2012-CA-01153

IN THE
SUPREME COURT OF MISSISSIPPI

TANYA DALE WRIGHT SANDERSON, APPELLANT

V.

HOBSON L. SANDERSON, JR., APPELLEE

For Rehearing of this Court's December 11, 2014 Opinion
From the Appeal from the Chancery Court of Monroe County, Mississippi
(Cause No. 2008-0627-48-L)
Honorable Talmadge D. Littlejohn, Chancellor

MOTION FOR REHEARING

SUSPENSION OF THE RULES TO PERMIT ORAL ARGUMENT REQUESTED

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The following abbreviations are used herein: (1) Trial Record—**R**; (2) Trial Exhibits—**TE** followed by the Trial Exhibit Designation); and (3) Hob Sanderson, Jr.'s Record Excerpts—**HRE**.

The *Classification of Assets* was ordered to be made a part of the corrected and supplemented record by Order of the Chancery Court transmitted to the Clerk of this Court on or about March 13, 2015, and is referred to herein as the "Supplemental Record"—**SR**.

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JURISDICTION

This Court entered its 6-3 Opinion on December 11, 2014. This Court's jurisdiction rests on MISS. CONST. ART. VI, § 146, MISS. CODE § 9-3-09, and is proper under M.R.A.P. 40.[1]

MOTION FOR REHEARING

Movant/Appellee Hobson L. Sanderson, Jr. ("Hob") respectfully requests the Court to rehear this matter, suspend the rules and grant the privilege of oral argument, withdraw the Opinion, and substitute a new opinion affirming the Chancery Court in all respects.

REASONS FOR GRANTING THE MOTION

It is with the utmost respect for this Honorable Court and the rule of law that Hob comes seeking rehearing.[2] Hob respectfully suggests that the Opinion should be withdrawn and corrected for several reasons. First, the new substantive policy effected by the Opinion creates vast uncertainty in private ordering (read "contracting") between private parties making very personal decisions about the public institution of marriage, and, does so without any meaningful standard that can be practically applied to a prenuptial agreement. By making the policy decision to engraft a substantive limit upon the bargaining between parties to a premarital agreement without elucidating any meaningful standard, no family law practitioner can reasonably assure a client that his or her prenuptial agreement will be enforced. Moreover, the policy decision foists the impossible task of objectively reviewing matters relating to the very personal and subjective

[1]Hob was granted an initial enlargement of time through January 12, 2015, in which to file this motion. Because part of the Chancery Court's opinion was not properly made a part of the initial appellate record, this Court stayed briefing. The Supplemental Record, consisting of the 11-page *Classification of Assets*, was ordered to be certified as part of the record by Order transmitted to the Clerk of this Court on or about March 13, 2015.

[2]With the utmost respect, as former Supreme Court Justice Frankfurter eloquently stated: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Watson v. United States*, 552 U.S. 74, 84 (U.S. 2007) (Ginsburg, J., concurring) quoting *Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J. dissenting).

decisions made by parties deciding to marry on their own terms upon chancellors. If substantive policy choices are to be made rendering certain financial aspects of marriage to be off limits in a prenuptial agreement, those policy choices must be concrete for chancellors to objectively apply them and practitioners to properly advise their clients.

Second, the new substantive policy encroaches upon the Legislative prerogative regarding the public institution of marriage, specifically the substantive limits of premarital bargaining between consenting adults seeking to avoid default rules of law and privately order the substantive financial rules of their marital contract. Indeed, on February 3, 2014 and again on February 3, 2015, the Mississippi Legislature rejected the notion of substantive unconscionability review of prenuptial agreements when it rejected Mississippi H.R. 1042 and Mississippi H.R. 163, respectively,[3] each of which would have adopted a substantially modified version of the 2012 UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT.[4]

Third, if general commercial law dictates the standard, substantive unconscionability must be raised as to a specific contract *clause*. Tanya failed to argue that any particular *clause* of the prenuptial agreement was substantively unconscionable, but instead focused on the wholly irrelevant alleged effects of enforcement upon her at the time of divorce. Hence, Tanya failed to properly raise the issue on appeal.

Fourth, the Opinion was rendered without the Chancery Court's full opinion having been

[3]H.R. 1042 died on the Legislative calendar on February 3, 2014. H.R. 1042 *See* <http://billstatus.ls.state.ms.us/2014/pdf/history/HB/HB1042.xml> (accessed January 5, 2015). H.R. 163 died on the Legislative calendar on February 3, 2015. *See* <http://billstatus.ls.state.ms.us/2015/pdf/history/HB/HB0163.xml> (accessed February 5, 2015). The measures are collectively referred to hereinafter as the "PROPOSED ACT".

[4]UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT, adopted by the National Conference of Commissioners on Uniform State Laws (2012) (hereinafter, "2012 UPMAA").

made a part of the record, specifically without the Chancery Court's 11-page *Classification of Assets*.[5] The inadvertent omission appears to have contributed to the erroneous conclusion that the Chancery Court did not address commingling and familial use. The Chancery Court classified the joint account as a marital asset in its 11-page *Classification of Assets*, but then correctly *distributed* that asset in accordance with the terms of the controlling prenuptial agreement.

Fifth, and finally, unless the Opinion intended to create a new canon of contract construction, i.e., that prenuptial agreements must use "magic words" when addressing the concepts of commingling or familial use, or intended to create a new "piercing the marital veil" doctrine, the Opinion was erroneous in failing to recognize and enforce the plain language of the prenuptial agreement.

I. The Opinion creates vast uncertainty for Mississippians without any meaningful standard for practitioners or chancellors to apply, upsets the justified contractual expectations of Mississippians who have existing prenuptial agreements, and does violence to the doctrine of stare decisis.

The Opinion, for the first time in the 197 years of Mississippi history, announces a new substantive rule of law: prenuptial agreements must be judicially reviewed for substantive unconscionability at the time of execution. *Sanderson v. Sanderson*, __ So.3d __, 2014 Lexis 600, at *16, ¶22 (Miss. 2014).

A. Prior to the Opinion, Mississippi law plainly rejected the notion that fundamental fairness (read "substantive unconscionability") of a prenuptial agreement was a legitimate judicial inquiry.

