

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI  
NO. 2009-CA-01672**

**EMORY HOBBS HUTCHISON, JR.**

**APPELLANT**

**VERSUS**

**RUTCHEL CLARIN HUTCHISON**

**APPELLEE**

**APPEAL FROM THE CHANCERY COURT OF  
LOWNDES COUNTY, MISSISSIPPI**

**BRIEF OF THE APPELLEE**

**ORAL ARGUMENT NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record for the Appellee certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. EMORY HOBBS HUTCHISON, JR., Appellant
2. HAL H.H. MCCLANAHAN, III, Attorney for Appellant
3. RUTCHEL CLARIN HUTCHISON, Appellee
4. MARK G. WILLIAMSON, Attorney for Appellee
5. HONORABLE H. J. DAVIDSON, JR., Chancellor

RESPECTFULLY SUBMITTED, this the 26<sup>th</sup> day of August, 2010.

  
MARK G. WILLIAMSON

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## **STATEMENT OF THE ISSUES**

### **EMORY HAS RAISED THE FOLLOWING ISSUES ON APPEAL:**

**THE CHANCELLOR ABUSED HIS DISCRETION OR WAS MANIFESTLY WRONG BY NOT AWARDING PRIMARY PHYSICAL CUSTODY OF THE MINOR CHILDREN, EMORY HOBBS HUTCHISON, III, BORN JULY 6, 2000 AND RICHARD HOBBS HUTCHISON, BORN FEBRUARY 24, 2003, TO THE FATHER, EMORY HUTCHISON, IN THE OPINION AND JUDGMENT DATED SEPTEMBER 9, 2009, AND THE ORDER OVERRULING THE MOTION TO RECONSIDER DATED SEPTEMBER 14, 2009.**

## **STATEMENT OF THE CASE**

### **A. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW**

On September 15, 2008, in the Chancery Court of Lowndes County, Mississippi, Emory filed an Original Complaint for Divorce seeking a divorce on the grounds of habitual cruel and inhuman treatment, adultery and/or irreconcilable differences. Emory sought custody of their 2 children, Emory Hobbs Hutchison, III, born July 6, 2000, who was 8 years old at the time of the filing of the divorce and Richard Hobbs Hutchison, born February 24, 2003, who was 5 years old at the time of the filing of the divorce.

On October 20, 2008, Rutchel filed an Answer to Complaint for Divorce and Cross-Complaint for Divorce seeking a divorce on the grounds of habitual cruel and inhuman treatment, uncondoned adultery and in the alternative, irreconcilable differences. Rutchel sought custody of their 2 children. On October 24, 2008, Emory filed a Denial of Affirmative Matters Raised in Answer to Complaint for Divorce and Answer to Cross-Complaint for Divorce.

On November 5, 2008, the Court entered a Temporary Order awarding temporary custody of the 2 children, Emory Hobbs Hutchison, III and Richard Hobbs Hutchison to Emory. Rutchel was awarded standard visitation. Rutchel was ordered to pay Emory temporary child support in the amount of \$850.00 per month, which was later reduced to \$488.00 per month.

On May 20, 2009, the parties presented to the Court an Agreed Order withdrawing all pleadings inconsistent with an application to the Court for a divorce on the grounds of irreconcilable differences and an Order Withdrawing Fault Grounds which contained a list of issues the parties wanted the Court to decide, two of which were child custody and child support.

The trial was held on May 20, 2009 and May 21, 2009. The Judge filed his opinion on August 27, 2009, wherein he awarded the parties joint legal custody of their 2 children, awarded Rutchel physical custody and awarded Emory reasonable rights of visitation. The Final Decree of Divorce was signed and filed by the Court on September 9, 2009. On September 14, 2009, Emory filed a Motion to Stay Enforcement of Decree and a Motion to Alter or Amend. On September 14, 2009, Rutchel filed an Objection to Motion to Stay Enforcement of Decree and an Objection to Motion to Alter or Amend. On September 14, 2009, the Court signed and filed its Order denying both motions.

Aggrieved by the Court's decision awarding custody of the 2 children to Rutchel, Emory appeals to this Court.

## **B. FACTS**

Emory and Rutchel were legally married in Panama City, Florida on October 1, 1999. They lived together as husband and wife until their final separation in February of 2008 in Lowndes County, Mississippi and they have not lived together since as husband and wife. Two (2) children were born to the marriage, Emory Hobbs Hutchison, III, born July 6, 2000, age 8 at the time of trial

and Richard Hobbs Hutchison, born February 24, 2003, age 6 at the time of trial. (R6) At the time of trial, Emory was 37 years old and disabled. (R65) At the time of trial, Rutchel was 39 years old and in very good health. (R105-106)

While in the Air Force in 1997, Emory had an accident that injured his back. Emory and Rutchel were married on October 1, 1999. Their first child, Emory Hobbs Hutchison, III, was born July 6, 2000. Emory had back surgery in June 2001. He had 2 rods and 6 screws put in his lower back from L4 to S1. In August of 2001, Emory filed claims for military disability and social security disability. On September 25, 2001, Emory filled out a form in support of his military disability. Emory received a letter from the Department of Veterans Affairs dated March 25, 2002, in which he was awarded total military disability benefits with a 60% disability rating to the body as a whole. Their second child, Richard Hobbs Hutchison, was born February 24, 2003. Emory also received a written decision from the Social Security Administration dated December 16, 2003, in which he was awarded total permanent disability benefits. On July 7, 2007, Emory filled out a Continuing Disability Review Report with the Social Security Administration. (R6,8,20,45,48-50,56,113-114, Exh. D-2, D-3, P-5, P-6)

