

**IN THE SUPREME COURT OF MISSISSIPPI**

**EMMA JANE HESTER**

**APPELLANT**

**VS.**

**CAUSE NO. 2007-CA-00225**

**DAVID HESTER**

**APPELLEE**

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**BRIEF OF APPELLEE**

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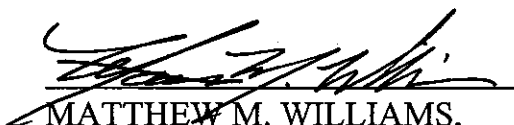
**APPELLEE**

**CERTIFICATE OF INTERESTED PERSONS**

The Undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. David Hester - Appellee;
2. Lane B. Reed, Matthew M. Williams - Attorney for the Appellee;
3. Emma Jane Hester - Appellant;
4. W. Brady Kellems, Joseph P. Durr - Attorneys for Appellant;
5. Jimmy W. Jones - Chancery Clerk of Franklin County, Mississippi;
6. Judge Debbra K. Halford, Chancellor for the 4<sup>th</sup> Judicial District.

**SO CERTIFIED** this 11<sup>th</sup> day of October, 2007.

  
MATTHEW M. WILLIAMS,  
Attorney for the Appellee

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## **STATEMENT OF THE ISSUES**

1. Is the Conservatorship of Emma Jane Hester valid where the doctors' certificates substantially complied with the relevant statutory authority required to establish conservatorship; and
2. Whether an Order by the chancellor in the midst of a continuance and before evidence could be fully heard on the matter, issued to protect the putative ward from the possibility of further damage to her estate is valid because of the chancellor's inherent power and duty to protect wards of the court.

## STATEMENT OF THE CASE

On October 2, 2006 the Appellee, hereinafter David Hester, requested from the Chancery Court of Franklin County, Mississippi, the appointment of a Conservator for the person and estate of Emma Jane Hester. Before the trial was had on this matter, the Chancellor, in her Order Setting Trial and Prohibiting Disposal and Transfer of Assets, dated October 24, 2006, issued an order to protect the putative ward's estate from persons intending to benefit from the estate other than Emma Jane Hester herself. ( R. at 6). The order simply required an accounting or all accounts for the ninety (90) days preceding the hearing scheduled for October 24, 2006. ( R. at 6). It specifically restricted any and all third-parties from benefitting from, living off of, consuming or exhausting any of Mrs. Hester's resources. ~~In~~ no way did it preclude Emma Jane Hester from accessing her own accounts for her own benefit. On October 24, 2006, a trial was had on whether a Conservator for the person and estate of Emma Jane Hester was necessary, and evidence presented and testimony was heard. ( R. at 6). During the trial, several witnesses, including her family physician Dr. Ben Yarbrough as well as several family members testified that Emma Jane Hester was incapable of managing her affairs. ( R. at 47-88). Before ruling on the matter, the Chancellor considered Emma Jane Hester's health and the safety of both her person and estate. The Appellee, David Hester, contends that after weighing the presented evidence the Chancellor did properly find that Emma Jane Hester was incapable of managing her own affairs and was in need of a conservator for both her person and her estate.

### SUMMARY OF ARGUMENT

The Conservatorship established for Emma Jane Hester is clearly valid and should be upheld for the following reasons: (1) there is no magic language required to be the in physicians' certification letters, therefore, the certifications substantially complied with the language and as such are valid certifications comporting with Mississippi Code Annotated Section 93-13-255; and (2) the record clearly demonstrates that the chancellor's ruling was supported by the overwhelming weight of the credible evidence and should not be disturbed in the absence of manifest error.

Further, the Appellee contends that the chancellor's Order dated October 24, 2006 is not tantamount to a temporary restraining order on the putative ward and as such is not subject to the requirements of Mississippi Rule of Civil Procedure 65. This particular Order specifically allows Emma Jane Hester to access her accounts in order to provide for her everyday ordinary care and maintenance. Additionally, the issuance of this Order is well within the inherent powers of the chancellor as the ultimate guardian of wards of the court and as part of her duty to protect those who cannot do so themselves. Clearly, this Order and the Conservatorship for Emma Jane Hester is valid and should be upheld as such.

## ARGUMENT

### **I. THE CONSERVATORSHIP OVER THE PERSON AND ESTATE OF EMMA JANE HESTER IS CLEARLY VALID AND SUPPORTED BY THE OVERWHELMING WEIGHT OF THE EVIDENCE PRESENTED.**

#### **A. The chancellor properly admitted the certifications of Dr. Benjamin Owen Yarbrough and the psychologist, Dr. Linda Wilborn, as conforming with the requirements of MCA §93-13-255.**

With the establishment of conservatorships in the State of Mississippi in 1962, the Mississippi Supreme Court broadened the class of people recognized as needing assistance in the management of their person and estate. *Harvey v. Meador*, 459 So.2d 288 (Miss. 1984). In addition to the Mississippi Supreme Court establishing the conservatorship, the legislature adopted §93-13-251 *et seq.*, permitting the courts to appoint conservators for persons incapable of managing their own estate by reason of advanced age, physical incapacity or mental weakness. At issue here, is whether Mississippi Code Annotated §93-13-255 was satisfied and thus a valid conservatorship was established for Emma Jane Hester.