Contrary to the statement that "Mississippi law concerning prenuptial is not well settled", *Sanderson*, 2014 Lexis 600, at *10, ¶14, and the following conclusion that "[c]onfusion has arisen

[5]Tanya included the 11-page *Classification of Assets* in her "record" excerpts, however, this Court presumably ignored the document, which is not mentioned in the Opinion, because it was never properly made a part of the record. *See* M.R.A.P. 10(e) ("Any document submitted to either appellate court for inclusion in the record must be certified by the clerk of the trial court.").

in Mississippi as to whether courts should consider the substantive unconscionability of prenuptial agreements", *id.* at *11, ¶17, **there was no confusion in Mississippi law as to whether prenuptial agreements were to be judicially reviewed for substantive unconscionability prior to the Opinion.** Not once, in 197 years, had a Mississippi appellate court held, or rendered a decision continuing language that was part of the *ratio decidendi* of a decision, that substantive unconscionability of a prenuptial agreement must be judicially reviewed.[6]

The Honorable Deborah Bell, Professor of Family Law at the University of Mississippi, has presumably taught this basic principle to hundreds of Mississippi law students for years.[7] It appears that legal writers universally concluded that *Mabus* stood for the express proposition that this Court *ruled upon*: "[t]he claim that the estates of the parties are so disparate that it questions *fundamental fairness* is of no consequence." *Mabus*, 890 So.2d at 821, ¶64 (emphasis supplied); *accord* BELL ON MISSISSIPPI FAMILY LAW, §14.02[6]. The statement in *Mabus* cannot be fairly characterized as *dictum*—Julie Mabus expressly raised the issue of fundamental fairness (read "substantive unconscionability"[8]) and this Court expressly rejected it as a legitimate judicial

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[6]In *McLeod v. McLeod*, 145 So. 3d 1246 (Miss. Ct. App. 2014), the Mississippi Court of Appeals reversed a chancery court decision finding a prenuptial agreement to be substantively unconscionable because one of the parties had "no meaningful choice" and the terms of it were "wholly unfavorable" to that party. *Id.* at 1252. Although the appellate court purportedly reviewed the issue of substantive unconscionability, it concluded that because the wife knew what she was signing and understood she would relinquish all claims to the husband's property in the event of divorce, the agreement was not unconscionable. *Id.* In other words, while purportedly reviewing the issue of substantive unconscionability, the court's reasoning addressed the elements of procedural unconscionability only.

[7]DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW, §14.02[6] (2d ED. 2011) (The Mississippi Supreme Court has declined to address the substantive fairness of prenuptial agreements).

[8]"Fundamental fairness" is a shorthand manner of expressing the 250-year old objectively meaningless postulate that a substantively unconscionable contract is "one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other." *See In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002) ("substantive unconscionability concerns the fundamental fairness of the provision itself") (arbitration case); *accord Tokyo Ohka Kogyo Am., Inc. v. Huntsman Propylene Oxide LLC*, 2014 U.S. Dist. LEXIS 109512, 42 (D. Or. 2014) (same) (UCC case); JANE P. MALLOR, UNCONSCIONABILITY IN CONTRACTS BETWEEN MERCHANTS, 40 SW. L.J. 1065, 1072 (1986);

inquiry.

B. Not a single case cited in the Opinion supports the conclusion that "Mississippi has implicitly considered the substantive unconscionability of premarital agreements"—the cited cases either did not present the issue of substantive unconscionability in prenuptial agreements, or addressed post-nuptial or property settlement agreements.

Although the Opinion cites *Estate of Hensley v. Estate of Hensley*, 524 So.2d 325 (Miss. 1988), *Smith v. Smith*, 656 So.2d 1143 (Miss. 1995), *In the Matter of Johnson's Will*, 351 So.2d 1339 (Miss. 1977), *West v. West*, 891 So.2d 203 (Miss. 2004), and *Mabus v. Mabus*, 890 So.2d 806 (Miss. 2003) as "domestic relations" decisions to support the conclusion that "Mississippi has implicitly considered the substantive unconscionability of premarital agreements" and the holding that "given the contract law on unconscionability, substantive unconscionability for premarital agreements must be considered by trial courts", *Sanderson*, at *13-15, ¶¶19-21, not a single one of those cases fairly support the stated conclusion or holding.

Two of the foregoing cases, *Estate of Hensley* and *Smith*, mentioned the issue of procedural unconscionability of prenuptial agreements in *dictum*. Neither case addressed substantive unconscionability. While it is true that *Estate of Hensley* noted the general law regarding procedural unconscionability and prenuptial agreements, *Estate of Hensley*, 524 So.2d at 327, n.1, and noted that there was "no inference that the parties did not deal honestly and fairly with each other", *id.* at 328, *Estate of Hensley* presented the straightforward task of interpreting a prenuptial agreement. *Id.* at 326 (holding that the chancellor failed to apply proper rules of construction and interpret the agreement as written).

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see generally JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS, § 96, at 486 (3d ed. 1990) (the postulate originates in an English decision, *Earl of Chesterfield v. Janssen*, (1750) 28 Eng. Rep. 82; 2 Ves. Sen. 125, 155, subsequently adopted in *Hume v. United States*, 132 U.S. 406, 411, 33 L. Ed. 393, 10 S. Ct. 134 (1889)). *Hume*, focusing on a *specific contractual clause*, held that the undisputed *agreed upon price term* (thirty-five times the market price) for shucks in a contract between a private party and the government was unconscionable. *Id.* at 414.

The Opinion also cites *dictum* in *Estate of Hensley*, "Mr. Hensley had actually been very benevolent", *Sanderson*, at *15, ¶21, for the proposition that it implicitly addressed substantive unconscionability. The proposition does not follow: even in the new rule announced by the Court, the statement is wholly irrelevant because the extrajudicial comments in *Estate of Hensley* related to *post-execution activities*, i.e., the benevolence of the husband, etc., not substantive unconscionability *at the time of execution*.

Similarly, the Opinion's citation to *Smith* as addressing unconscionability is incorrect. *Smith* involved numerous proceedings and issues, including the wife's withdrawal from a joint checking account containing the husband's funds (during a time the wife was authorized to do so), however, the lower court ultimately denied both a divorce and separate maintenance. *Smith*, 656 So.2d at 1147. Although the Court expounded on an "overview of antenuptial contracts", the entire discussion was *dictum* because the Court did not reach the issue. *Smith* instead *held* that because "no divorce was granted, the chancellor was without authority to order any division of property", or to enforce the prenuptial agreement until "the time of dissolution of the marriage." *Smith*, 656 So.2d at 1147.

The Opinion's suggestion that *In the Matter of Johnson's Will* or *West* support the conclusion that "Mississippi has implicitly considered the substantive unconscionability of premarital agreements" and holding that "given the contract law on unconscionability, substantive unconscionability for premarital agreements must be considered by trial courts", *Sanderson*, at *13-15, ¶¶19-21, is likewise incorrect.

Both cases involved *post-nuptial* agreements where marital rights were vested in whole or

in part.[9] With the utmost respect, not a single one of the foregoing cases can be critically read to support the conclusion that "Mississippi has implicitly considered the substantive unconscionability of premarital agreements" or the holding that "given the contract law on unconscionability, substantive unconscionability for premarital agreements must be considered by trial courts." *Id.*

C. The Opinion upsets the justified contractual expectations of Mississippians who have existing prenuptial agreements and does violence to the doctrine of stare decisis.

