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-TS-01672

RUTCHEL CLARIN HUTCHISON — APPELLEE

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

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMORY HOBBS HUTCHISON, JR. **APPELLANT**

VERSUS **CAUSE NO. 2009-TS-01672**

RUTCHEL CLARIN HUTCHISON **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

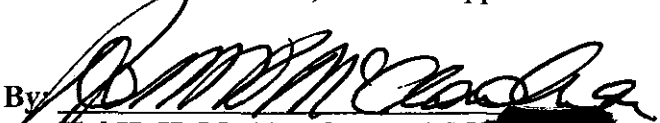
In accordance with Rule 28(a) of the Mississippi Supreme Court Rules, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

These representatives are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Emory Hobbs Hutchison, Jr., Appellant.
2. Rutchel Clarin Hutchison, Appellee
3. Hal H. H. McClanahan, III, Attorney for Appellant
4. Mark G. Williamson, Attorney for Appellee
5. Honorable H. J. Davidson, Chancellor

RESPECTFULLY SUBMITTED on this the 25th day of May, 2010.

EMORY HUTCHISON, Plaintiff/Appellant

By: 

Hal H. H. McClanahan, III, M[redacted]
Attorney-at-Law
518 2nd Avenue North
P. O. Box 1091
Columbus, MS 39703-1091
(662) 327-3154 telephone
(662) 328-0901 facsimile
threehlaw@bellsouth.net

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**

STATEMENT OF THE ISSUES

Appellant appeals the decision of the Trial Court on the following basis:

I

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.

RESPECTFULLY SUBMITTED on this the 25 day of May, 2010.

EMORY HUTCHISON, Plaintiff/Appellant

By: _____

Hal H. H. McClanahan, III, MSB#2220
Attorney-at-Law
518 2nd Avenue North
P. O. Box 1091
Columbus, MS 39703-1091
(662) 327-3154 telephone
(662) 328-0901 facsimile
threehlaw@bellsouth.net

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMORY HOBBS HUTCHISON, JR. **APPELLANT**

VERSUS **CAUSE NO. 2009-TS-01672**

RUTCHEL CLARIN HUTCHISON **APPELLEE**

STATEMENT OF THE CASE

The most sufficient Statement of the Case is contained in the first three (3) pages of the Opinion of the Court of August 27, 2009, included in the trial pleadings (T.P. 76-78, R.E. 4-6).

I

While the mother is a fully healthy thirty-nine (39) year old woman at the time of the divorce, the thirty-seven (37) year old father has been effectively disabled since 2001 after he underwent back surgery to repair injuries to his back suffered while on active duty in the United States Armed Forces. Emory had his initial surgery in April or May of 2001. In 2002, he was awarded total disability benefits through the VA with a 60% disability to the body as a whole (T.T. 115, R.E.26-27, 30-39, Exhibit P-5). In 2003, he was awarded total Social Security Disability (Exhibit P-6, R.E. 40-45). In 2007, Emory underwent shoulder surgery and got a Social Security Continuing Disability Report. (Exhibit D-3, R.E. 50-64) The crucial fact in the 2001 and 2007 reports is that none of them show a progression of the disability beyond 60%. In the spring of 2009 he was using a TENS medicine for pain relief and getting great benefits. This continued stabilization of his condition at the time of the trial is further documented in a post-trial exhibit to the trial court in an agreed submission by both parties showing that in May of 2009, his medical condition was unchanged.

II

In October of 2008, Rutchel, by agreement with Emory in an effort to make additional money to pay off their credit card debt, agreed to go to Iraq as a base exchange employee. From October of 2008 up until the trial in May of 2009, Emory had the continued primary physical custody of both of the minor children, Emory Hobbs Hutchison, III, born July 6, 2000; and Richard Hobbs Hutchison, born February 24, 2003. He had the limited assistance of his mother-in-law Daylinda, which will be set forth hereinafter in the raising of the children. During this time frame Emory, who was sixty percent (60%) disabled by the VA and totally permanently disabled by the Social Security Adminstration, successfully raised the two minor boys with the older child making the honors lists for academics with the Principal in the first grade (T.T. 68-69, R.E.26-27) and Emory receiving the Parent of the Year award for his efforts in raising the children (T.T.56-57, R.E.28-29).

