

**IN THE SUPREME COURT OF MISSISSIPPI**

**EMMA JANE HESTER**

**APPELLANT**

**VS.**

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

**DAVID HESTER**

**APPELLEE**

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**REPLY BRIEF OF THE APPELLANT**

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## **ARGUMENT**

### **I. APPELLEE'S CONTENTIONS AND DEFENSES ARE INACCURATE, MISLEADING AND CONTRARY TO SWORN TESTIMONY.**

This Reply Brief of the Appellant will set the record straight as to the allegations and false statements of the Appellee. Appellant will show this honorable court the reasons, through sworn statements and Mississippi law, as to why the trial court erred.

Mississippi Rule of Civil Procedure 65 addresses injunctive relief. Rule 65 states that

A temporary restraining order may be granted, without notice to the adverse party or his attorney if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice. (Emphasis added.)

Mississippi Rule of Civil Procedure 65 (b).

Emma Jane Hester was prohibited from accessing her accounts as Appellant noted in her brief. Appellee, in his brief, stated that the Order of the trial court did not "preclude Emma Jane Hester from accessing her own accounts for her own benefit." (Appellee Brief p. 2.).

From a practical as well as legal perspective, it is inconceivable that a chancellor would grant a temporary restraining order which in effect limits a person subject to a conservatorship proceeding from accessing their own funds. The Order filed October 24, 2007, but issued approximately October 2, states "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 on October 24, 2006.” A copy of said Order is attached hereto as Exhibit “A” and incorporated herein by reference. The unsupported allegations and statements made by the Appellee are simply false. Further, the action on part of the Chancellor is a temporary restraining order and said conduct is governed by Mississippi Rule of Civil Procedure 65, and, accordingly, must fail.

The Appellee David Hester’s brief is not only misleading, but presents false and inaccurate representation to this Court. The Appellee contends in his brief that during the trial on this matter, “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” (Appellee Brief p. 2). However, Appellee makes no reference to the transcript to support this blatant misrepresentation. The actual testimony of Dr. Ben Yarbrough completely contradicts the misleading assertions of Appellee. Dr. Yarbrough testified under examination that Emma Jane Hester “is capable of managing a fair amount of her medical needs every day.” Dr. Yarbrough further opines that “I do think she is capable of taking care of herself in a general fashion day to day.” (R. at 47-88). Appellee is simply attempting to characterize the events that transpired at trial in a misleading manner that is contrary to the testimony of the doctor and evidence presented to the trial court.

The Mississippi Supreme Court in Harvey v. Meador acknowledges that a conservator may be appointed by the chancery court if a person by reason of advanced age, physical incapacity, or mental weakness is incapable of managing her own estate. Mississippi Code Annotated Section 93-13-251; See also Harvey v. Meador, 489 So.2d 288 (Miss. 1984). Here, the reporting physician indicates that Appellant Emma Jane Hester is capable of managing most of her affairs on a day to day basis.

Clearly, the findings and reports of Dr. Yarbrough, in no way indicate that Emma Jane Hester needs the limitations and restrictions that are imposed by a conservatorship. Accordingly, the conservatorship must fail because the statutory requirements were not followed; and assuming arguendo that the conservatorship is valid, which it clearly is not, then the chancellor's decision is against the overwhelming weight of the evidence and the conservatorship implemented by the trial court must fail.

### CONCLUSION




It is clear from the sworn trial testimony and Mississippi case law provided above, that the trial Court erred in establishing a conservatorship for the person and estate of Emma Jane Hester. Appellee is apparently attempting to mislead this Court down a "rabbit hole" Meador management analysis based on unsupported allegations. The Appellee, as did the Chancellor, is ignoring the Statutory requirements of two doctors' certificates pursuant to MCA 93-13-255 (1972). Appellee simply dismissed the statutory language as not being "magical" (Appellee Brief p. 5) when in fact the statutory requirement of doctor certificate is a mandatory prerequisite to establishing a prima facie case. Until such a requirement was met, Emma Jane Hester was under no obligation to retain experts as to her mental or management abilities - not that she could have hired anyone given that her funds have remained frozen under an illegal Restraining Order. The appellant, Emma Jane Hester as stated in her original brief contends the conservatorship is invalid due to failure to comply with the statutory requirements of MCA93-13-255. The appellee requested and was granted authority to supplement the record with the entire transcript. However, in lieu of referencing specifics of the transcript, appellee has chosen to make false and inaccurate

representation to this Court while continuing to ignore the statutory requirements.

The testimony reiterates that Appellant is physically and mentally capable of providing for her own needs, and that she is able to manage her estate and own affairs.

Respectfully submitted,

**EMMA JANE HESTER**

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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:

**Lane B. Reed  
P.O. Box 188  
Meadville, MS 39653**

**Betty Sephton  
Supreme Court Clerk  
P.O. Box 117  
Jackson, MS 39205**

**Honorable Debbra Halford  
Chancellor  
P.O. Box 578  
Meadville, MS 39653**

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

This the 24 day of October, 2007.