Stare decisis, while not "an inexorable command", is a "foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (internal citations omitted, internal quotations modified). This Court's longstanding view of stare decisis has been similar: "[A] former decision of this court should not be departed from, unless the rule therein announced is not only manifestly wrong, but mischievous." *McDaniel v. Cochran*, 2014 Miss. LEXIS 535, *19-20 (Miss. Oct. 24, 2014) (quoted case omitted).

With respect to property rights, this Court has explained that: "[s]ettled rules, so far as they relate to rights of property, on which the people may repose with confidence and security, are

[9] *In the Matter of Johnson's Will* considered a *post-nuptial* contract arising in a *marital relationship* with evidence of procedural unconscionability, and held that a spouse's surrender of marital rights in the *post-nuptial* contract was substantively unconscionable. *Id.*, 351 So.2d at 1342. *West* considered a *property settlement agreement* initially approved by the chancery court as part of a divorce which was abided by the parties for over five years. *West*, 891 So.2d at 207, ¶2. The principal issues before the Court in *West* were (a) whether the chancery court erred in holding that there was no meeting of the minds on the *property settlement agreement* provisions governing alimony and division of marital assets, *id.* at 209, ¶5, and (b) whether the chancery court's conclusion that the provisions of the *property settlement agreement* were unconscionable was correct. *West*, 891 So.2d at 213, ¶25. *West* held that the parties' 5-year compliance with the agreement manifested the clarity of the agreement, *id.* at 211, ¶18, that that the husband's vague allegations of procedural unconscionability, in light of his sophistication and representation by counsel, were unconvincing, and, that while the provisions of the *property settlement agreement* "were less than desirable", they were not substantively unconscionable. *West*, 891 So.2d at 213, ¶27.

essential to the welfare of society." *Lombard v. Lombard*, 57 Miss. 171, 177 (Miss. 1879). *Lombard* further explained that the rule of stare decisis, insofar as it applies to decisions of this Court, "should not be disregarded, except on the fullest conviction that the law has been settled wrong; and even then it is better to leave the correction to the legislature in all cases where a departure from it would have the effect to disturb vested rights, resulting from transactions entered into under the law as settled." *Id.* (noting that "a departure from former rulings should never take place except upon the clearest necessity and the most assured conviction that the former ruling was erroneous."). The Opinion markedly departs from what was understood to be well-settled Mississippi law prior to the Opinion, upsets justified contractual expectations of Mississippians who have prenuptial agreements in place, and does so without articulating any clear necessity or need to remedy mischievous effects of existing law.[10]

II. The Opinion imposes substantive policy choices which invade the Legislative prerogative to make substantive policy choices affecting the very personal decision made by Mississippians to marry or not.

In Mississippi, both marriage and divorce are creatures of statute, flip sides of the same legislative coin.[11] On February 13, 2014 and again on February 3, 2015, the Mississippi

[10]Because the marked departure upsets justified expectations of married Mississippians, Hob respectfully submits that the policy choice reflected in the Court's new substantive rule, if maintained, should, at a minimum, be applied prospectively only, not to this case or to any existing prenuptial agreements. *See Lombard*, 57 Miss. At 177; *cf. Douglass v. Pike County*, 101 U.S. 677, 687 (1880) ("The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."); *State v. Longino*, 109 Miss. 125, 132 (Miss. 1915) (citing *Douglass*, *id.*); *compare* PROPOSED ACT at 3, §3 (respecting the justified contractual expectations of Mississippians who entered prenuptial agreements prior to its adoption); *cf.* MISS. CONST. ART. 3, §16 ("Ex post facto laws, or laws impairing the obligation of contracts, shall not be passed.").

[11]Nearly 150 years ago this Court explained that a marriage is, to a certain extent, a civil contract. *Carson v. Carson*, 40 Miss. 349, 350-351 (Miss. 1866). The *Carson* Court recognized, however, that "marriage itself, as a personal relation between the parties, is not a matter of contract within the meaning of the constitutional provision in reference to the inviolability of contracts." It went further to explain that:

> We regard marriage as a civil status, a matter publici juris, ***created by public law***, subject to the

Legislature rejected the PROPOSED ACT, which would have adopted a substantially modified version of the UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT. The PROPOSED ACT, after detailing additional procedural requirements for a valid prenuptial agreement, *id.* at §10(1)-(4), pp. 5-7, set forth the following policy choice regarding substantive unconscionability:

> (5) A marital agreement or amendment thereto or revocation thereof that is otherwise enforceable after applying the provisions of subsections (1) to (4) of this section is *nevertheless unenforceable insofar, but only insofar, as the provisions of such agreement, amendment, or revocation relate to the determination, modification, limitation, or elimination of spousal maintenance or the waiver or allocation of attorney fees,* and such provisions are unconscionable at the time of enforcement of such provisions. The issue of unconscious ability [sic] shall be decided by the court as a matter of law.

PROPOSED ACT at §10(5), p. 7 (emphasis supplied).[12]

Unlike the Opinion, the PROPOSED ACT carved out two issues only, spousal maintenance and attorney's fees, to be subject to judicial review for substantive unconscionability at the time of enforcement, rather than at the time of execution. Either approach foists upon practitioners and chancellors the impossible task of objectively determining substantive unconscionability without

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> public will, and not to that of the parties, who cannot dissolve it by mutual consent; that *it is more than a contract, because it establishes fundamental domestic relations, affecting the welfare of the community, and because it is an institution of the State,* ***founded on reasons of public policy***.

Id. (citing *Magee v. Young*, 40 Miss. 164 (Miss. 1866)) (emphases supplied). *See also Kergosien v. Kergosien*, 471 So.2d 1206, 1210 (Miss. 1985) (Divorce is a creature of statute—reversing a divorce granted outside statutory boundaries); *Massingill v. Massingill*, 594 So.2d 1173, 1175 (Miss. 1992) (Courts may exercise only such authority as has been given by the legislature in granting a divorce); MISS. CODE § 93-1-17 (who may solemnize marriages); MISS. CODE § 93-1-19 (permitting solemnization by religious customs); MISS. CODE § 93-1-15 (imposing licensure requirement since April 5, 1956); MISS. CODE § 93-7-3 (creating causes for annulment); MISS. CODE § 93-1-1 (declaring certain marriages void); MISS. CODE § 93-1-3 (prohibiting evasion of marriage prohibitions); MISS. CODE § 93-7-1 (annulment of void marriages); MISS. CODE § 93-1-9 (statutory exceptions by solemnization and cohabitation); MISS. CODE § 93-17-1 (creating jurisdiction to legitimize children); MISS. CODE § 97-29-27 (declaring certain marriages felonious); MISS. CODE §§ 93-5-1 *et seq.* (causes for divorce, spousal support, child custody and support, various procedural and jurisdictional requirements).

[12]The PROPOSED ACT also contains other limits relating to child custody, domestic violence, grounds for divorce, among others, and would have made terms applicable to "marital agreements" applicable to "prenuptial agreements. *Id.*, §4, p.4.

subjectively weighing the benefit of the bargain, or, without imposing one's own subjective views of marriage. Consider, for a moment, the genesis of any prenuptial agreement.