That section states, in relevant part that

The chancery judge shall be the judge of the number and character of the witnesses and proof to be presented, except that there shall be included therein at least two (2) physicians who are duly authorized to practice medicine in this state, or another state or one (1) such physician and a psychologist, licensed in this state or another state, each of whom shall be required to make a personal examination of the subject party, and each of whom shall make in writing a certificate of the result of such examination, which certificate shall be filed with the clerk of the court and become a part of the record of the case. They may also be called to testify at the hearing.



Mississippi Code Annotated 93-13-255 (1972).

In the present case, the Appellant, Emma Jane Hester, was examined by her primary physician, Dr. Benjamin Yarbrough, as well as a psychologist, Dr. Linda Wilborn. Both personally examined the Appellant and certified that she was incapable of managing her business affairs. The Appellant contends, however, that neither of the certifications conformed with MCA §93-13-255. This is simply not the case. In addition to this Court following the long standing rule that the substance of a document will control over its form, the Appellee also urges this Court to adopt a practical reading of this statute. It is the Appellee's position that a practical reading of MCA §93-13-255 would not require a physician to be learned in the intricacies of legal certification formalities as long as the official finding of the physician and psychologist definitively conveys that their opinion was based on their personal examination of the putative ward and based on their reasonable medical judgment. There is no "magic language" required by the statute, as the Appellant claims. As such, it is the Appellee's position that the Chancellor properly allowed the certifications of both Dr. Benjamin Yarbrough and psychologist, Dr. Linda Wilborn.

Further, the Appellee, David Hester contends that any lack of formalities in Dr. Yarbrough's certification should have been resolved by his live testimony during the trial of this matter. ( R. at 47-54). The Appellant had ample opportunity at the trial to cross-examine Dr. Yarbrough on his findings. ( R. at 54-66). Therefore, there could be no resulting prejudice from their admission into evidence.

**B. The Chancellor's findings are supported by the overwhelming weight of evidence.**

It is the chancellor's job to resolve factual disputes. *Murphy v. Murphy*, 631 So.2d 812, 815 (Miss. 1994). Therefore, this Court should not disturb a chancellor's findings of fact unless those findings are manifestly wrong or clearly erroneous, or where the chancellor applied the incorrect legal standard. *In re Estate of Ladner*, 909 So.2d 1051, 1054 (¶6) (Miss. 2004). This Court has previously held the position that the chancellor is in the best position to evaluate the credibility of the witness testimony and it has not been the practice of this Court in the past to replace the chancellor's judgment with this Court's own. *In re Estate of Carter*, 912 So.2d 138, 143 (¶18) (Miss. 2005).

The Appellee, David Hester, contends that this Court should follow the above line of precedent. This case reaches the Court with an extensive record of evidence presented in favor of the establishment of the conservatorship. The evidence presented and admitted at trial easily hurdles the burden of proof in this case, which amounts to a preponderance of the credible evidence. The chancellor found from the record shows on multiple accounts that Mrs. Hester is unable to manage her estate. During extensive questioning, it was clearly demonstrated that she was confused as to how many bank accounts she had, where they were located, and who had access to the account money. ( R. at 101-12). On multiple occasions "loans" which she didn't even remember were made to her live-in son Glen without any terms of repayment. ( R. at 123-24). With regards to the "loans," no direct proof that Emma Jane

Hester was cheated is required. *In re Conservator of Demoville*, 856 So.2d 607, 610 (Miss. 2004). “To require everyone seeking an appointment of a conservator to prove that the person at issue was being cheated by someone goes far beyond anything required by the statute.” *Id.* There was also testimony during the trial, that on multiple occasions, Glen would violently shout at Mrs. Hester. ( R. at 194).

As for the need of a conservatorship to be appointed over Mrs. Hester’s person, there is extensive evidence that she lived in unsanitary and unsafe conditions of which she was unwilling to change. ( R. at 223-28). The record clearly states that multiple freezers that were damaged since Hurricane Katrina, still remained full of spoiled food. ( R. at 217). Additionally, there were a number of vehicles, purchased by her live-in son, Glen, that were parked at the house in such a manner that it would render emergency access to Mrs. Hester’s home nearly impossible. ( R. at 215). Since Mrs. Hester is 78 years old and has several medical conditions, including diabetes, that have a high probability of requiring immediate medical attention, the cluttered cars create a safety hazard for the putative ward by restricting medical access to her home. ( R. at 213-14). Testimony was given by the Mrs. Hester’s own daughter that she wished that her children could spend more time with their grandmother, however, she worried about her children’s safety every time they would go to Mrs. Hester’s home. ( R. at page 211).