III

In the trial of the case the actual medical testimony consisted of the entry of the Emory's status report of 2001 to the VA, the disability determinations of the VA in 2002 the Social Security Disability determination in 2003 and the SSA Continuing Disability Report in 2007(Exhibits D-2, P-5, P-6, D-3 and R.E.30-64).

IV

The trial was held on May 20 and 21, 2009. Subsequent to the trial another continuing disability report from the Veteran's Administration was received by the Appellant. By agreement with counsel opposite it was to be submitted to the trial court for its consideration in reaching its opinion. It was included as part of Appellant's Motion to Alter or Amend. Copies all of the correspondence to the Court, counsel opposite and undersigned are attached (R.E.159-195). In

the Continuing Disability Report of 2009, it shows no change in the Appellant's condition or any progression of disability. These reports were the only medical testimony before the Court.

V

On August 27, 2009, the Court entered its Opinion awarding custody of the minor children to the Appellee (T.P. 76-91, R.E.4-19). The opinion was followed by the entry of the Final Decree of Divorce on September 9, 2009 (T.P.100-102, R.E. 20-22), a Motion to Alter or Amend filed on September 14, 2009 (T.T.106-136, R.E.67-195), and overruled on the same day by the trial court (T.P.146-148 R.E.23-25).

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMORY HOBBS HUTCHISON, JR. **APPELLANT**

VERSUS **CAUSE NO. 2009-TS-01672**

RUTCHEL CLARIN HUTCHISON **APPELLEE**

SUMMARY OF THE ARGUMENT

APPELLANT CONTENDS THE TRIAL COURT ABUSED ITS DISCRETION OR WAS MANIFESTLY WRONG IN AWARDING THE PRIMARY PHYSICAL CUSTODY OF THE MINOR CHILDREN TO THE APPELLEE IN ITS DECREE OF SEPTEMBER 9, 2009, AND THE ORDER OF SEPTEMBER 14, 2009 OVERRULING THE MOTION TO VACATE AND SET ASIDE ON REQUESTS THAT THE CUSTODY BE AWARDED TO HIM.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EMORY HOBBS HUTCHISON, JR. **APPELLANT**

VERSUS **CAUSE NO. 2009-TS-01672**

RUTCHEL CLARIN HUTCHISON **APPELLEE**

ARGUMENT

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

This standard for review utilized by this court on a case decided on conflcting evidence historically has been that the supreme court will not overturn a chancellor's judgment when supported by susbstantial evidnce unless the trial court abused its discretion, was manifstly wrong or an erroneous legal standard was used. While meaning no disrespect to the trial court, in the instant case he did abuse his discretion and/or was manifestly wrong ***Chapel vs. Chapel,*** **876 So.2d 290(293),** ***Townsend vs. Townsend*** **859 So.2d 370, AND** ***McBride vs. Jones*****, 803 So.2d 1168, 1169.**

The basis for the request that the trial court be overruled is that it has based its custody decision on facts not in evidence and made assumptionS about Appellant's health that are not supported in the record, ***Rodgors vs. Taylor*****, 755 So.2d 33,** ***McAdory vs. McAdory*****, 608 So.2d 695, and** ***Hammett vs. Woods*****, 602 So.2d 825.** The two primary areas that the trial court has abused its discretion or is manifestly wrong are (1) basing its opinion on the amount of care supposedly provided by the maternal grandmother in keeping the children during the year and a half absence of the Appellee and (2) basing its decision on Emory's inability to adequately care for the children on medical information not found in the record. A third area is the fact that the

Chancellor attached absolutely no importance to the fact that Rutchel had already had two (2) children by a previous marriage and either lost or gave them up in the Final Decree in Florida. Either way it is a definite negative on her capabilities to take care of the children by this marriage. In short, while meaning absolutely no disrespect to the trial court, its decision should be overturned just as this Court overruled the Chancellor in ***Lowery vs. Lowery*, 28 So.3d 274, and *Lawrence vs. Lawrence*, 956 So.2d 251.**

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

(1)

The trial court has totally ignored the testimony of the witness Charlton Lester, III, the first cousin of the Appellant, and minimalized the uncontradicted testimony of Emory, and about the mother-in-law's lack of contribution to the raising of the children in the crucial year and a half prior to trial when Rutchel was absent. Finally, the trial court took no notice of the fact that the Appellee never called her own mother to substantiate her claim to the mother-in-law's contribution when the mother-in-law was physically available for trial on both days and not called (T.T. 248-249, R.E.65-66). The parties live in Columbus, Mississippi; and the trial was held in Starkville Mississippi, a distance of twenty-two miles one way.

