases by stating:

> The cases suggest that courts are often hostile to strict application of time clauses in Agreements. They frequently find waivers of the essentiality of time, both from written or oral statements of waiver and from the surrounding circumstances. The statute of frauds is typically held no barrier to such waiver. Silence or failure to demand strict performance may be construed as a waiver, particularly where the opposing party is under the reasonable impression that timely performance will not be insisted upon...Once a waiver has been made, the waiving party can

reinstate the essentiality of time only by notifying the other party of his intentions to do so and stating a reasonable time for the latter to come into compliance.

Canizaro v. Mobile Communication Corp. of Am., 655 So. 2d 25, 30 (Miss, 1995) (C. P. Page 46-47)

27. Paragraph 13 of the Agreement states, "time is of the essence of this Agreement." Although the Agreement made time of the essence, the parties' actions after the closing date show a contrary intent. According to the testimony, the waiver of the closing date was agreed upon by both parties in order to benefit Mary C. Lagarde. If the closing date would have remained October 30, 2004, Mary C. Lagarde would have incurred a penalty on her loan from Keesler Federal Credit Union. Although there was no written agreement to extend the closing date, the actions of all parties clearly show their intention to extend the closing date beyond the initial date. Mary C. Lagarde signed the Gift Equity Letter which, according to evidence and testimony, was required by the lender on November 9, 2004. Alan and Lisa signed the Gift Equity Letter on November 12, 2004, applied for Homeowner's Insurance on November 1, 2004, inquired about financing on November 29, 2004, had an appraisal performed on December 1, 2004, and a Power of Attorney was given to Alan by Lisa because she was going to be out of town on the date of closing on January 7, 2005. (C. P. Page 47-48) (T. Vol. 2, Page 210, Lines 24-29; and Page 221, Page 15-20) (Exhibits "C", "D", "E", "F", "G", "H", "I", "J", "K", "L", "M", "N", "O", and "P")

28. The above actions of the parties clearly show their intention to waive the date of performance for the sale to a later time. No testimony was provided showing any of the parties reinstated the essentiality of time. Therefore, the Court finds the Agreement did not expire on its own terms due to the waiver of the time for closing by the actions and oral agreement of the parties. (C. P. Page 48) (Exhibit G)

The Court did not "craft a new Agreement' as alleged by the Appellants, but rather took the aforementioned matters into consideration and upheld the initial written Agreement entered into between Mary C. Lagarde, her son, Alan Lagarde and daughter-in-law Lisa Lagarde, which was executed by all parties prior to Mary's death. The Court was eminently correct in upholding the Agreement of the parties (Exhibit D) dated October 8, 2004 and finding that the Agreement was not voided due to the death of Mary the day before the real estate closing. The Court found as follows:

25. For the reasons, the Court finds the initial contract to be sufficiently written, Expressing the parties intention to convey specifically identified property for a set price with set terms and signed by the parties to be charged in compliance with the statute of frauds. (C.P. Page 46)

39. Because valid consideration was given by Alan and Lisa at the time the Agreement in the form of a bargained for return promise, and subsequently in the form of their agreement to use their gift equity in the house and allow Mary C. Lagarde to live in the house after the sale, the Agreement did not fail for lack of consideration and is therefore enforceable. Also Paragraph 14 of the Agreement to Purchase or Sell states, "The provisions of this contact shall apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties hereto." This section of the Agreement clearly carried the Agreement and all agreements related to it beyond the death of any of the parties. (C. P. Page 54-55) (T. Vol. 1, Page 101, Lines 18-21; Page 102, Lines 13-23; Page 103, Lines 10-17; Page 104, Lines 15-29 and Page 105, Lines 1-14; T. Vol. 2, Page 201, Lines 26-27; Page 202, Lines 12-16; Page 206, Lines 26-28; and Page 208, Lines 8-22) (Exhibits C, D, E, F, G, H, I, J, K, L, M, N, O and P)

The evidence also supported the Court's finding that the parties continued to execute documents, bank financing, obtain hazard insurance, appraisals and work together toward the closing which was scheduled for January 12, 2005 (Mary died unexpectedly on January 11, 2005). Wherein the Court specifically stated:

40. Although Chris and Liz put forth the Doctrines of Waiver and Estoppel as their fifth affirmative defense in the Answer to the Complaint for Specific Performance, they provided no evidence showing Alan and Lisa ever indicated, either specifically or impliedly, they had any intention of abandoning their purchase of the property. In fact, the testimony provided shows they clearly expressed their intention to continue with the purchase after Mary's death in discussions with all eight (8) of Mary's other children. Therefore, the Court finds the Doctrines of Waiver and Estoppel do not apply. (C. P. Page 55)

VII. The Chancellor applied the correct legal standard and was within his discretion in awarding attorney's fees against Christopher Lagarde and Elizabeth Bosarge.

The Chancellor was also correct in finding that Alan and Lisa Lagarde were required to retain counsel to enforce the terms of the Agreement and as they filed an Amended Complaint

for Specific Performance, and the Court based its award of attorney fees on Paragraph 13 of Exhibits "D" and "J", which states:

> 13. Breach of Contract. Specific performance is the essence of this contract, except as otherwise specifically provided for in paragraphs 4, 12 and 20 and as delineated below, and time is of the essence of this contract: (a) in the event of breach of this contract by Purchaser, Seller at this option, may either (1) accept earnest money deposit as liquidated damages and this contract shall then be null and void, or (2) enter suit in any court of competent jurisdiction for damages for said earnest money deposit, or (3) enter suit in any court of competent jurisdiction for specific performance. In the event of breach of contract by Seller, Purchaser at his option may either: (1) accept the return of the earnest money and cancel the contract, or (2) enter suit for damages in a court of competent jurisdiction, or (3) enter suit in any court of competent jurisdiction for specific performance. If it becomes necessary to insure the performance of the conditions of this contract either party to initiate litigation, then the losing party agrees to pay reasonable attorneys fees and court costs in connection therewith.

CONCLUSION

In summary, the trial transcript and the evidenced admitted at trial clearly support the Chancellor's Judgment dated June 3, 2008 which was correct in both its findings of fact and conclusion of law and should be upheld in all respects.

Respectfully submitted, this the 10th day of April, 2009.

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CERTIFICATE OF SERVICE

I, the undersigned attorney for the Appellees, Alan Lagarde and Lisa Lagarde, hereby certify that I have on this date mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of the Appellee to the following:

ATTORNEY FOR THE APPELLANTS:	Clement S. Benvenutti Post Office Box 2718 Bay St. Louis, MS 39521
PRESIDING TRIAL JUDGE:	Hon. James B. Persons Chancellor Post Office Box 457 Gulfport, MS 39502

SO CERTIFIED, this the 10th day of April, 2009.

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