Emory and Rutchel married October 1, 1999 in Florida. Immediately after they were married, Emory got orders to report to Holloman, New Mexico. They lived in Holloman from October 1999 until July 2001. (R113) Emory was discharged from the Air Force after his back surgery in June 2001 and the family relocated to Florida in July or August 2001. (R116) Rutchel took care of their oldest child from his birth until they moved to Florida because Emory was having a lot of back problems and he was not able to do very much. (R116) Rutchel also had to do all of the physical work, household work and cooking. She would cook before she went to work to make sure Emory had food for lunch and dinner. She washed the dishes, washed the clothes and cut and watered the

grass. She cleaned their cars and tended to their pets. (R117)

When they moved to Florida in July or August of 2001, they moved in with his parents. They lived with his parents for about 8 months. Rutchel was still the one taking care of their oldest child while they lived with his parents. Emory's parents were not able to help out with the child because his mother is physically disabled and his father is a full time fireman working 24 hour shifts. (R117)

On September 25, 2001, three (3) months after his back surgery and during the period of time they are living with his parents in Florida, Emory fills out a form to be used in his military disability claim which provides an accurate description of the physical condition he was in at that time. (R228-230, Exhibit D-2) In response to the first question on the form that asked the claimant to describe your pain symptoms, Emory wrote:

"Lower back pain where lumbar fusion was done, it radiates down the back of both legs to my toes. Slight numbness in my lower extremities. Have to use cane to help me support myself. Sometimes I have sudden pain from my back and legs and makes me lose balance walking & sitting. Shoulder is bothering me, have burning & aching sensation from my back towards my arms & fingers."

In response to the second question on the form that asked the claimant what factors cause you to experience pain, Emory wrote:

"I cannot stand and sit too long in one position. Bending is impossible due to back injury. Reaching could be accomplished only if the object is not heavy and in close proximity to upper body. Walks with cane for about 5 minutes then have to stop and rest. Crawling & stooping is impossible due to back mostly and knee pains."

In response to the third question on the form that asked the claimant how frequently do you experience pain and how long does your pain usually last, Emory wrote:

"Everyday I have constant pain and discomfort. The intensity of pain varies from extreme to moderate."

In response to the fourth question on the form that asked the claimant what prescription or non-prescription medication do you take for relief of pain, Emory wrote:

"Oxycodone 20 mg 2 tablets every 12 hours  
Oxycodone 10 mg 2 tablets every 12 hours



Oxycodone 5 mg 1-2 tablets every 4-6 hours  
Vicodin 200 mg 1-2 tablets every 6 hours  
Celebrex 200 mg 1 tablet every 12 hours  
Hydroxyzine 25 mg 2 tablets every 6 hours”

In response to the fifth question on the form that asked the claimant how effective are these medications in relieving your pain, Emory wrote:

“These medicines have provided short temporary relief of pain, but have not provided any long term relief to date.”

In response to the sixth question on the form that asked the claimant to describe any side effects from your medication, Emory wrote:

“Mild headache, slight memory loss, fatigue, lack of concentration”

In response to the seventh question on the form that asked the claimant besides medication, have you required any other forms of therapy or treatment for relief of your pain, Emory wrote:

“I have various other types of treatment, to include physical therapy, Tens unit and ultra sound therapy which have only inflamed the areas of injuries & made pain worse”

In response to the eighth question on the form that asked the claimant does your pain prevent you from performing any of your usual daily activities, Emory wrote:

“Cooking/meal preparation- My wife pre-cooks meals for us especially when she has to go to work. Cannot stand for long period, back pain, migraine almost daily.

Personal care (bathing, hair care, dressing)- I can take a bath, shampoo hair & soap my body except legs. My wife has to help me put my pants on cause I can't bend & left my legs high.

Housecleaning- My wife does all housework.

Laundry- Load clothes into washer if hamper is on top of dryer.

Shopping- Accompanied by wife. Have to use electric shopping carts.

Sleeping- Sleep with plenty of pillows, constantly change position due to back pain, leg pain. Always uncomfortable with one position, sleep on and off due to pain. Sleep an average of 4 hours every night.

Driving- My wife drives me back and forth to any appointments or errands. Cannot sit too long in one position. Leg hurts & shooting pain towards back.

Yardwork, gardening- Cannot bend my back to any angle. Knee hurts and shoulders.

Social activities/hobbies- Limited, I think it's all gone. My injury has limited me on all strenuous activities. Feeling fatigue all the time plus pain.

Child care- Limited, cannot pick up my 1 year old son. Playtime is limited to table activities with him like coloring & drawing.

Home maintenance- My wife does most of household work.

Other- My wife has to help me fill out all paperwork and drive me to all appointments. Basically I'm dependent on her."