In *Harvey*, 459 So.2d 288 (Miss. 1984), the Court adopted a “management competency test” with regards to the proof required for the establishment of a

conservatorship which states: "A test of management competency can be answered by considering the factors of: ability to manage, or improvident disposition, or dissipation of property, or susceptibility to influence or deception by others, *or similar factors*. *Harvey*, 459 So.2d at 292 (emphasis added). There is nothing in that test that states a chancellor is required to consider each of those factors in order to appoint a conservator. *In re Conservator for Demoville*, 856 So.2d 607 (Miss. 2004). The chancellor may just find that one of those factors to be sufficient for an appointment of a conservator. *Id.* Again, with the burden of proof in a conservatorship matter only being a preponderance of the credible evidence, the Appellee contends that the evidence presented far exceeds this burden.

**II. THE CHANCELLOR'S RULING, DATED OCTOBER 24, 2007, REQUIRING A 90-DAY ACCOUNTING OF THE PUTATIVE WARDS ACCOUNTS WAS PROPER AND NOT TANTAMOUNT TO A RULE 65 RESTRAINING ORDER**

The order issued October 24, 2006, does not amount to a Rule 65 Temporary Restraining Order on Emma Jane Hester. Unlike the inherent nature of the of a Rule 65 Temporary Restraining Order and Appellant's claim in their brief to this Court, the order did not restrict the putative ward from accessing her own accounts. The Appellant's brief attempts to mislead this Court by editing the language of this order in their brief. Page 8 of the Appellants brief cites this order as stating "neither Emma Jane Hester nor any person living with her or associated with her business matters shall expend any funds... until trial be had on this matter." However they neglected to include the portion of that sentence that allowed for the expenditure of funds to be used "directly for Emma Jane Hester's care and

maintenance, being normal routine everyday living expenses.” It merely prevents others from exercising undue influence over Mrs. Hester and benefitting at her expense. The Order itself has no bearing on access to Mrs. Hester’s accounts for use as part of Mrs. Hester’s routine daily care and maintenance. As stated on page 7 of the trial transcript, all that is being required is an accounting of Mrs. Hester’s accounts for the 90 days preceding the October 24, 2006 hearing. Also, the Appellee, David Hester, assumes the position that it is not only well within the chancellor’s powers to issue such orders in this case, it is also the Chancellor’s duty to provide such measures to ensure that those persons who are vulnerable to improper influence and cannot maintain for themselves are protected by the court. In *Union Chevrolet Co. v. Arrington*, 138 So. 593, 595 (Miss. 1932), referring to persons *non compos mentis* the Court noted, “[t]he court... will make for them every valuable election; will rescue them from faithless guardians, designing strangers... and in general will and must take all necessary steps to conserve and protect the best interest of these wards.” This being said, “[t]he chancellor is the ultimate guardian of wards of the court.” *In re Conservatorship of Cole*, 958 So.2d 276 (Miss. 2007) (citing *Jackson v. Jackson*, 732 So.2d 916, 921 (¶7) (Miss. 1999)). The case *sub judice* exposes the principle behind these two perfectly. The chancellor’s Order dated October 24, 2006 was her attempt to exercise her power and duty to protect this vulnerable ward. Additionally, it is the Appellee’s contention that the Chancellor in this case exercised the least restrictive measures possible to ensure that the putative ward was adequately protected from further influence that might result in the

dissipation of her property before evidence could be heard and the matter could be ruled upon.

### CONCLUSION

The Appellee, David Hester, has illustrated clearly for this Court the numerous reasons why the chancellor's findings regarding the necessity to establish a conservatorship for the person and estate of Emma Jane Hester must not be disturbed. First, MCA§ 93-13-255 requires no "magic language" to be contained in the examining physician's certificate, thus the substance of the certificates should prevail over their form resulting in their proper admission into evidence. Secondly, since the chancellor had the ability to evaluate the witnesses and the proof presented during the trial, her findings should not be disturbed in the absence of manifest error. Additionally, the evidence admitted, taken as a whole, clearly meets the burden of proof for this matter.

Finally, the Order that Appellant attempts to characterize as a temporary restraining order, is no such thing. As the chancellor is the ultimate guardian of wards of the court with a duty to protect those who are unable to protect themselves, the chancellor was acting well within the realm of the inherent power and duty to protect Mrs. Hester by issuing the Order dated October 24, 2006. The Order does not, as Appellant claims, restrict Emma Jane Hester from accessing her accounts. The Order specifically provides that she can access her accounts to provide for her care and maintenance. Thus, the Order does not amount to a temporary restraining order which would be subject to the requirements of Mississippi Rule


of Civil Procedure 65. Given the above conclusion, the conservatorship in place for Emma Jane Hester is valid and must be upheld.


Respectfully Submitted,

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By: 

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**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true copy of the above and foregoing document on the following:

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placing a copy of the same in the United States mail, postage prepaid, addressed to their regular business mailing address.

This the 11<sup>th</sup> day of October, 2007

  
MATTHEW M. WILLIAMS