IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EMORY HOBBS HUTCHISON, JR. — APPELLANT

VERSUS — CASE NO. 2009-CA-01672

RUTCHEL CLARIN HUTCHISON — APPELLEE

REPLY BRIEF OF APPELLANT EMORY HOBBS HUTCHISON, JR.

APPEAL FROM THE CHANCERY COURT OF
LOWNDES COUNTY, MISSISSIPPI
CAUSE NO. 2008-0654-d

(ORAL ARGUMENT REQUESTED)

HAL H. H. MCCLANAHAN, III
ATTORNEY-AT-LAW
518 2ND AVENUE NORTH
P. O. BOX 1091
COLUMBUS, MS 39703-1091
TELEPHONE: (662) 327-3154
FACSIMILE: (662) 328-0901
EMAIL: threehlaw@bellsouth.net
MS BAR NO. [redacted]

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS PAGE

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMORY HOBBS HUTCHISON, JR. — APPELLANT

VERSUS — CAUSE NO. 2009-TS-01672

RUTCHEL CLARIN HUTCHISON — APPELLEE

REPLY BRIEF

Appellant will respond as best he can to the Appellee's Brief although the Appellee's Response is not categorized in direct response to the three grounds for reversal Appellant argued to the Court.

FACTS

With reference to the Fact Statement contained in the Brief of the Appellee on pages 2 and 6, the Appellant would state that by and large the Appellee has correctly quoted what the forms say. Unfortunately for the Appellee, there is no contradiction in the record of Charles Lester's observations of Emory in 2001 as set forth in the Appellant's original Brief that despite all of his physical limitations post surgery Emory was fully able to take care of the oldest child, Emory Hobbs Hutchison, III, at that time. Emory may have been a little bit slow in certain instances, but he could still take care of his child. That testimony has not been contradicted by anyone.

On page 6 of the Appellee's Brief, they point out that he has been taking anti-depressants since 2002. This contention, however, has already been answered in the Appellant's Brief that the Welbutrin and Cymbalta were both used for pain management, not to treat depression (¶ 9, Appellant's Brief).

On pages 8-10 of her Brief, the Appellee quotes from Exhibit P-6, which is a Disability Decision from the Social Security Administration dated December 16, 2003. On page 9 of his Brief, the Appellee makes notation of the fact that a Dr. Loiry reported a diagnosis of Emory with mood disorder due to multiple physical impairments with depressed features. The problem, from the Appellee's standpoint, however, is that there is no treatment recommended or drugs prescribed. Consequently, the disorder, if any, was not medically severe enough to disable Emory from taking care of his children or warrant correction medically.

On page 10 of the Appellee's Brief she makes note of the fact that Emory filed a Continuing Disability Review Report with the Social Security Administration on July 7, 2007. Among the other things that she noted was the fact that Emory was currently on Cymbalta and Wellbutrin. What she omits, however, is that on page 2 of the Report or page 52 of the Record Excerpts, Emory had also checked that he had not been seen by a doctor, hospital or anyone else for emotional or mental disorders in the past twelve (12) months, nor did he have a future appointment for treatment of such. This fact goes hand and glove with Emory's previous testimony that Wellbutrin and Cymbalta were used for pain management (see page 14 of Appellant's Brief in Paragraph 9.)

With reference to Emory's purported limitations as stated on pages 11 and 12 of the Appellee's Brief, Appellant would point out that these limitations were in July, 2007, before Emory's last series of treatments in 2009 as shown on page 5 of the Appellant's Brief. The crucial fact is that from 2001-2007, there had never been any progression of a disability beyond sixty percent (60%) with Emory. Secondly, in the spring of 2009 when he began using the TENS unit, the pain relief starting getting much better results. This lack of progression of the disability was corroborated in turn by the correspondence from the VA in May 2009, which was