In response to the ninth question on the form that asked the claimant to provide any additional comments regarding how your impairment or pain limits your ability to work, Emory wrote:

"I have always been employed and enjoy going to work. Ever since my injuries, it has affected my ability to perform my duties on my job. I am in constant pain and cannot stand, sit, walk & concentrate for long. Kneeling, bending, crouching & stooping is impossible. My wife has to do all housework, yard work, take care of family, driving, shopping, and even has to help me take a bath & dress me cause I can't lift my legs too high." (Exhibit D-2)

Emory testified that the information he listed in Exhibit D-2 was an accurate description of his health problems and physical condition in 2001 after his back surgery. (R228-230, 232-233, 236-239)

Since his back surgery, Emory developed other health problems. He gained 100 pounds, which at the time of trial, he still had not lost. He went from 140 pounds to 240 pounds. He started having problems with his feet and had to get leg braces. He developed carpal tunnel syndrome in both hands and had to get arm braces. He developed sleep apnea and had to go to sleep every night with oxygen. (R115) Emory has been taking antidepressants since 2001 or 2002. (R235) Emory was hospitalized for acute pancreatitis for 2 weeks and almost died. (R120) He also had shoulder surgery. (R123)

Emory was discharged from the Air Force after his back surgery in June 2001 and the family

relocated to Florida in July or August 2001. (R116) Charles Lester is Emory's first cousin. (R10) Charles lived in Florida near Emory, Rutchel and their oldest child from the summer of 2001 through February of 2002. (R11) In response to how often he saw Emory, Rutchel and their oldest child on a weekly or monthly basis during this period of time, Charles testified it may not have been every week. (R12) Charles knew Emory had a back injury. Charles testified that Emory's back injury did not affect his ability to take care of their oldest child. Charles did not know of anything Emory could not do. According to Charles, Emory did everything. (R12) Charles was shown Exhibit D-2, and was asked to read what Emory had written under child care. Charles read aloud, "Child care-Limited, cannot pick up my 1 year old son. Playtime is limited to table activities with him like coloring & drawing." When confronted with his version of child care and Emory's version of child care being completely opposite of each other, Charles stated that he didn't know what to tell you on that. (R20-21) When confronted with other limitations listed by Emory in Exhibit D-2, Charles testified that he wasn't there to see him, you know, all day everyday. He didn't really know of like the entire daily routine of what went on at that time. (R21)

Emory received a letter from the Department of Veterans Affairs dated March 25, 2002, in which he was awarded total military disability benefits with a 60% disability rating to the body as a whole. (Exhibit P-5)

They lived with Emory's parents in Florida for about 8 months and then moved out. They bought a home in Florida and continued to live in Florida until November of 2003. (R117-118) While they were living in Florida on their own, their second child was born. (R118) During the period of time they were living on their own in Florida, Emory's physical condition stayed the same. Rutchel was taking care of the 2 children. Rutchel was also working, taking Emory to his doctor's appointments, taking him to physical therapy and doing the household work. (R118-119)

They left Florida in November, 2003 and moved to San Antonio, Texas because she got a promotion at work. They lived there in San Antonio until March of 2006. (R119)

Emory received a decision from the Social Security Administration dated December 16, 2003, in which he was awarded total permanent disability benefits. (Exhibit P-6) On page 2 of Exhibit P-6, there is a narrative of an examination of Emory on February 14, 2003, wherein Emory reported his symptomatology included pain said to be aching, sharp, penetrating, throbbing, tender, nagging, shooting, burning, numb and stabbing in nature with an intensity of 8. Aggravating factors were said to include sitting, standing, walking, bending, driving, coughing, sneezing and lifting. Associated signs and symptoms were said to be numbness, weakness, loss of control of the bowels and limping. Emory reported that medication had not improved his ability to function. His assessment was chronic low back pain syndrome, history of interbody fusion and facet arthropathy. Also on page 2 of Exhibit P-6, there is a narrative of an examination of Emory on July 18, 2002, wherein Emory reported that he was on continuous pain medication to keep him functional and that he had to use a cane for walking, but even then he sometimes lost his balance. He also complained of numbness and tingling to both his hands and that he had been diagnosed with carpal tunnel syndrome. Emory also reported that he was unable to do most of his activities, he had to walk using a cane and could not do household or daily activities. That his wife was helping him, he could not even dress himself without the help of his wife and if he did not take pain medication he could not function at all. On page 3 of Exhibit P-6, Dr. Syed Gilani, the examining physician during the July 18, 2002 examination, reported that his assessment of Emory was chronic low back pain secondary to injury in 1993, status post surgery with laminectomy and spinal fusion. Dr. Gilani reported that the MRI scan was consistent with findings of surgery and degenerative disc disease. Dr. Gilani reported that they had MRI scan and notes available from neurosurgery from January 2002 which

were consistent with recurrent and persistent low back and bilateral leg pain. Dr. Gilani reported that Emory's symptoms were persistent and had not changed since his previous evaluation. (His previous evaluation being in October, 2001.) Also on page 3 of Exhibit P-6, there is a report of a consultative psychological evaluation for Emory performed by Dr. David A. Loiry on July 26, 2002, wherein Emory reported that it hurts his back and legs when he sits, he has shooting pains when he walks, and it hurt too much to bend. He reported that the pain kept him awake at night, he did not do much during the day, and his wife did all the housework. Dr. Loiry reported that his diagnosis of Emory was mood disorder due to multiple physical impairments with depressed features. (Exhibit P-6)