A prenuptial agreement is *ipso facto* an agreement negotiated and executed prior to the marriage. There are no marital rights, inchoate or otherwise, at the time it is negotiated or executed. Without the resulting marriage, the prenuptial agreement is meaningless. The unmarried parties, presumed to be competent, autonomous and self-interested adults, always have a choice and each holds the ultimate bargaining chip—not to marry. The marriage itself is consideration for the prenuptial agreement—they are inextricably intertwined. As such, the State's interest (read "Legislative prerogative") is far greater in the case of a prenuptial agreement than the typical contract.[13]

Moreover, the new rule of substantive policy affects the negotiations leading to the basic

[13]The Opinion relies upon the general principle that "prenuptial agreements are just as enforceable as any other contract", and commercial cases to conclude that since prenuptial agreements are "contracts like any other, substantive unconscionability must be considered." *Sanderson*, at *14-15, ¶¶19-20. With the utmost respect, the conclusion is a non sequitur. Understood correctly, the general principle simply stands for the proposition that prenuptial agreements are not void against public policy. *Stevenson v. Renardet*, 83 Miss. 392, 400, 35 So. 576 (1904); *Gorin v. Gordon*, 38 Miss. 205 (Miss. 1859). Moreover, as the dissent recognized, "[t]he decision to marry is not an arms-length commercial transaction, but rather is grounded in personal, moral, religious, and emotional considerations that are off-limits to strangers to the relationship." *Sanderson*, at *22, ¶33 (Chandler, J., dissenting). The Opinion disregards the fundamental public policies at issue, and, fails to recognize well-settled principles of contract law applying different canons of construction to different types of contracts. For example, an assignee of a contract does not incur the assignor's obligations without express agreement, *Coggins v. Joseph*, 504 So.2d 211, 213 (Miss. 1987), however, an assignee does assume the obligations of a lessor if they run with the land, *id.* at 214, but this rule does not apply to collateral assignees. *Kroger Co. v. Chimneyville Prop. Ltd.*, 784 F. Supp. 331, 340 (S.D. Miss. 1991); *compare American Oil Co. v. Estate of Wigley*, 169 So.2d 454, 458 (Miss. 1964) (guaranty and surety agreements strictly construed); *Empiregas, Inc. of Kosciusko v. Bain*, 599 So.2d 971, 975 (Miss. 1992) (non-competition agreements disfavored); *Stokes v. Board of Dirs. of La Cav Improvement Co.*, 654 So.2d 524, 527 (Miss. 1995) (restrictive covenants disfavored); *Stampley v. Gilbert*, 332 So.2d 61, 63 (Miss. 1976); (perpetual leases disfavored); *J&W Foods Corp. v. State Farm Mut. Auto. Ins. Co.*, 723 So.2d 550, 552 (Miss. 1998) (ambiguous insurance terms excluding coverage strictly construed against insurer) *with Hutto v. Jordan*, 36 So.2d 809, 812 (Miss. 1948) (arbitration agreements construed liberally to encourage settlements by indulging every reasonable presumption in favor of validity).

decision to marry or not, and, whether one ascribes the best subjective motivations to parties engaged in such negotiations, e.g., they are "in love" and never believe they will divorce, or ascribes cynical motivations, e.g., one secretly desires the physical affections of the other, while the other simply desires to exploit the financial means of the other, it matters not: both ask a court to do the impermissible, inject itself in subjective decisions underlying the marriage contract and subjectively measure the benefit of the bargain in the context of the public institution of marriage.

Consider, if it were permissible or possible, exactly how would a court measure substantive unconscionability at the time of execution? Would it simply be a financial calculus? If it is matter of financial calculus, can one fairly look at the time of execution only while disregarding the life of luxury, worldwide trips, and lavish lifestyle received by the less wealthy party throughout the marriage? What if, cynically speaking, the wealthier party simply wants the physical affections (read "consideration") of the other? Can a court permissibly measure a personal intangible such as physical beauty? If the person is particularly unattractive, would that make the prenuptial more likely to be enforced?

Are private parties who have contractually ordered the financial rules applicable to their marriage now required to maintain separate accounts, strict financial controls and accounting records during their marriage like a corporation, with a constant eye toward the possibility of divorce, lest they risk rendering their prenuptial nugatory? Or, are certain subject matters to be off limits as a matter of public policy as the dissent suggests? If a matter of public policy affecting the very formation of the marriage contract, is it really within the judicial prerogative under our State's constitution? If it is, what policy boundaries are to be applied?

Should alimony and attorney's fees be carved out of a prenuptial agreement as a matter of law after a marriage of 5 years? 10 years? Only if it would leave the less wealthy party destitute

as suggested by the 1983 UPAA? Should the less wealthy gain a percentage interest in all assets on a year-by-year basis? Should a morality clause be imposed in every prenuptial agreement? If such policies are adopted, do they incentivize divorce and separation contrary to public policy? To borrow a word from the Opinion, while all may be "interesting" questions, they are not, with the utmost respect, questions to foist upon a chancellor attempting to interpret, or an attorney attempting to draft, a prenuptial agreement. They are instead matters of significant public policy which should be debated and decided by the Mississippi Legislature, not the Mississippi Judiciary. No legal practitioner, in light of the new rule, can confidently advise a client with an existing prenuptial agreement that it will be enforced by a particular chancery court, and, no legal practitioner, in light of the new substantive rule, can reasonably and objectively assure a client that the prenuptial agreement he or she has prepared will be enforced. Decisions to impose substantive limits on competent, autonomous and self-interested adults engaging in the private ordering of their financial affairs prior to a marriage, recognizing the underlying social policy that marriage is an expression of uniquely private values which actually matter, and which can be expressed through the liberty granted to freely contract and order such private affairs around default rules of law, should be left to the Legislature.

III. The Opinion goes further in its policy choices than the Proposed Act and the 1983 Uniform Premarital Agreement Act, and does violence to separation of powers principles.

In establishing the new substantive rule, Opinion goes further in its policy choices than the 1983 UNIFORM PREMARITAL AGREEMENT ACT first adopted by the National Conference of Commissioners on Uniform State Laws ("1983 UPAA"), and subsequently adopted in various forms by 26 jurisdictions, 2012 UPMAA at prefatory note, ¶3, and further than the PROPOSED ACT.

For example, under the new substantive rule adopted by the Opinion, a party can avoid enforcement of a prenuptial agreement if that party proves either procedural or substantive

unconscionability at the time of execution. In contrast, under the 1983 UPAA, unless a party proves he or she executed the prenuptial agreement involuntarily, or that enforcement would render a party eligible for public assistance,[14] the party must prove both substantive unconscionability *and* procedural unconscionability at the time of execution of the agreement. 1983 UPAA at §6(a). Similarly, although the PROPOSED ACT also permitted independent grounds of procedural and substantive unconscionability to avoid enforcement, the PROPOSED ACT limited judicial review of substantive unconscionability to spousal maintenance and attorney fees at the time of enforcement. PROPOSED ACT, §10(5), p. 7.