  
\_\_\_\_\_  
JOSEPH P. DURR

IN THE CHANCERY COURT OF FRANKLIN COUNTY, MISSISSIPPI

IN THE MATTER OF THE CONSERVATORSHIP  
OF EMMA JANE HESTER

CAUSE NO. 2006-163

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ORDER SETTING TRIAL AND PROHIBITING  
DISPOSAL AND TRANSFER OF ASSETS

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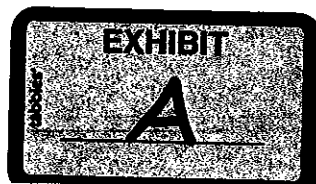
CAME ON hearing on the *Petition For Appointment Of Conservator And Issuance Of Letters Of Conservatorship* filed by David E. Hester, and counsel for Emma Jane Hester, Joseph Preston Durr, moved the Court for a continuance and the Court does find, order and adjudicate as follows:

1.

This matter shall be set down for trial on the *Petition For Appointment Of Conservator And Issuance Of Letters Of Conservatorship* filed by David E. Hester on Tuesday, October 24, 2006, at 9:00 A.M. at the Franklin County, Mississippi Courthouse, in Meadville, Mississippi.

2.

The Guardian Ad Litem of Emma Jane Hester, Kirby Maxwell Graves, Jr., shall be served a copy of this order and directed to be present.



3.

Neither, Emma Jane Hester nor any person living with her or associated with her business matters shall expend any funds, which are not directly for Emma Jane Hester's care and maintenance, being normal routine everyday living expenses. No third parties shall receive any funds of Emma Jane Hester until trial be had on this matter on October 24, 2006.

4.

The Court finds that in order to determine whether a Conservator is needed for Emma Jane Hester it is necessary to review a complete and total report of her income and expenditures. <sup>DKH</sup> ~~Counsel for~~ Emma Jane Hester is directed to provide to the Court a full <sup>Counsel and DKH</sup> accounting of income and expenditures of Emma Jane Hester <sup>DKH</sup> ~~and any other person living with her or associated with her business matters~~, beginning ninety (90) days next prior to the <sup>02 DKH</sup> date of the Petition being filed on October 22, 2006. All income and expenditures should be <sup>Mrs. Hester DKH</sup> listed and ~~counsel~~ shall file proof of income and expenditures in the form of cancelled checks or receipts for each documented item.

5.

A copy of this accounting of Emma Jane Hester ~~and each and every person living with her or associated with her business matters in any way~~, shall be submitted to the Court <sup>and DKH</sup> ~~under~~ <sup>Counsel and</sup> seal <sup>by</sup> ~~through counsel for~~ Emma Jane Hester, and shall be due on or before 9:00 a.m. on October 24, 2006. The Accounting referenced hereinabove shall include any joint accounts Emma Jane Hester has with any party to this action or third parties and shall include all

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income and all expenditures.

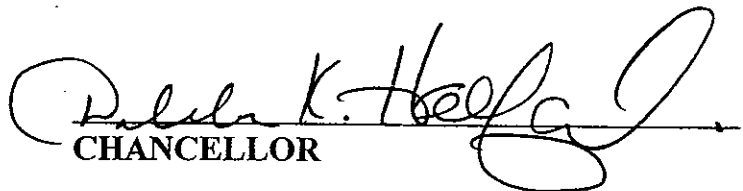
6.

No third party shall receive any benefit of any kind during the pendency of this matter. There shall be no disposal or transfer of any asset belonging to Emma Jane Hester DKH

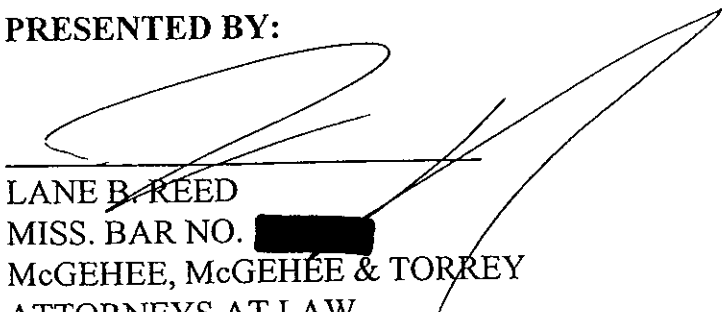
or which she owns as interest, during pendency of this matter. *and her resources and income may only be used to provide for her health and welfare, including her living expenses of maintaining her home, as noted in paragraph 3 above.*

~~A certified copy of this Order shall be served upon each and every third party living with Emma Jane Hester or in any way involved or associated with her business matters. The Order shall be implemented forthwith.~~

ORDERED this the 24<sup>th</sup> day of October, 2006.

  
CHANCELLOR

**PRESENTED BY:**

  
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