While living in San Antonio, Emory was hospitalized for acute pancreatitis for 2 weeks and almost died. (R120) Rutchel testified that she could no longer do it all by herself. When asked what she meant by that statement she replied, working full-time, taking care of the household, going with Emory to his doctor's appointments and taking care of the children. (R120) Rutchel called her mother, who lived and worked as a postal worker in the Philippines and asked her to come to San Antonio and help her with everything. (R120) Her mother agreed to come and in order to do so had to retire early from the post office. (R121) Rutchel's mother moved in with them in November of 2005 and immediately assumed most of the household work, laundry, ironing the clothes, yard, helping with the kids, bathing and cooking. (R121) Emory's health is not getting any better and maybe getting worse. He still has back problems, sleep apnea, has to sleep with oxygen every night, leg problems, knee problems and carpal tunnel. (R122)

In March of 2006, they move from San Antonio, Texas to Columbus, Mississippi. Rutchel got another promotion and the family relocated to Columbus. (R122)

Emory and Rutchel talked about divorce in the summer of 2006. During their conversations about a divorce, Emory told Rutchel that they had \$60,000.00 in credit card debt. (R125) Emory had

handled all of the money and paid all of the bills during their entire marriage. (R189-190, 201) Emory suggested that Rutchel volunteer with her employer to go over to Iraq and work for a year, send him the money and he would pay off all of the \$60,000.00 of credit card debt. Emory was aware that other people with her company had gone to Iraq and tripled the amount of money they made here. He figured that way, if they still wanted to go through with a divorce when she got back they would not have to deal with \$60,000.00 worth of credit card debt. (R125-126) Rutchel did not want to go to Iraq, but she finally agreed and signed up to go. (R126-127)

Emory filled out a Continuing Disability Review Report with the Social Security Administration on July 7, 2007. (Exhibit D-3) On page 1 of this report, Emory listed his height and weight as 5' 6", 248 lbs.

In response to a question on page 2 of this report, if there has been a change (for better or worse) in your illnesses, injuries or conditions since the date of your last medical disability decision, Emory wrote:

"I have a broad disc bulge L3-L4, with increased spinal stenosis. Diagnosed with severe carpal tunnel syndrome (both hands). Left shoulder surgery tore tendon and decompression. Both feet have plantar fasciitis. Use C pack machine for sleep apnea every night."

In response to a question on page 2 of this report, within the last 12 months, have you seen a doctor/hospital/clinic or anyone else for emotional or mental problems, Emory wrote:

"I am currently on Cymbalta and Welbutrin."

In response to a question on page 3 of this report, list each doctor/hmo/therapist/other person who has treated you within the last 12 months and list the reasons for the visits and what treatment was received, Emory wrote:

"Dr. Kevin P. Jouzapavicius - Blood pressure, acid reflux, high cholesterol-Medications and referrals. Dr. Eric Thomas-Left shoulder pain with MRI showing moderate-severe tendinitis with small partial thickness tear of distal supraspinatus tendon, carpal tunnel both hands-Left shoulder surgery. Dr. Farrukh Qureshi-Ongoing right and left hand pain interfering with sleep, worse pain at night, problems with driving and holding objects as hands go numb. Nerve conduction test performed, Dr. Qureshi recommended surgery as soon as possible. Oktibbeha County Hospital-Back

pains-Lumbar injections. GV Sonny Montgomery VA Medical Center-Back pains, blood pressure, cholesterol-Evaluation. Oktibbeha County Pain Management Clinic- Pain management-Medicine refills and evaluations.”

On page 6 of this report, Emory listed the medicine he is currently taking and the reason for taking each medicine.

Plendil	10 mg	Blood pressure
Atenolol	50 mg	Blood pressure
Claritin	10 mg	Allergy
Singulair	10 mg	Allergy
Cymbalta	60 mg	Depression
Welbutrin	200 mg	Depression
Niacin	500 mg	High cholesterol
Hydrodiuril	25 mg	High cholesterol
Simvastatin		Cholesterol
Prilosec	20 mg x 2	Acid reflux
Pyridoxine	100 mg	Carpal tunnel
Feldene	20 mg	Back & knee pains
Ultrain ER	200 mg	Back pains
Opana	10 mg	Back pains
Unesta	3 mg	Sleep
Lyrica	150 mg	Nerves
Xanax	4 mg	Muscle spasms
Linocane patch		Back pains

On page 11 of this report, when asked to describe your typical day, Emory wrote:

“I wake in pain, entire body feels like been beat. Take more pain medications to start my day. Force myself to eat breakfast and go back to bed. Lay in bed most of the day because of too much pain especially my back, hands, knees, and feet.”