(2)

One of the principal errors made by the trial court is the complete disregarding of the uncontradicted testimony of Charlton Lester, III. Lester is a first cousin of Emory, who had personal firsthand knowledge of Emory's health both in 2001 after the initial back surgery and his ability to take care of his child at that point together (T.T.11-12, 38-40, R.E.67-71), with Emory's condition starting in August 2008 and continuing up through the trial date of May 20-

21, 2009 (T.T.14-18, 40-44, R.E.72-80). The reason that the trial court's disregard of or non-reliance on the uncontradicted testimony of Lester is so crucial is that it establishes unequivocally that even with whatever pain Emory was suffering in 2001 before the disability determinations were made by the VA in 2002 and the Social Security Administration in 2003 and again from 2007 to the trial in 2009 following the VA continuing assessment in 2007 Emory was able to take care of his children even with permanent disability ratings.

(3)

In 2001 and 2002 Lester saw Emory and Rutchel generally on a bi-weekly to monthly basis (T.T. 12, R.E. page 80A). Emory would do everything on a daily basis to take care of Emory, III, while Rutchel was at work. His back injury did not affect his ability to take care of his children. Despite whatever the initial VA reports stated as pointed out by the Defense Counsel, Emory was able, through the pain, to take care of his child at that point.

(4)

In August or September of 2008, Lester moved back in with Emory and resided with him until the time of the trial (T.T. 14, R.E. 81). During this period of time he had a daily observation of Emory's ability to take care of the children, as well as what Daylinda, Rutchel's mother did insofar as her taking care of the children. Lester was positive that during this nine month period, with the exception of October and possibly November, that Emory had a system of taking care of the children. When he got up every morning at 5:30, he got everything organized for them to go to school and got them to school. Even though Emory was totally disabled at this particular point, Emory was able to adequately take care of both of his children. (T.T. 15-16, 41-42, R.E. 82-55). Equally important is the fact that Daylinda helped little, if any, on a daily basis in taking care of the children (T.T. 16, R.E. 83). In fact, she would get up in the

morning, leave the house and be gone basically the entire day and come back in late at night. During this same period of time, Lester is positive that the grandmother did not have a major role in the care of the children and had no personal knowledge of Daylinda laying out the children's books and clothes or ironing. Emory basically did all of that (T.T. 27-29, R.E. 86-88). Lester was also positive that he and Emory did all of the yard work while Daylinda puttered with the plants (T.T. 29, R.E. 88). The critical point for Lester's testimony (T.T. 30-44, R.E.89-103) is that in 2001 and again in 2008, despite his pain and medication, Emory could and did take care of his children. During this same period of time he won the Parent of the Year at Emory, III's school for taking care of his child and his education all while being disabled (T.T. 55-57, R.E. 104-106). Consequently, the uncontradicted record is that despite whatever medications he may have had, Emory was able to function through the pain and take care of the children. Nowhere in the record has this testimony been contradicted by sworn testimony for the critical year of 2008 and 2009 when Rutchel was not even around. The most glaring thing is that Daylinda was never called to testify to substantiate what she did or dispute what Rutchel said.

(5)

The second equally, if not more important, part of Lester's testimony is that it unequivocally demonstrates that Daylinda, the mother of the Defendant Rutchel Hutchison, had little, if any, effect in the daily lives of the children during the crucial year and a half that Emory had the primary physical custody from October 2008 to May 2009 of the children (T.T. 16, 27-29, 41-42 R.E. 107-112). The reason Lester's uncontradicted testimony about the lack of attention by the grandmother from August 2008 to May 2009 is so crucial is that the Court has placed great reliance in its Opinion on the purported services in the same time frame supposedly given by the grandmother, who was never called to testify live to support her daughter in the trial

(T.T. 248-249, R.E.113-114). Consequently, the trial court for the crucial period of time during the year that Rutchel was in Iraq and up to the trial had absolutely no credible witness to contradict the testimony that Emory Hutchison virtually singlehandedly took care of the children by himself and equally important any corroboration by the mother-in-law who was available for trial as to what she did. Rutchel definitely could not do it, because she was in Iraq.