The new rule imposed by the Opinion interjects the Court in a matter recently considered and rejected by the Legislature not once, but twice. Although the new substantive rule at least includes two purported limitations, application at the time of execution, *Sanderson*, 2014 Lexis 600, at *15, ¶22, and prohibiting application so as to "relieve a party to a freely negotiated contract of the burdens of a provision which becomes more onerous than had originally been anticipated," *id.*, it encroaches upon the Legislative power to regulate the public institution of marriage and usurps a Legislative function contrary to MISS CONST. ART. I, §§1-2. *Compare Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981) (refusing to adopt public policy exception to common law employment-at-will doctrine, explaining that such a public policy decision was for the Legislature, not the Judiciary).[15]

Hence, while subjecting a prenuptial agreement to substantive unconscionability review at the time of execution, *Sanderson*, at *16, ¶22, and/or limited review of particular provisions as the

[14]The 1983 UPAA provides an exception permitting modification if enforcement of a prenuptial agreement affecting spousal support causes a party to be eligible for public assistance, but only to the extent necessary to avoid eligibility for that assistance. *Id.* at §6(b).

[15]*See also Presley v. Mississippi State Hwy. Comm'n*, 608 So.2d 1288, 1294-95 (Miss. 1992).

dissent suggests, *id.* at *22, ¶32, may very well be, or not be, valid policy decisions, either, however, is just that—a policy decision affecting the very personal and subjective decision of whether to marry or not. With the utmost respect, such public policy decisions belong to the Legislature, not to the Judiciary.

IV. Because Tanya failed to challenge a single *clause* of the prenuptial agreement as substantively unconscionable, but instead challenged the agreement based upon the alleged circumstances its enforcement would result in, the Opinion erred by mandating judicial review of substantive unconscionability in this case.

The Opinion disregards the very commercial cases its cites which hold that (a) the issue of unconscionability is one of law, (b) procedural unconscionability goes to the contract as a whole, but (c) substantive unconscionability must be raised as to specific *clauses*. *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 517 (Miss. 2005)[16]; *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So.3d 1026, 1034, n.10 (Miss. 2010). Specifically, the Opinion overlooked the fact that Tanya failed to challenge a *specific clause* of the prenuptial agreement. *Terre Haute Cooperage v. Branscome*, 35 So.2d 537 (Miss. 1948), the first case in which this Court stated the now 250-year old postulate, involved a timber contract. In *Terre Haute*, this Court refused to relieve a timber company from its unilateral mistake, and equated unconscionability with fraud arising in the context of equitable estoppel. *Id.* at 541 (citations omitted).

In *Sawyers*, this Court explained that "[u]nder 'substantive unconscionability, we look within the four corners of an agreement in order to discover *any abuses relating to the specific terms* which violate the expectations of, or cause gross disparity between, the contracting parties'" and that "[s]ubstantive unconscionability is proven by *oppressive contract terms* such that 'there

[16]*Overruled on other grounds by Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009).

is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach.'" *Id.* at 1034, n. 10 (internal citations omitted, internal quotations modified, emphases supplied) (rejecting the claim); *accord Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695 (Miss. 2009) (same).[17]

Here, the Sanderson prenuptial agreement is mutual in all of its operative terms.[18] Moreover, Tanya nowhere argued in her briefs that a specific *clause* of the prenuptial agreement was substantively unconscionable, but instead argued that because she is allegedly "destitute" (an argument, not a finding by the lower court), the prenuptial agreement is substantively unconscionable.[19] The argument that Tanya advances, i.e., that one can attack a prenuptial

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[17]*See also Vicksburg Partners* (holding a one-sided limitation of liability and punitive damages clause in an arbitration agreement substantively unconscionable). In *York v. Georgia-Pacific Corp.*, 585 F. Supp. 1265 (N.D. Miss. 1984), the district court, applying Mississippi law, including *Terre Haute* and other authorities, defined "substantive unconscionability" as a contract in which (1) "the terms […] are of such an oppressive character as to be unconscionable" or in which (2) "where there exists a large disparity between the cost of an item and the price paid for it." *York*, 585 at 1278 (N.D. Miss. 1984) (citations omitted); *accord Myers v. GGNSC Holdings, LLC*, 2013 U.S. Dist. LEXIS 65628, 13 (N.D. Miss. 2013); *Bank of Indiana, Nat'l Ass'n. v. Holyfield*, 476 F. Supp. 104, 110 (S.D. Miss. 1979).

[18]The only provision in the Sanderson prenuptial agreement that is not mutual is the "premature death clause", which favored Tanya, not Hob. **R3, HRE 003** (Prenuptial Agreement, p.2, 2)

[19]Appellant's Brief at 10 (unconscionable because of the "disparity of bargaining power" and "great disparity in estates"); *id.* at 24 (unconscionable "as the agreement protects Hob and makes no provisions for Tanya" and left Tanya "destitute, homeless and without a vehicle"); *id.* at 24-25 (unconscionable because it is "so grossly unfair that it is impossible to state it to one with common sense without it producing an exclamation at the inequality of it"); *id.* at 25 ("so one-sided that no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other"); *id.* at 58 ("[t]he disparity of Hob and Tanya's assets is so great and the fact that Tanya was left homeless . . . is unconscionable"). Disregarding the mutuality of the agreement and the fact that Tanya's arguments are just that, there is no finding of her "net worth" or that she was "destitute". Hob gave Tanya a 26.6 acre subdivision during the marriage, **TEF142** that the Chancery Court awarded to her, **R310** and 17 days after Hob filed divorce, Tanya deeded a home and lot to her mother and father**TEF142** valued at $175,000.**TEF206**. The Chancery Court awarded Tanya items and accounts valued at $424,587.01 (which did not include $211,827.67 in temporary support she received during the pendency of the case, any value for her rent-free occupation of Hob's home and 320 acres during the lengthy case, or any consideration that Hob alone bore all of the valuation expert's fees).**R313-314, R325** Nor does the award reflect the $209,913.27 that Tanya had accumulated as of July 22, 2008, in a separate account comprised of child support payments from her former

agreement, mutual in all of its operative terms, on the alleged financial consequences of its enforcement at the time of dissolution, instead of as to a specific clause, is impermissible under Mississippi law. Tanya is in effect asking the Court to measure the benefit of the bargain, a task which could not be accomplished without measuring the totality of consideration, personal and monetary, received by the parties during the course of the marriage. This is simply not a case in which the Court should consider substantive unconscionability, much less announce a new substantive rule of law.