On page 12 of this report, when asked about specific activities, Emory wrote:

“Dressing- My wife helps me put on underwear, pants, socks & shoes.  
 Bathing- I can wash hair and soap body except legs.  
 Caring for hair- Difficulty in holding hair brush.  
 Preparing meals- Mother-in-law cooks.  
 Doing chores (inside/outside house)- Mother-in-law does the chores.  
 Shopping- Accompanied by wife and use store electric cart.  
 Walking- Increase pain in back, knees and feet.  
 Standing- Increase pain in back, knees and feet.  
 Lifting objects- Nothing over 5 pounds.  
 Using arms- Had left shoulder surgery, mild pain with most activities.  
 Using hands or fingers- Due to carpal tunnel in both hands creates difficulty.”

Sitting- Can't sit more than 10 minutes without moving, changing positions.  
Seeing, hearing or speaking- Slurring while talking, can't hear sometimes.  
Concentrating- Cannot focus, go on a daze mostly.  
Remembering- Often forget things.  
Understanding/following directions-Have to repeat several times for understanding.  
Completing tasks- Will start something and not finish project.  
Getting along with people- Irritable, snappy, short temper, abrasive towards people."

On page 13 of this report, when asked if you use any assistive devices, Emory wrote:

"I wear eyeglasses, use hand (both) braces, assisted with cane at all times, use wheel chair (store) while shopping, use a C pack machine every night to assist breathing, use ortho leg brace to keep ankle straight."

On page 13 of this report, when asked about hobbies or interests, Emory wrote:

"Plenty of interests, but not able to accomplish because of pains." (Exhibit D-3)

In going over Exhibit D-3 with Emory, he admitted he wrote that his mother-in-law cooks. (R237) He also admitted that he wrote that his mother-in-law does the chores. (R238) Rutchel's mother lived with Emory the entire time Rutchel was in Iraq. (R191) Emory admitted that his mother-in-law has continued to live with him and the boys and that she was still living there the day of trial. (R244, 248) Emory testified that his mother-in-law lays out the kids' clothes every morning. (R248) Rutchel testified that the reason her mother has remained in the house with Emory and the boys was because she had asked her mother to stay there and help Emory and the boys. (R273) Rutchel also testified that after the divorce was over her mother was coming with her to Georgia regardless of who was awarded custody. (R272)

Rutchel left for Iraq in October of 2007. (R129) Life in Iraq was very terrifying. When Rutchel drove to work, she would have to go through checkpoints. One day, a suicide bomber, 2 cars in front of Rutchel, blew herself up. Then a mortar attack started. The window in her vehicle shattered. There were bodies everywhere. All she could think about was her boys and would she ever see them again. (R129)



Everyone agreed that Emory's total average monthly expenses listed in his 8.05 financial statement (Exhibit P-7) were incorrect and were actually around \$4,500.00 a month. (R108, 140, 198-199) Everyone also agreed that Emory's total monthly income listed in his 8.05 financial statement (Exhibit P-7) was incorrect and was actually \$4,235.00 a month. (R109-110, 200) Everyone agreed that Rutchel would be sending home about \$5,500.00 a month to apply to their \$60,000.00 credit card debt. (R127-128, 201-202) Everyone agrees Rutchel sent Emory over \$60,000.00 to pay off the \$60,000.00 in credit card debt. (R92, 111) Emory testified that the figures contained in Exhibit D-7, showing what he spent each month, while Rutchel was in Iraq, from November 2007 until September of 2008 were all accurate and correct and there were no discrepancies. (R226) In March of 2008, Emory spent approximately \$13,000.00. In April of 2008, Emory spent approximately \$12,400.00. In May of 2008, Emory spent approximately \$11,600.00. In June of 2008, Emory spent approximately \$10,000.00. (R144-145) Rutchel never suspected that Emory was not using the money she sent to him to pay off the credit card debt. (R129) Rutchel came home in September 2008 and they started talking about the credit card debt. She had been gone almost a year and believed the debt to be paid off. Emory laughed at her and told her they still owed the same amount, \$60,000.00. Rutchel sat there and cried. Emory told her that if she wanted a divorce, that this was the price she was going to have to pay. He told her that there was not a judge in this world that would make a disabled veteran pay the \$60,000.00. (R130-131) They are actually \$10,000.00 more in debt now than when she left to go to Iraq. (R138, 227-228)

Emory's first cousin, Charles Lester, testified that he has been around Emory and the children since the Fall of 2008 and that Emory's disability had no effect on his ability to take care of the children. (R15) Charles also testified that Rutchel's mother does not take care of the children. (R27) He also testified that he does not recall Rutchel's mother ironing and laying out the boy's clothes

on a regular basis. (R28)

Exhibit P-9 is a list of medication Emory is currently taking. (R241, Exhibit P-9) The list of medication that he is currently taking (Exhibit P-9) is exactly the same medication he listed he was taking in July of 2007 when he filled out Exhibit D-3, the Continuing Disability Review Report for the Social Security Administration. (R242, Exh. P-9, D-3)

Emory also testified that his condition in 2001 and 2007 is the same condition he finds himself in the day of trial. (R240) Rutchel testified that the last time they resided together as husband and wife would have been in February of 2008. She testified that Emory's physical condition in 2008 is the same as it was in 2001 or maybe even worse. (R124)

### **SUMMARY OF THE ARGUMENT**

There is more than enough direct evidence to support the Chancellor's decision to award custody of the parties' 2 children to Rutchel. There are ample medical records, as well as Emory's testimony and Rutchel's testimony supporting the Chancellor's decision. Further, the Chancellor properly evaluated each witness's credibility.