not available at trial, but submitted and reported on pages 159-195 of the Record Excerpts. These reports were submitted by agreement as shown in the Record Excerpts to the Court as part of the Motion to Alter, Vacate or Amend. These reports also clearly show that there is no deterioration from the sixty percent (60%) disability that has existed since 2001. On page 2 of the Report on Record Excerpt 163 the report clearly shows that "you have had no prescribed bed rest in the past year. You are independent in activities of daily living. You take medication for relief of pain. On physical exam you were ambulatory with a slight limp...." In short, in the two year span since the May of 2007 Report to the Social Security Administration, the VA now finds that Emory is significantly better. This report is crucial from the standpoint that in the years 2008 and 2009 is when Emory single-handedly raised the two boys with limited assistance from the grandmother, who never testified in the case.

As quoted in the Appellant's Brief on Page 13, Emory now has access to a TENS unit in 2009 immediately before the trial, which increased the pain relief and in turn Emory's mobility. Emory expected to be granted a permanent TENS unit (T.T. 34-35, 52-54, R.E. 117-1358). In neither D2 or D3 does the Court have any evidence that Emory's condition will further deteriorate. This is further buttressed by the report submitted post-trial to the Court for consideration as correspondence from the May 2009 report of the VA from page 159-195 of the Record Excerpts. In short, there have been no increase in further disability in over eight (8) years in Emory's condition.

ARGUMENT

THE COURT WAS MANIFESTLY WRONG OR ABUSED ITS DISCRETION IN AWARDING PRIMARY PHYSICAL CUSTODY OF THE MINOR CHILDREN TO THE APPELLEE

A. LACK OF PROOF OF MOTHER-IN-LAW'S INVOLVEMENT

It is unequivocal from the medical reports as submitted to the Court that since March 2001, Emory Hutchison has been sixty percent (60%) disabled according to the doctors. This disability, however, did not prevent him from being able to take care of his child in the period of 2001-2002, as shown by the testimony of Charles Lester as previously cited in the Appellant's Brief. Appellee's statement that the testimony on page 16 of the Brief that the testimony of Charles Lester is not credible is not based in the record. Lester was testifying on what he physically observed Emory Hutchison do, not what the doctor's report said. According to what Charles Lester observed, Emory did take care of Emory Hobbs Hutchison, III.

Emory and Charles were both adamant that in the crucial year and a half that Rutchel was either in Iraq or in Fort Stewart, Georgia, that the participation of the grandmother, Daylinda Clarin, was minimal at best. As shown in the Appellant's Brief on page 11 and 12 in ¶ 4 and 5, the activities of the grandmother were relegated to laying out clothing in the early morning and coming back late in the evening from her work. The testimony of Lester to this fact was unequivocal. Neither Rutchel herself could testify to this crucial year and half period when Emory raised the two children virtually by himself and received the Parent of the Year Award from Sale Elementary School for his attention to his children nor did Daylinda come testify as to what she did although being only twenty-two miles from Court on the two days of the trial.

B. LACK OF MEDICL EVIDENCE FOR OPINION

Secondly, the Appellee has done absolutely nothing to refute the Appellant's points that the trial court has based its decision on the evidence not stated in the record. None of the Exhibits admitted by either party or the final Social Security Disability Opinion in May of 2009 support the fact or statement that as a person ages his ability to cope with medical problems becomes more acute (T.T. 81, R.E. 9). What all of the records in evidence do prove, however, is that through three reports over an eight year period Emory has never risen above sixty percent (60%) disability. All that the trial court did was opine that at some unspecified point in time Emory might slip a little. Somehow this unsupported extrapolation of a personal opinion does not seem fair to Emory, III or Richard Hobbs Hutchison, let alone Emory.

The Appellee has done absolutely nothing to support the trial court's reaching outside the record buttress its statement that "his medical condition" based on the testimony would only decline. Nowhere in the record in any of the medical reports does it substantiate such a statement. In fact, the May, 2009, report clearly shows that Emory has improved.