V. The Opinion was rendered without the benefit of the Chancery Court's full opinion, inadvertently not made a part of the record, which demonstrates that the Chancery Court addressed the issue of commingling and family use in its classification of the joint account as a marital asset, but then properly *distributed* the asset in accordance with the terms of the controlling prenuptial agreement.

The Opinion incorrectly states that the Chancery Court "held that, under the prenuptial agreement which provided that property that could be traced to one spouse belonged to that spouse, the money traceable to Hobson was *not commingled and not a marital asset*." *Sanderson*, 2014 Lexis 600, at *17, ¶24 (emphasis supplied). The italicized portion of that statement is incorrect. The Chancery Court did not make such a finding in its written Final Judgment, **R.305-325** or in the Opinion it delivered from the bench on June 15, 2012. **Tr. 1234-1267**

Moreover, it is incorrect to state that that the "chancellor erred by failing to address the familial use of the funds", *Sanderson*, 2014 Lexis 600, at *17, ¶24, when the Chancery Court plainly addressed the issue in its full opinion. Specifically, when the Chancery Court handed down its bench opinion on June 15, 2012, it distributed an 11-page *Classification of Assets*, which it

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ex-husband during her marriage to Hob.**R314; TEF60 at p.18** Disregarding the lavish lifestyle Tanya led during the marriage, but including the items awarded to her by the Chancery Court, the property she transferred to her parents, the temporary support she received during the pendency of the case, and the child support she saved during the marriage, Tanya received $1,021,327.95.

designated as an exhibit to its opinion:

> In doing that as to the property involved here and it's been a rather cumbersome procedure to do so -- I've made a detailed analysis of this classification of assets pursuant to *Hemsley* and *Johnson*.
>
> Mr. Clerk, I need you to distribute these to counsel, please, sir. The court reporter gets this one and the lawyers *** **That's the classification of assets, non-marital and marital, pursuant to *Hemsley* that I feel is now an exhibit to this opinion and I would ask that it be considered accordingly.**

Tr. 164, ll.9-25 (emphases supplied). The pertinent portion of the *Classification of Assets* is as follows:

CLASSIFICATION OF ASSETS

ASSET:		NON-MARITAL:	MARITAL:
Investments and Accounts			
	Community Bank Account #xxx853		$12,851.00
	Community Bank Account #xxx8517		$3,564.00
	American Funds Account #xxx4058		$2,088.00
	American Funds Account #xxx4923		$15,783.00
	Trust Management, Inc. Account #xxx682		$82,322.00
	Herring Bank Church Bonds - includes earned interest		$650,488.00

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After classifying the joint account as a marital asset, the Chancery Court then properly *distributed* the joint account (funds traceable to Hob's income solely) through a straightforward interpretation of the prenuptial agreement in accordance with basic principles of contract construction and Mississippi case law plainly holding that the "*prenuptial agreement is controlling in the distribution of the assets.*" *Mabus*, 890 So.2d at 823 (emphases supplied).

VI. Unless the Opinion intended to create a new canon of contract construction or impose a "magic words" requirement for prenuptial agreements, the Opinion's failure to recognize and enforce the plain language of the Sanderson prenuptial agreement covering all property, all income, earnings, traceability, regardless of any change of circumstances, etc., is erroneous.

The Opinion's conclusion that "Tanya and Hobson could have drafted the prenuptial agreement to address funds commingled for familial use, but they did not", *Sanderson*, 2014 Lexis

600, at *19, ¶27, misapprehends basic contract construction principles and disregards the plain language of the prenuptial agreement itself. The Opinion cites *A & L, Inc. v. Grantham*, 747 So.2d 832, 838 (Miss. 1999) and *Heigle v. Heigle*, 654 So.2d 895, 897 (Miss. 2005) in support of the erroneous conclusion, but neither case involved a prenuptial agreement. Moreover, neither *A & L* nor *Heigle* stand for the proposition that use of a joint account negates the contractual terms of a prenuptial agreement.[20] Furthermore, while the Opinion correctly states that "contract interpretation is a question of law and is reviewed de novo", *Sanderson*, 2014 Lexis 600, at *9, ¶13. (citations omitted), it disregards that black letter principle, fails to engage in a *de novo* review of the prenuptial agreement, and concludes without so much as applying a single canon of contract construction that:

> Absent a contractual provision that indicates the parties intended familial use monies to be separate and subject to tracing, thereby waiving the operation of law that so converts it, we are constrained to hold the parties intended for our law regarding familial use to apply.[2]

Sanderson, 2014 Lexis at *18, ¶26 (citations omitted). Footnote 2 to the above quote states in full:

> It is interesting to note that the *Mabus* Court placed great importance on the fact that, in *Mabus*, the parties "meticulously maintained separate accounts for their premarital separate property and for the gifts and inheritances that they each received during the marriage." *Mabus*, 890 So. 2d at 823 (¶71). By creating the joint account at issue, the parties in the case sub judice were not so meticulous.

[20]In *A & L, Inc.*, this Court affirmed the lower court's judgment that the parties, who used corporate accounts and funds throughout the marriage, including for payment for the marital home and other assets, (but had no prenuptial agreement) had thereby converted non-marital assets to marital assets through commingling. 747 So.2d at 836-38, ¶¶-17; 838-841, ¶¶18-47; *id.* at 843, ¶50, 844, ¶52, and 846, ¶61 (affirming judgment to set aside fraudulent conveyance of the corporation, to pierce the corporate veil, and to award attorney's fees resulting from fraudulent conveyance). The issue in *Heigle* was the effect of commingling inherited assets (again, no prenuptial agreement). Therein, this Court held that a wife's deposit of a $10,000 inheritance into an account used for joint purposes, including the purchase of cattle, became marital property, however, when the husband repaid wife $4,000 for the cattle, the $4,000 *regained its non-marital status*. *Heigle*, 654 So.2d 895, 897. *A & L, Inc.* and *Heigle* simply state black letter Mississippi law on commingling of non-marital assets with marital assets, or familial use of non-marital assets in the *absence of a prenuptial agreement*.

Sanderson, 2014 Lexis 600, at *19, n.2, ¶26 (underlined emphasis supplied). With the utmost respect, footnote 2 of Opinion, while citing what appears to be *obiter dictum* from *Mabus* on the one hand, wholly disregards the actual reasoning employed, and controlling principle announced in ¶71 of *Mabus* on the other hand, i.e., that a prenuptial agreement is controlling in the *distribution* of assets. *Mabus*, 890 So.2d at 823, ¶71.