The Court made specific findings of facts which were supported by the evidence. In so doing, the Court properly applied the applicable law and there is no basis for any reversal of the Court's decision.

### **ARGUMENT**

The standard of review in domestic relations cases is limited by the substantial evidence/manifest error rule. Hensarling v. Hensarling, 824 So.2d 583, 586 (Miss. 2002) (citing Johnson v. Johnson, 650 So.2d 1281, 1285 (Miss. 1994)). The Court will not "disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." Hensarling, 824 So.2d at 586 (citing Johnson v. Johnson, 650 So.2d 1281, 1285 (Miss.

1994)).

Further, the standard of review regarding child custody cases is also limited. The Court will reverse a chancellor's decision regarding child custody determinations only when the "decision of the trial court was manifestly wrong or clearly erroneous, or an erroneous legal standard was employed." Hensarling, 824 So.2d at 587; Wright v. Stanley, 700 So.2d 274, 280 (Miss. 1997); Williams v. Williams, 656 So.2d 325, 330 (Miss. 1995). This Court will always treat the best interest of the child as the "polestar consideration." Robinson v. Lanford, 841 So.2d 1119, 1122 (Miss. 2003) (citing Hensarling, 824 So.2d at 587).

The chancellor's findings of fact will not be reversed if there is any substantial credible evidence which supports it. Dunaway v. Busbin, 498 So.2d 1218, 1221 (Miss. 1986). Therefore, if there is any supporting evidence and 'even if this Court disagreed with the lower court on the finding of fact and might have arrived at a different conclusion, we are still bound by the chancellor's findings unless manifestly wrong. Richardson v. Riley, 355 So.2d 667, 668 (Miss. 1978).

The cases that state and restate these principles are legion, and the rationale is likewise well accepted and sound, as noted by Justice Griffith, as follows:

...and when two or more reasonable inferences are deducible from the facts as proved, the inference drawn and adopted by the chancellor will control an appeal. [citations omitted]. This rule has its foundation not only in the imperative operation of the constitutional ordinances mentioned; it has a further controlling reason in this: the opportunities afforded to the trial court are far better for arriving at correct conclusions and findings upon the questions of fact. Of this matter, our Supreme Court has said: "Here we have nothing but the naked record before us; there, in most cases, the parties themselves are in the presence of the court in testifying. The manner of testifying, and their appearance upon the witness stand, and many other things, are influential in determining the triers of fact;" or as said in another case; the decision of the chancellor where the evidence is conflicting will not be disturbed on appeal, since he is better able to determine the truth of the matter than the appellate court.

(Griffith, Miss. Chancery Practice, 2 Ed., 1950, Sec 674 at 741-743).

The testimony of Charles Lester, Emory's first cousin, is not credible. Charles testified he was around Emory, Rutchel and their oldest child from the summer of 2001 through February of 2002 on a weekly or so basis. (R11-12) Emory had back surgery in June of 2001. He had 2 rods and 6 screws put in his lower back from L4 to S1. (R56, 114) Charles testified that during this period of time (summer of 2001 through February of 2002) that Emory's back injury did not affect his ability to take care of their oldest child. Charles also testified that he did not know of anything Emory could not do and that Emory did everything. (R12)

On September 25, 2001, three (3) months after Emory's back surgery and during the period of time Charles is testifying about, Emory fills out a form to be used in his military disability claim which provides an accurate description of his current physical condition. (R228-230, Exhibit D-2) In that form, Emory describes his pain as constant, varying from extreme to moderate. Emory wrote that he experienced constant discomfort. He cannot stand or sit too long in one position. Pain radiates down his back, into his legs and toes. He loses his balance while walking and sitting. Slight numbness in lower extremities. He wrote that bending, crawling and stooping is impossible. He takes a lot of prescription medication all day every day for pain. The side effects from his medication are mild headache, slight memory loss, fatigue and lack of concentration. In regards to his daily activities he wrote that his wife pre-cooks their meals. He wrote that his wife has to help him take a bath and dress him. He wrote that his wife has to do all the housework, yard work, taking care of the family, driving and shopping. He also wrote that his contributions toward child care are limited. He cannot pick up their 1 year old son. Their playtime is limited to table activities like coloring and drawing. (Exhibit D-2) When Charles was confronted with his version of child care and Emory's version of child care being completely opposite of each other, Charles stated that he

didn't know what to tell you on that. (R20-21)

Emory testified that the information he listed in Exhibit D-2 was an accurate description of his health problems and physical condition in 2001 after his back surgery. (R228-230, 232-233, 236-239) Rutchel testified that during this period of time (summer of 2001 through February of 2002) that she was the one taking care of their oldest child. That Emory's parents were not able to help out with the child because Emory's mother is physically disabled and his father is a full time fireman working 24 hour shifts. (R117)

Emory also developed other health problems after his back surgery. He gained 100 pounds. He went from 140 pounds to 240 pounds. He started having problems with his feet and had to get leg braces. He developed carpal tunnel syndrome in both hands and had to get arm braces. He developed sleep apnea and had to go to sleep every night with oxygen. (R115)