Finally the Appellant cites ***Story vs. Allen*, 9 So.3d 295,** as quoted in the Appellee's Brief as authority for Appellant's case. In the case at bar the trial court has made medical finding unsupported in the record upon which to base its opinion as set forth hereinabove. It also gives great credit to the non-existent testimony of the grandmother on her assisting Emory in performing his duties from 2007-2009. Rutchel could not testify about the period of time that she is in Iraq or had gone to Fort Stewart, Georgia, about what Emory did or did not do or what her mother did or did not do. The record is clear, however, that for a year and a half Emory successfully took care of the children while receiving the award for Parent of the Year.

C. FAILURE TO CONSIDER LOSS OF CUSTODY OF CHILDREN IN PREVIOUS DIVORCE AGAINST FITNESS OF THE MOTHER.

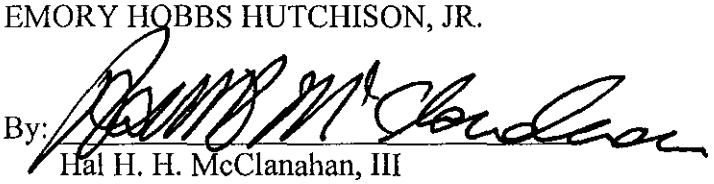
The Appellee cites no authority for its argument in its response. The only thing that the Appellee does is make one statement in a sentence on Page 22 of its Brief that says, "Regarding Rutchel not having custody of her two (2) children from her previous marriage in Florida, there is absolutely no evidence before the Court for the Court to consider." This statement candidly ignores the citation to the record (T.T. 183, Exhibit D-1, R.E. 137-158) as well as the other testimony involved. Although the undersigned counsel was unable to find a Mississippi case directly on this point, the failure of the Chancellor to include in his Albright assessment that the mother lost custody of her children in a previous custody decision, which would have included the best interest of those children, should be viewed as a negative factor against the mother and a possible basis for reversal of his Decision. The Chancellors definitely did not make a finding one way or the other than this fact about the fitness of the mother for custody.

In short, as stated in ***Story***, *supra,* the Mississippi Supreme Court stated "Indeed, this Court may only disturb the chancellor's determination regarding a modification of custody if the Chancellor is manifestly wrong, clearly erroneous, or applied an erroneous legal standard. ***Jernigan,*** 830 So.2d, 652 (¶2). This principal, however, does not mean that this Court may never disturb a chancellor's decision regarding the modification of custody. The supreme court has emphasized that "where the Chancellor improperly considers and applies the Albright factors, an appellate court is obliged to find the chancellor in error ***Hollon vs. Hollon*, 784 So.2d 943, 946** (¶11) (Miss. 2001) (Citing ***Jerome vs. Stroud*, 689 So.2d 755, 757, (Miss. 1997)** This Court is now faced with the same situation that it had in ***Storey***. The Chancellor has made findings that are inconsistent with the record and are not born out by the testimony before him.

CONCLUSION

For all of the above reasons together with the citations of authority in Appellant's Brief and decision of the trial court in awarding custody to the mother and overruling Appellant's Motion to Vacate, Alter or Amend should be reversed.

Respectfully submitted,
EMORY HOBBS HUTCHISON, JR.

By: 

Hal H. H. McClanahan, III
Attorney-at-Law
518 2nd Avenue North (39701)
P. O. Box 1091
Columbus, MS 39703-1091
(662) 327-3154
MS Bar No [redacted]

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I have on this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of Appellant Emory Hobbs Hutchison, Jr. to the Honorable Mark G. Williamson, Attorney for Appellee, at P.O. Box 1545, Starkville, Mississippi 39703-0648; the Honorable H. J. Davidson, Jr., Chancery Court Judge, P. O. Box 684, Columbus, Mississippi, 39703; and Ms. Betty W. Sephton, Clerk, Mississippi Supreme Court, P. O. Box 249, Jackson, MS 39205-0249.

SO CERTIFIED on this the 12th day of October 2010.

Hal H. H. McClanahan, III
Attorney-at-Law