When construing an unambiguous contract,[21] courts must ascertain the parties' intent from the "four corners" of the instrument, *Cooper v. Crabb*, 587 So.2d 236, 239, 241 (Miss. 1991), reading the contract as a whole so as to give effect to all of its clauses. *Brown v. Hartford Ins. Co.*, 606 So.2d 122, 126 (Miss. 1992).[22] Courts must ascribe contractual terms their ordinary meaning unless employed in a technical sense, or doing so would be contrary to the intentions of the parties as manifested in the contract. *See Williams v. Batson*, 187 So. 236, 238 (Miss. 1939) (*en banc*).[23] **"Magic words" are not required.** *Smith v. Little*, 834 So.2d 54, 58 (Miss. Ct. App. 2002) (rejecting contention that "magic words" are necessary) (citations omitted); *see also Blain v. Sam Finley, Inc.*, 226 So.2d 742, 745-46 (Miss. 1969). Courts may not infer intent contrary to the contractual term at issue, *Cooper*, 587 So.2d at 241, and are not concerned with parties may claim they intended, but rather with what they actually stated in their contract. *Simmons v. Bank of Mississippi*, 593 So. 2d 40, 42-43 (Miss. 1992).

So, what did Hob and Tanya actually state in their prenuptial agreement?

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[21]The Chancery Court found the prenuptial agreement to be unambiguous.**R315** Plain meaning controls in an unambiguous contract. *Ferrara v. Walters*, 919 So.2d 876, 882 (¶13) (Miss. 2005); *see also Harrison County Commer. Lot, LLC v. H. Gordon Myrick, Inc.*, 107 So.3d 943, 960 (Miss. 2013).

[22]*See also McKee v. McKee*, 568 So.2d 262, 266 (Miss. 1990); *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 202(2) (1981).

[23]*See also Miller v. Fowler*, 28 So.2d 837, 838 (Miss. 1947) (contractual terms prevail over custom); *Citizens National Bank of Meridian v. L.L. Glascock, Inc.*, 243 So.2d 67, 70 (Miss. 1971) (same); *see generally* RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a).

Sanderson **Prenuptial Agreement**
. . . all property now owned by each and set forth herein . . . or any property hereafter acquired by each that shall be traceable to proceeds or appreciation from their separate property . . . shall for testamentary, intestate succession, and for their lifetimes and for any and all other purposes, be free from any claim of the other that may arise by reason of the . . . marriage, notwithstanding any and all State laws to the contrary. . . . R1, HRE 001
After the . . . marriage between the parties, each . . . shall separately retain all rights in his or her own property, real and/or personal, whether now owned or hereafter acquired, and each . . . shall have and maintain, regardless of circumstances or change of circumstances, the absolute and unrestricted right to dispose of and maintain use and retain the use and ownership of such separate property, free from any claim that may be made by the other by reason of or as a result of their marriage, and with the same effect as if no marriage had been consummated between them, notwithstanding any State laws to the contrary. . . . R2, HRE 002
[Each party] hereby further waives and releases all rights and interest, statutory or otherwise, including but not limited to widow's allowance, alimony, statutory allowances, distribution of intestacy, and the statutory right of election to renounce or take against the will of [the other party] which [they] might acquire as [spouse], widow [or widower, etc.] of [the other party] in [the other party's] property, real and personal, owned by [the other party] at the time of the marriage or acquired by [the other party] at any time thereafter by any and all sources and means including, but not limited to return on investments, earnings, gifts or inheritance. *** R4, HRE 005 **24**

The Opinion's failure to apply basic canons of construction may be due in part to the failure to make the 11-page *Classification of Assets* part of the record. Regardless, the Opinion's conclusion regarding the joint account, which contained Hob's income and Hob's income only, is erroneous, unless the Opinion intended to create a new canon of contract construction applicable to prenuptial agreements, impose a novel requirement that prenuptial agreements use "magic words" to address issues of tracing, commingling and/or familial use, or to create a new "piercing

[24]For comparison, the only provision of the *Mabus* prenuptial agreement that this Court deemed important enough to quote in its decision is as follows:

> This agreement . . . cover[s] and appl[ies] to all property now owned by each party and to all property which each may acquire in his or her sole and separate right, and to any property acquired by an exchange, lease, mortgage or otherwise, to any property vesting by purchase, reinvestment, substitution, increase, descent, gift, bequest, or devise, and to proceeds derived from any sale. The agreement does not apply to property as to which title is taken after their marriage in the names of both parties as joint tenants or tenants by the entirety.

Mabus, 890 So.2d 806, 823.

the marital veil" doctrine that overrides the terms of a controlling prenuptial agreement. Remembering that one of the essential purposes of a contract is to allow private parties to order their affairs under their own rules to avoid the default statutory and common law rules that might otherwise apply, let us briefly examine, through the lens of the expressed intentions of the parties in the instrument at issue, why the Opinion's conclusions regarding the joint account are erroneous.

First, the expressed intention of the parties was to address all property in existence at the time of the prenuptial agreement or at any time in the future: "[a]ll property now owned . . . or any property hereafter acquired . . .." **R1, HRE 001** (Prenuptial Agreement, p.1). "All" means "the whole of", "the greatest possible", "any; any whatever", "the whole quantity or amount", "one's whole interest", "every". WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE at 38 (1989 ED.) (hereinafter "WEBSTER'S"). "All" modifies "property". "Property" means "that which a person owns", "ownership", "right of possession", "something at the disposal of a person". WEBSTER'S at 1153. "All property" thus embraces the whole quantum of tangible and intangible property.

Second, the expressed intention of the parties was that if property (as broadly defined above, including proceeds from the property) were traceable, it would remain free from any claim arising from the marriage: "[a]ll property now owned . . . or any property hereafter acquired . . . that shall be traceable to proceeds or appreciation from their separate property . . . shall . . . for any and all other purposes, be free from any claim of the other that may arise by reason of the contemplated marriage, notwithstanding any and all State laws to the contrary." **R1, HRE 001** (Prenuptial Agreement, p.1). Thus, if property or proceeds therefrom were traceable,[25] the parties,

[25]"Traceable" simply means that which is "capable of being traced", WEBSTER'S at 1500, or to "determine the course or line of, esp. by going backward from the latest evidence." *Id.*; *see also* BLACK'S LAW DICTIONARY 1629 (9th ED. 2009) (hereinafter "BLACK'S LAW DICTIONARY") ("[t]he process of tracking

having specifically chosen to contract around the default rules of State law, expressly declared their mutual intentions that such property and proceeds would be free from any claim of the other.