Charles' testimony was contradicted and completely discredited by the military disability claim form filled out by Emory, Emory's testimony and Rutchel's testimony. Charles no longer had any credibility. In Culbreath v. Johnson, 427 So.2d 705, 708 (Miss. 1983), the Court stated: "We recognize that because a chancellor is the only one to hear the testimony of witnesses and observe their demeanor, he or she is in the best position to evaluate a witness's credibility." See also Bell v. Parker, 563 So.2d 594, 597 (Miss. 1990); Rice Researchers, Inc. v. Hiter, 512 So.2d 1259, 1265 (Miss. 1987); Jones v. Jones, 995 So.2d 743, 747 (Miss. App.2007); Simmons v. Jagers, 914 So.2d 693, 698 (Miss. 2005); Bodne v. King, 835 So.2d 52, 58 (Miss. 2003). Once Charles' testimony was completely discredited and he was no longer considered a credible witness, the Court was justified in giving whatever weight it did to his testimony.

Charles goes on to testify that he has been around Emory and the children since the Fall of 2008 and once again he says that Emory's disability had no effect on his ability to take care of the

children. (R15) This is exactly what he said for the period of time he was around them in 2001-2002. (R11-12) Charles testified that he does not recall Rutchel's mother ironing and laying out the boys' clothes on a regular basis. (R28) Emory testified that his mother-in-law lays out the kids' clothes every morning. (R248) Rutchel asked her mother to move from the Philippines to San Antonio, Texas to help her with the children, Emory and the house. (R120-121) Emory admitted that his mother-in-law has continued to live with him and the boys after the separation and that she was still living there the day of trial. (R244, 248) Rutchel testified that the reason her mother remained in the house with Emory and the boys was because she had asked her mother to stay there and help them. Rutchel also testified that after the divorce was over, her mother was coming with her to Georgia regardless of who was awarded custody. (R272-273)

In Exhibit D-3, the Continuing Disability Review Report Emory filled out on July 7, 2007 for the Social Security Administration, Emory reported his health and physical condition getting worse. He also listed he was now taking prescription medication for emotional and mental problems. Emory summed up his typical day as "I wake in pain, entire body feels like been beat. I take more pain medications to start my day. I force myself to eat breakfast and go back to bed. Lay in bed most of the day because of too much pain, especially in my back, hands, knees and feet." Most of this report contains information supplied by Emory that reflects a man whose mental and physical condition and overall health is deteriorating. (Exhibit D-3) In this report, Exhibit D-3, Emory admitted his mother-in-law does the cooking and chores. (R238) Emory admitted that Exhibit P-9, a list of his current medication, is exactly the same medication he listed he was taking in July of 2007 when he filled out Exhibit D-3. (R242, Exh.P-9, D-3) Emory also testified that his condition in 2001 and 2007 is the same condition he finds himself in the day of trial. (R240) Once again, Charles's testimony has been contradicted and completely discredited by the Continuing Disability Review

Report filled out by Emory and by the testimony of Emory and Rutchel.

Emory makes issue out of the fact that Rutchel never called her mother to testify. There is plenty of testimony from both Emory and Rutchel to her mother's contribution around the house and with the boys. Exhibit D-3, filled out by Emory, contains some more of the same information. If Emory wanted Rutchel's mother to testify he could have called her as a witness. She was living with him and the children in the marital home. Further, the Court offered the parties an opportunity to reopen the matter for additional proof and to delve into the role of the mother-in-law, but Emory turned it down. (See Order Overruling Plaintiff's Motion to Alter or Amend and Motion to Stay Enforcement of Decree.) (R.E.27-29).

Emory wants to be rewarded for being home for the year that Rutchel was in Iraq. He also wants the Court to punish Rutchel for not being home during this same period of time. Emory is the one that suggested she go to Iraq to make enough money to pay off their \$60,000.00 in credit card debt. Upon his encouraging her to go and his assuring her that he would use the money she sent back to pay off their debt, she went to Iraq in October of 2007. (R125-127, 129) Rutchel sent Emory over \$60,000.00 to pay off their credit card debt and instead of paying off this debt, he spent it on himself. Upon arriving back home, Rutchel found out that they owed \$10,000.00 more in credit card debt than what they owed when she left. Emory failed to pay off their debt out of spite and anger towards Rutchel for her wanting a divorce. (R92,108-111,127-131,138,140, 144-145,198-202,226-228, Exh.P-7, D-7)

It is neither logical nor proper to favor one of the parents, under an Albright factor, because of that parent's malfeasance. Story v. Allen, 7 So.3rd 295, 298 (Miss. App.2008) Rutchel's absence from the home was because of malfeasance on the part of Emory. He never intended to pay off their debt and either sent Rutchel to Iraq to be placed in "harm's way" or to remove her from the home

for a significant period of time in order to bolster his claim regarding one or more of the Albright factors. It would not be logical or proper for the Court to reward such conduct.