B. LACK OF MEDICAL EVIDENCE FOR OPINION

(6)

The other big problem with the trial court's Opinion is its reliance on medical evidence that is not in the record and of which the court had no proof. As previously stated, the medical evidence testimony before the court was Exhibits P-5, P-6, D-2 and D-3 (R.E. 30-64). All of these reports are the determination of disability and the reports made to the Veteran's Administration as prepared by Rutchel and signed by Emory. The initial spinal surgery in 2001, which he has two (2) rods and six (6) screws placed in his back (T.T. 86, R.E.115). This was followed by a shoulder surgery in 2007 (T.T. 163, R.E.116) and then the use of the TENS unit in 2009 immediately before the trial for alleviation of pain. Because of the success in relieving pain and increasing his mobility, Emory expects to be granted a permanent TENS Unit (T.T. 34-35, 52-54, R.E.117-138). In neither D-2 or D-3 does the court have any evidence that Emory's condition will further deteriorate.

(7)

Following the trial, by agreement with the Defendant the May 21, 2009, disability determination report of the VA was forwarded to the trial court as set forth hereinabove. It also shows no deterioration of Emory's health that evidences a decrease in Emory's ability to properly care for his children. More importantly it does not show any evidence of a decline or

progression of the disability. The crucial point here is that this is all of the medical testimony of record before the trial court upon which it could make its opinion. The problem is that on T.P. 81, R.E. 9 of the Opinion of the Court, the trial court says, "it is without question that as a person ages, his/her ability to cope with medical problems becomes more acute." There is no, however, proof before the Court that Emory's health is declining or getting worse. Second, on T.P. 83 R.E. 11 of the Trial Record, the trial court makes the statement with reference to the Emory's health that, "his medical condition, based on the testimony will only decline." The problem is that there is absolutely no medical testimony to that effect. Consequently, the Court is making a determination on the unsubstantiated belief that at some undetermined point in time Emory Hutchison's health is going to decline to the point that he cannot take care of his children.

(8)

What the trial court also overlooked is Emory's testimony that since 2007 with the changing of the medication his capacity to take care of his children has materially *increased.* Further, the use of the TENS unit materially reduces the pain, which he lives with on a constant basis, and improving his ability to take care of the children. (T.T. 52-62, R.E.196-206)

(9)

The Appellee attempted to make hay of the fact that for some time he had been taking Wellbutrin and Cymbalta, two (2) anti-depressants. The problem is, according to Emory, these medications were for the purposes of pain management, which is a common practice in medicine, not for psychological problems (T.T. 60, R.E. 139). Emory has never been treated by a psychiatrist or a psychologist for any type of medical illness (T.T. 249, R.E. 140). Overall, he has improved in his ability to take care of the children because of the changes in medication (T.T. 240, R.E. 141). In short, from a crucial two (2) year period when the mother was out of the

country, Emory successfully took care of Emory, III and Richard. The assistance, if any, by the maternal grandmother was limited at best. She would make sure that the children's clothes were put out so Emory could get them dressed at 5:30 a.m. for school (T.T. 61, R.E. 141) and she did the laundry. Otherwise she was not home, left early for work and got home anywhere from 4:30 to 9:30 p.m. (T.T. 16. 27-29, 69, R.E. 142-146). With his medical condition improving and there being no proof to the contrary in the record that his healthy is decreasing, the testimony before the trial court proves unequivocally that he was the better of the two (2) to have custody of the children.

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

Finally, for whatever reason, the trial court in making its assessments of the capabilities of each parent to take are of the children overlooked a crucial point. Rutchel does not have the custody of her two (2) children by the first marriage. She has to pay child support for both of them (T.T. 183, Exhibit D-1, and R.E. 147-158). Consequently, the trial court had before it the fact that for whatever reason the Appellee had already lost two (2) children in a custody proceeding in the State of Florida. Regardless of this fact, the trial court awarded the custody of the children to her despite Emory's proof of what he did in a solid year without assistance and no credible proof to the contrary.

CONCLUSION

For all of the above reason, Appellant respectfully requests that the Court overrule the Chancellor's Orders of September 9, 2009, and September 14, 2009, awarding custody of the minor children to the Appellant.

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 28th day of May 2010.

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