Third, if the intentions of the parties were not clear enough, the parties further expressed their intentions by agreeing that each "**shall** separately retain all rights in his or her own property, real and/or personal, whether now owned or **hereafter acquired**, and each of them **shall have and maintain**, ***regardless of circumstances or change of circumstances***, the **absolute and unrestricted** right to dispose of and maintain use and retain the use and ownership of such separate property, **free from any claim that may be made by the other** . . . **as a result of their marriage, and with the same effect as if no marriage had been consummated between them**. . .. **R2, HRE 002** (Prenuptial Agreement, ¶2, p.2) (emphasis supplied). The word "shall" is used in its mandatary sense: "shall separately retain all rights in his or her property", "shall have and maintain". There is no rational, contextual interpretation under which one can find anything permissive about the use of the term "shall". Retain means to "keep possession of", "continue to hold or have". WEBSTER'S at 1223. "Circumstances" means "a condition, detail, part, or attribute, with respect to time, place, manner . . . which modifies a fact or event" and "the condition or state of a person with respect to income and material welfare." WEBSTER'S at 269. Hob's act of using the joint checking account was a circumstance, a convenience through which he continued to exercise dominion and control over his money by withdrawing it as he desired and transferring to various other accounts. Hob did exactly what he had "the absolute and unrestricted right", **R2, HRE 002** (Prenuptial Agreement, ¶1, p.2), to do under the controlling prenuptial agreement: "dispose of and maintain use and retain the use and ownership of [his] separate property." *Id.*; *see* BLACK'S LAW

property's ownership or characteristics from the time of its origin to the present"). Here, the task is simple: even though Tanya banked over $200,000.00 of child support she received from a former husband in a separate account, it is undisputed that all of the money in the joint account came from Hob.

DICTIONARY at 7 (Absolute means "free from restriction, qualification, or condition" and "[c]onclusive and not liable to revision").

Fourth, not a single case cited in the Opinion, or which can be found by the undersigned in published Mississippi case law, stands for the proposition that deposit of separate monies into a joint account constitutes, *as a matter of law*, commingling, irrevocably converts those monies into marital property, effects an *inter vivos* gift, or trumps the plain language of a controlling prenuptial agreement. Indeed, case law authority supports the opposite conclusion.[26] No one has ever suggested that when Hob's money was in the joint account that Tanya could not use it. Once Hob withdrew the money (read "exercised dominion over") and deposited it into his accounts, said money being solely *traceable* to him, it regained its separate status under the controlling terms of the prenuptial agreement. *Cf. Long v. Long*, 928 So.2d 1001 (Miss. Ct. App. 2006) (prenuptial agreement controlling notwithstanding commingling of assets) (no "magic words" in the prenuptial agreement). This was undisputedly Hob's practice throughout the marriage, exercising dominion and control over his money as he desired, withdrawing from the joint account and depositing it into his own investments,[27] as was his "absolute and unrestricted right" to do under the prenuptial agreement. **R2, HRE 002** (Prenuptial Agreement, ¶1, p.2).

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[26]*See McDonald v. McDonald*, 115 So. 3d 881, 886 (Miss. Ct. App. 2013) (rejecting contention that mere deposit of funds into joint account constituted commingling, noting that an appellate court is "restrained from substituting [its] own judgment for that of a chancellor, even if [it] disagrees with his or her findings of fact and would arrive at a difference conclusion.") (quoted case omitted); *Carter v. State Mutual Federal Savings & Loan Ass'n*, 498 So. 2d 324 (Miss. 1986) (rejecting contention of gift where depositor made deposits in accounts owned by other parties on which depositor retained signatory authority to withdraw deposits); *Leverette v. Ainsworth*, 23 So.2d 798 (Miss. 1945) (*en banc*) (same).

[27]The Chancery Court's correct *factual* finding that the joint account was used as a "clearinghouse", was covered "6 ways to Sunday" in the prenuptial agreement. *See State v. Moore*, 2006-Ohio-3680, P10, 2006 Ohio App. LEXIS 3639 (Ohio Ct. App. 2006) (describing exhaustive review conducted by trial court).

Fifth, each party further broadly "**waive[d] and release[d] all rights and interest**. . .[in the other party's] **property, real and personal,** . . . **acquired by** [the other party] **at any time thereafter by any and all sources and means including, but not limited to return on investments, *earnings*, gifts or inheritance.**[R4, HRE 004-5] (Prenuptial Agreement, ¶6, pp.4-5 (emphases supplied). "Waive" means to "abandon, renounce, or surrender (a claim, privilege or right, etc.)". BLACK'S LAW DICTIONARY at 1717. "Release" means to "libera[te] from an obligation, duty, or demand." *Id.* Hence, Hob and Tanya mutually expressed their intentions, and mutually agreed, to abandon, renounce and surrender all rights and interest in, while mutually releasing each other from any obligation or demand to, the other's real and personal property acquired at "any time" from any and all sources, to include "return on investments [and] earnings." *Id.* The money Hob deposited into the joint account was always his to exercise such dominion and control over as he desired, including the dominion and control to withdraw it and deposit it into his own investments.

A further extensive linguistic analysis of terms having plain meaning is not necessary to further demonstrate that the Opinion erroneously failed to give effect to the parties mutually expressed intentions that all property and proceeds therefrom, including earnings and income, owned at the time and acquired thereafter, traceable to one party or the other, would remain a separate asset under the prenuptial agreement, free from any claim of the other, regardless of the change in circumstances, just as if the parties had never married. The parties expressly contracted around default rules of law that might otherwise apply. Contrary to Mississippi law, the Opinion renders basic terms such as "all", "traceable", "property", "hereafter", "free", "income",

"earnings", and other terms meaningless and of no effect,[28] and contravenes a most basic principle by effectively rewriting, or rendering nugatory, the Sanderson prenuptial agreement.[29]

CONCLUSION

With the utmost respect, the Opinion does violence to the rule of law and is erroneous in several aspects. The Chancery Court eminently understood and applied the canons of contract construction. And, even though it would be Hob's contention that none of his assets, absent a bona fide gift from him to Tanya, could have ever became a martial asset under the controlling prenuptial agreement, the Chancery Court classified most of the assets in this case as marital, and then, applying basic canons of contract construction and the controlling terms of the prenuptial agreement, properly distributed those assets. Whether Hob or this Court disagrees with the process or classification is without substance—at the end of the day, the Chancery Court reached the correct result by applying the *controlling terms* of the prenuptial agreement in its *distribution* of assets. For these and other reasons, Hob asks the Court to withdraw the Opinion and substitute a new opinion affirming the Chancery Court in all respects.

Respectfully submitted, this the 15th day of March, 2015.

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[28]Mississippi courts must construe contracts so that no word or provision is rendered "repugnant, senseless, ineffective, meaningless, or incapable of being carried out in the overall context of the transaction consistently with all of the other provisions of the contract." *Wilson Indus., Inc. v. Newton County Bank*, 245 So. 2d 27, 30 (Miss. 1971).

[29]"Courts do not have the power to make contracts where none exist, nor to modify, add to, or subtract from the terms of one in existence." *Citizens National Bank of Meridian*, 243 So.2d at 70.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2015, I electronically filed the foregoing Motion for Rehearing with the Clerk of the Court using the MEC system, which upon belief will automatically send notification of such filing to the following counsel of record for the Appellant:

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I further certify that I have deposited the foregoing document in the U.S. Mail, postage prepaid, and addressed to the following non-MEC participant:

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CERTIFICATE OF FILING

The undersigned hereby certifies that on 15th day of March, 2015, he electronically filed the foregoing original Motion for Rehearing with the Clerk of the Court using the MEC system:

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