Emory argues that there is a lack of medical evidence for the trial Court's opinion. The record is replete with medical evidence and testimony to support the chancellor's opinion. His back surgery was in June of 2001. (R114) Exhibit D-2 contains information that accurately reflects Emory's health problems and physical condition in 2001 after his back surgery. (R228-230, 232-233, 236-239, Exhibit D-2) Since his back surgery and after submitting Exhibit D-2 to the military, Emory's health deteriorated. He gained 100 pounds. (R115) He started having problems with his hands and feet. (R115) On page 3 of Exhibit P-6, there is a report of a consultative psychological evaluation for Emory performed by Dr. David A. Loiry on July 26, 2002. Dr. Loiry diagnosed Emory with mood disorder due to multiple physical impairments with depressed features. (Exhibit P-6) In 2005, Emory was hospitalized for acute pancreatitis for 2 weeks and almost died. (R120) Rutchel had to have her mother move in with them to help her out with Emory and the children. (R120-121) Rutchel testified that Emory's health was not getting any better and maybe getting worse. (R122) In Exhibit D-3, on page 2, Emory reported new medical problems which changed his health and physical condition for the worse. Also on page 2, he listed 2 prescription medications he is currently taking for emotional and mental problems. The description of his typical day on page 11 of Exhibit D-3 is worse than his condition has ever been. (Exhibit D-3) Emory testified that his condition in 2001 and 2007 is the same condition he finds himself in the day of trial. (R240) Emory also testified that Exhibit P-9, the list of medicine he is currently taking, is exactly the same medication he listed he was taking in July of 2007, when he filled out Exhibit D-3. (R242, Exh.P-9, D-3) Emory also argues that the May 21, 2009 disability determination report of the VA showing that his condition remains unchanged and therefore his disability rating continues, supports his



argument that he is fine and able to take care of his children. His condition he reports to the VA in 2001 and to the SSA in 2007 reflects a man who can't take care of himself much less two children. The information in those reports paints a picture of a man who is totally dependent on others. So if his condition in 2009 remains unchanged from 2001 and 2007, he is completely unable to take care of 2 children.

The chancellor recognized that there was a substantial conflict in Emory's testimony about his ability to care for the children and the reports he filed with both the VA and the SSA. Either the trial Court or those agencies do not have a true picture of Emory's physical condition. Emory can't have it both ways, i.e., allege he can adequately care for his children, or being virtually helpless and dependent on his wife and his mother-in-law. The conflicting evidence calls into question Emory's credibility.

A chancellor sits as a fact-finder in resolving factual disputes, and is the sole judge of the credibility of witnesses. West v. Brewer, 579 So.2d 1261, 1263-64 (Miss. 1991); Polk v. Polk, 559 So.2d 1048, 1049 (Miss.1990). On appeal, this Court is required to follow the "substantial evidence/manifest error" standard of review. West, 579 So.2d at 1264, quoting Stallings v. Bailey, 558 So.2d 858, 861 (Miss. 1990). This Court does not sit to redetermine questions of fact. Johnson v. Black, 469 So.2d 88, 90 (Miss. 1985). Further, we will not disturb a chancellor's findings of fact when supported by substantial evidence unless an erroneous legal standard has been applied or is manifestly wrong. Westbrooke v. Oglesbee, 606 So.2d 1142, 1145 (Miss. 1992); Phillips v. Phillips, 555 So.2d 698, 701 (Miss. 1989). Finally, when substantial evidence supports the chancellor's findings, we will not disturb his conclusions, notwithstanding that we might have found otherwise as an original matter. Jim Murphy & Assocs., Inc. v. LeBleu, 511 So.2d 886, 894 (Miss. 1987), aff'd 557 So.2d 526 (Miss. 1990).

Regarding Rutchel not having custody of her 2 children from a previous marriage in Florida, there is absolutely no evidence before the Court for the Court to consider.

### **CONCLUSION**

One of the primary functions of a Chancellor as fact finder is to sift through the evidence that is presented, evaluate the credibility of the proof presented and resolve issues of fact. Indeed, a Chancellor is given wide latitude in resolving those issues because they are in the best position to not only hear the spoken word from the witnesses, but to evaluate the believability of each witness and discern the truth of the evidence presented.

In this case, the Chancellor obviously felt granting custody of the 2 children to Rutchel was in the best interest of the children. There is no reason here to question the Chancellor's evaluation of that evidence.

Respectfully submitted, this the 26<sup>th</sup> day of August, 2010.

RUTCHEL CLARIN HUTCHISON

BY: Mark G. Williamson  
MARK G. WILLIAMSON

**CERTIFICATE OF SERVICE**


I, Mark G. Williamson, attorney for the Appellee, hereby certify that I have this date forwarded via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to:

Honorable H. J. Davidson  
Chancellor  
Post Office Box 684  
Columbus, Mississippi 39703

Honorable Hal H. H. McClanahan, III  
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SO CERTIFIED, this the 26<sup>th</sup> day of August, 2010.

  
MARK G. WILLIAMSON

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**CERTIFICATE OF MAILING**

I, the undersigned, Mark G. Williamson, do hereby certify that on this the 26<sup>th</sup> day of August, 2010, I personally deposited in the United States Mail, addressed to the Clerk of the Supreme Court of the State of Mississippi the following:

1. The original and three (3) copies of the Brief of Appellee, and
2. Four (4) copies of the Record Excerpts.

This the 26<sup>th</sup> day of August, 2010.

  
MARK G. WILLIAMSON

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